Lisbon and the federal order of competences: a prospective analysis

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***E.L. Rev. 709** The clarification of the European Union's federal order of competences was one of the principal objectives behind the constitutional reform route leading from Laeken to Lisbon. After 50 years of incremental growth, principled definitions and a clear division of the European Union's competences were needed to bring Europe closer to its citizens. The promise of greater transparency would not be fulfilled by the Lisbon Treaty. On the contrary, if the Treaty ever came into force, it would represent a step backwards. First, the wording of the European Union's exclusive competences, especially as regards implied external powers, will imperfectly reflect the constitutional status quo. Secondly, shared competences have been defined with the vocabulary of concurrent competences. Thirdly, the re-conception of complementary competences will increase the instances of "competence cocktails" within policy areas. Finally, the presence of "unofficial" competence types will erode the European Union's future order of competences.*

Introduction: from Laeken to Lisbon

Twenty years ago, Europe's constitutional order was--somewhat euphorically--described to "present … unmistakably a clear, logical structure with fewer inconsistencies and gaps than its American counterpart". [1] This description, if ever true, hardly reflects our perception of Europe's legal order today. Had the 1957 Rome Treaty been praised for "its sober and precise legal

wording",[2] every Treaty amendment starting with the Single European Act would be criticised for the legal distortions it introduced into the constitutional order of the European Community.[3] While each political ***E.L. Rev. 710*** compromise would advance European integration, two decades of legal pragmatism have turned Europe's constitution into an "accumulation of texts, breeding ever deepening intransparency".[4]

What, then, were the impulses for constitutional reform in the first decade of the twenty-first century? In the wake of the Nice Treaty's "Declaration on the Future of the Union", the European Council convened in Laeken. Among the four desirable aims, the Laeken Declaration identified the need for "[a] better division and definition of competences in the European Union", a "[s]implification of the Union's instruments", "[m]ore democracy, transparency and efficiency in the European Union" and a move "[t]owards a Constitution for European citizen". To pave the way for the next Treaty amendment, the European Council would convene a "Convention on the Future of Europe".[5] The fruit of this novel constitutional technique was a Constitutional Treaty which ultimately failed to convince France and The Netherlands. Despite this failure, many of its provisions survive into the "Reform Treaty" concluded at Lisbon.[6] Yet, with the Irish refusal to ratify the Lisbon Treaty, the constitutional reform efforts of the last decade now seem close to an unsuccessful end. But would the constitutional aspirations of the Laeken Declaration be really satisfied by the Reform Treaty? The question has already received some early answers in respect to the European Union's reformed instruments,[7] the efficiency of the European Union,[8] and the attempt to bring Europe closer to its citizens.[9] This short note will address the question from the angle of the first Laeken objective: a better federal order of competences.[10]

E.L. Rev. 711 Would this Laeken mandate be fulfilled by the Lisbon Treaty? The important point, according to the former, was "to clarify, simplify and adjust the division of competences between the Union and the Member States" and this involved "clearer distinctions" between the various types of competence.[11] The Treaty on the Functioning of the European Union (TFEU) distinguishes different types of EU competences: exclusive competences, shared competences (including: parallel competences), coordinating competences and complementary competences. We shall discuss these competence categories in the order in which they appear in the TFEU.

Beforehand, a few preliminary reflections are in order. While the 1957 Rome Treaty had listed the "tasks" and "objectives" in Arts 2 and 3 EC, similar provisions will not be found in its functional successor, that is: the TFEU. Instead, the (reformed) EU Treaty lists the common objectives of the European Union in Art.3 TEU. The latter provision represents a less precise definitional corset than its predecessor. Article 3 (reformed) TEU lists the "tasks" and "objectives" of the European Union in five congested paragraphs. The old Art.3(1) EC, on the other hand, clarified the objectives of the European Community in 21(!) sub-paragraphs. Secondly, the Lisbon Treaty will formally remove the pillar structure of the European Union and replace "EC competences" with "EU competences".[12] Yet, despite the formal abolition of the (in)famous pillar structure established at Maastricht, the provisions concerning the Common Foreign and Security Policy (CFSP) remain

"specific". CFSP competences retain their *sui generis* status in the reformed European Union. [13] They are beyond the scope of this note.

Exclusive EU competences: internal and external

Exclusive competences are defined as areas, in which "only the Union may legislate and adopt legally binding acts". The Member States will only be enabled to act "if so empowered". [14] Article 3 TFEU defines the scope of the European Union's sphere of exclusive competences as follows:

1. The European Union shall have exclusive competence in the following areas:

-- customs union;

-- the establishment of the competition rules necessary for the functioning of the internal market;

-- monetary policy for the Member States whose currency is the euro;

-- the conservation of marine biological resources under the common fisheries policy;

-- common commercial policy.

***E.L. Rev. 712** 2. The European Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the European Union or is necessary to enable the European Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope.

In the light of the constitutional status quo under the EC Treaty, Art.3(1)(a)-(d) pose minor definitional problems. First, there was, arguably, no need to expressly mention the exclusive competence for the establishment of a customs union. On the one hand, the competence to establish *intra*-Community customs has been "abolished". [15] Regarding the *external* aspect of the customs union competence, on the other hand, the adoption of a common customs tariff is already covered--and thus absorbed--within the European Union's Common Commercial Policy competence. Secondly, what distinguishes the competition rules from the establishment of *all other rules* "necessary for the functioning of the internal market"? The constitutional drafters seem to have fallen victim to an "ontological fallacy": the category of "rules necessary for the functioning of the internal market" will not, by definition, require the exclusion of all national action within their scope. [16] Thirdly, as regards monetary policy, the European Union is to enjoy an exclusive competence in relation to the Member States whose currency is the Euro. But can an exclusive Union policy be subject to differential integration? This is not the case for differentiation under the mechanism of enhanced cooperation. [17] The argument may, however, not be applicable to the *constitutional* differentiation enshrined in the provisions on monetary union. Still, there is an important objection to extending the concept of constitutional exclusivity to situations of

differential integration: the fact that there is more than one public authority--the European Union and the national authorities of the *non-participating* Member States--within Europe could provide a theoretical argument against classifying monetary union as an exclusive competence *of the European Union.* [18] Finally, sub-para.(d) codifies a constitutional chestnut that has lost touch with Europe's constitutional practice. In the light of its subsequent constitutional biography, [19] the conservation of marine biological resources could well have been re-integrated into the European Union's *shared* agricultural competence.

E.L. Rev. 713 Be that as it may, serious constitutional issues emerge with para.2. Are these "areas" of exclusive external competence? And are these "competences" of the same type as those listed under para.1? The Lisbon Treaty would opt against the theory of legislative pre-emption and in favour of subsequent constitutional exclusivity in the external sphere. Three situations are enumerated in which the European Union will enjoy exclusive (implied) external powers.

The first situation presents a restrictive codification of the "WTO Principle". [20] According to this doctrine, exclusive external competences may be created: "Whenever the Community has concluded *in its internal legislative acts* provisions relating to the treatment of nationals of non-member countries or expressly conferred on the institutions powers to negotiate with non-member counties." [21] This principle undermines the idea of competence typologies as a *constitutionalised* division of power. The European Union can empower itself with an exclusive competence and, thereby, circumvent the principle of subsidiarity in the area of international agreements. Moreover, if we assume that the inclusion *in a legislative act* of a provision granting the European Union the power to conclude an international agreement automatically excludes the Member States, could the same reasoning not apply a fortiori to Treaty provisions? [22] Such a broadly understood "WTO doctrine" would transform all express external competences of the European Union into *exclusive* external competences. This potential analogy may explain why the masters of the Treaties felt it necessary to expressly "save" the Member States' right to conclude international agreements within competence types that were clearly not designed as exclusive EU competences. [23]

The second situation mentioned in Art.3(2) TFEU grants the European Union an exclusive external competence where an international agreement "is necessary to enable the Union to exercise its internal competence". This appears to codify the "Opinion 1/76 Principle", albeit with a decisive difference: it omits the restrictive formulation that the doctrine has received in recent jurisprudence. There, the Court had made its application dependent on the impossibility of achieving an internal objective through internal legislation and the internal objective being "inextricably linked" with the external sphere. [24] Instead of codifying this restrictive version of the *Opinion 1/76* doctrine, Art.3(2) borrows, ironically, the wording of the European Union's general "residual" competence. [25] Will this give the European Union a "residual" exclusive external power? Moreover, the "almost identical wording" of Art.216 TFEU--defining the scope of the European ***E.L. Rev. 714*** Union's implied external powers, [26] as M. Cremona has pointed out, suggests that "implied *shared* competence would disappear". Yet, this would be "a wholly

undesirable departure from the case law" if it means that the "*Union must have either no competence at all or exclusive competence*". [27]

Finally, the European Union will enjoy an exclusive external power insofar as a *European Union* agreement "may affect common rules or alter their scope" (Art.3(2) TFEU--third alternative). That simply must be an "editorial mistake" if it attempts to entrench the "ERTA doctrine". For the latter granted an exclusive parallel competence to the European Community, to the extent that a *Member State* agreement would affect internal European legislation or alter its scope. While it is logically possible for a proposed EU agreement to affect existing internal EU legislation, what would be the constitutional rationale behind such a principle? On the assumption that the codification of the traditional ERTA doctrine was in the drafters' mind, the formulation also tilts towards an expansion of the European Union's sphere of exclusive competences. Why did the Treaty-makers use the ambivalently wide original ERTA formulation instead of the subsequently developed restricted wording? [28]

In conclusion, the Reform Treaty would--more or less adequately--codify constitutional orthodoxy in the internal sphere. However, it may represent a textual revolution for the European Union's external sphere. [29] Here, the potential for EU exclusivity is significantly expanded. Within the textual corset of Art.3(2) TFEU, it might well be difficult after the Lisbon amendments to imagine a sphere of shared external powers. Were the Member States aware of the potentially suicidal consequences of these amendments for their future existence on the international scene? Would the European Court of Justice re-interpret Art.3(2) TFEU in such a way that the constitutional *acquis* will be safeguarded?

From shared to concurrent powers?

Under the new Treaty, shared competences remain the "ordinary" competences of the European Union: unless the Treaties expressly provide otherwise, an EU competence will be shared. [30] Within a shared competence, "the Union and the Member States may ***E.L. Rev. 715*** legislate". However, according to the new formulation in Art.2(2) TFEU *both cannot act at the same time*: "[t]he Member States shall exercise their competence to the extent that the Union has not exercised its competence". This formulation provides us with the geometrical image of a divided field: the Member States may only legislate in that part which the European Union has not (yet) entered. Within one field, *either* the European Union *or* the Member States can exercise their shared competence. To the extent that the European Union has exercised its competence, the Member States must not exercise theirs. [31]

When viewed against the background of the constitutional status quo of the past 50 years, this is a bewildering conception of shared competences. In fact, the TFEU defines the concept of "shared" competences with the vocabulary of "concurrent" competences. Was this a conscious move towards a (Germanic) dual federalism in the legislative sphere? [32] The definition of shared competence in Art.2(2) TFEU is problematic and if it was designed to codify past jurisprudence

it is seriously misconceived. First, the definition of shared competence seems to constitutionalise "automatic pre-emption of Member State action where the Union has exercised its power". [33] True, the Reform Treaty clarifies that such field pre-emption would "only" be in relation to the legislative act. [34] But was it its intention to get rid of all weaker types of pre-emption? [35] Will the technique of minimum harmonisation--based on the idea of a legislative floor set by the European Union and to be complemented *at the same time* by higher national standards *within the same area*--be in danger? This seems doubtful in the light of the affirmed existence of minimum harmonisation competences in the Treaty (and their apparent identification by the Reform Treaty as shared competences). [36]

***E.L. Rev. 716** How, then, will future European constitutionalism square the circle of the existence of minimum harmonisation with the dual federalist re-definition of "shared" competences in Art.2(2) TFEU? Should we interpret the provision to mean that the states remain competent to adopt higher legislative standards on the same matter, because "to *that extent*" the European Union has not exercised its competence? Will the European Court thus be forced to conceptualise the operation of *minimum* harmonisation in terms of its "field pre-empting" the Member States through a *maximum* legislative core? These linguistic distortions stem from the conceptual reductionism of the Lisbon Treaty: Art.2(2) conflates the *area* in which the European Union exercises its competence with the *intensity* of EU intervention and thereby reduces a three-dimensional legislative space into a two-dimensional one.

There may be a second and equally revolutionary twist in the transformation of "shared" into "concurrent" competences: the nature of the principle of supremacy. Within the old EC legal order, the supremacy of European law meant *disapplication*--not invalidation. Within shared powers, the European Community and the Member States were competent to legislate *on the same issue at the same time*; but where a legislative overlap resulted in a normative conflict, European law would pre-empt national law. [37] If the EU legal order (un)consciously adopts the German federal solution, [38] could Art.2(2) TFEU in the future be used as a platform to strengthen the normative potency of EU law and permit to *void* national legislation? [39] This transformation of the supremacy principle would finalise the transformation of shared into concurrent competences: to the extent that the European Union exercises its "shared" powers, the Member States would lose their very competence to legislate. Yet, this prospect seems unlikely as there remains an important textual difference between Art.72(1) of the German Constitution and Art.2(2) TFEU. While under the German formulation States lose their very *competence* to the extent that the federation has exercised its power, Art.2(2) only speaks of the Member States losing their right to *exercise* their shared competence. This subtle textual difference could safeguard the "old" *legislative* conception of the supremacy principle. Based on the idea of competence overlaps, the principle of supremacy may thus retain its softer structure and only require the disapplication of conflicting national law. [40]

(Hidden) parallel competences

Two parallel competences should never meet, for "[e]n mathématique, deux droites sont parallèles quand, situées sur un même plan, elles ne se coupent pas".[41] Without any express acknowledgement of this category in the Reform Treaty, we find two instances ***E.L. Rev. 717** of (supposedly) "parallel competences" strangely buried in the list of shared competences in Art.4 TFEU. According to paras 3 and 4 of that provision, the European Union shall have competence in the areas of research, technological development and space as well as development cooperation and humanitarian aid. However, "exercise of that competence shall not result in Member States being prevented from exercising theirs". Since that qualification undermines the very essence of what constitutes a "shared" competence as defined in Art.2(2) TFEU, these policy areas should never have been placed there.[42]

While false reductionism is in itself an intellectual sin, the definition of this special competence type may also be problematic: it is simply difficult to imagine that an EU *legal* act has no limiting effects whatsoever on the powers of the Member States. Assuming, for example, that the European Union takes a legal position within the area of development co-operation, should we believe that *all national measures adopted within this area will be permitted,* even if they actually hinder or impede the EU scheme? If the European Union's competences are perfectly parallel with those of the Member States, why was there any need for expressly requiring that "in order to promote the complementarity and efficiency of their action, the Union and the Member States *shall* coordinate their policies on development cooperation and *shall* consult each other on their aid programmes?"[43] How can two parallels "complement" each other and why emphasise a duty of co-operation for two levels that supposedly could never come into conflict?

Co-ordinating competences

Co-ordinating competences are listed separately in the third paragraph of Art.2 TFEU. The "inspiration" for this fourth category was the absence of a political consensus between two opposing positions in the Convention wishing to place economic and employment co-ordination, respectively, within the category of shared or complementary competence. The Presidium thus came to feel that "the specific nature of the coordination of Member States' economic and employment policies merits a separate provision".[44] Was the addition of a new competence type necessary in the light of Art.2(6) TFEU?[45] Would the detailed arrangements for these competences not have prevented any dangers that might flow from their classification as "shared competences"?

Be that as it may, the constitutional character of co-ordinating competences remains largely undefined. From Arts 2 and 5 TFEU, we may solely deduce that the European Union has a competence to provide "arrangements" for the Member States to exercise their competences in a co-ordinating manner. The European Union's co-ordination effort may include the adoption of "guidelines" and "initiatives to ensure coordination". It has been argued that the political genesis for this fourth competence type should place it, on the normative spectrum, between shared and

complementary competences.[46] If this **E.L. Rev. 718* systematic interpretation is accepted by the European Court, co-ordinating competences would have to be normatively stronger than complementary competences (as defined by the Reform Treaty). This would imply that the adoption of legislative acts--resulting in *some* degree of harmonisation--would be constitutionally permitted under these competences.

The inclusion of social policy within the list of shared competences in Art.4 and within the European Union's co-ordinating competences under Art.5 TFEU raises a number of issues. Essentially, any double qualification of a policy area erodes the essence of competence typologies. In competence typologies, each policy area should be ascribed to *one particular competence type* which defines the legal power of the competence holder within the area. Competence types should thus be mutually exclusive. How can social policy be a "shared" and a "coordinating" competence at once, when the constitutional definition of either competence type conflict? Perhaps, the solution to this puzzle lies in the distinct wording of Art.5(3) TFEU: "The Union *may* take initiatives to ensure the coordination of Member States' social policy." This voluntary character contrasts with the obligatory nature ("shall") of the European Union's co-ordination of economic and employment policies. But if this is the case, why was the express statement necessary at all? Should we conclude that the taking of co-ordinating initiatives is *not* already included within the shared competence for social policy under Art.4 TFEU? Is this assumption wrong? Can the European Union thus not take co-ordinating initiatives outside the areas expressly mentioned in Art.5 TFEU? Would the latter view not contradict a legitimate *argumentum ad majore?*

Complementary competences

The term "complementary competence" is not used in Art.2(5) TFEU.[47] The Treaty defines this type of competence as follows:

"In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas. Legally binding acts of the Union adopted on the basis of the provisions in the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations."

Article 6 TFEU lists seven areas: the protection and improvement of human health; industry; culture; tourism; education, vocational training, youth and sport; civil protection; and administrative co-operation. Is this an exhaustive list? This should be the case in the light of the residual character of shared competences.[48] But will this mean that all policy areas that could hitherto be regarded as falling within Europe's "complementary" **E.L. Rev. 719* competences are transformed into shared competences?[49] All depends on definitions. Prior to the Lisbon Treaty, the concept of complementary competences could be employed to refer to *two* types of competences. In the first group were those competences that constitutionally limited the European legislator to the adoption of minimum standards that could then be "complemented" by higher national

standards. The second group of "complementary competences" expressly described the function of the Community legislator as "complementing", "supplementing" or "supporting" national action by means of "incentive measures" that would exclude all harmonisation within the field. Article 2(5) TFEU restricts the definition of complementary competences to this second group. After ratification of the Reform Treaty, all complementary competences will, it seems, be non-legislative competences. [50] This definitional *fait accompli* places the first group into the residual category of shared competences.

This restriction of the definition of complementary competences to the second group would have a number of systemic disadvantages. First, the classification of competences such as environmental and social policy as shared competences pays no attention to an important *constitutional* characteristic of these competences: unlike "ordinary" shared competences, these competences must never totally prevent the Member States from exercising their competence within the policy area. Why did this *constitutional* difference not warrant a *constitutional* distinction? Why did the Treaty-makers not treat these competences separately? Article 2(6) TFEU will not provide a convincing counterargument: the point about minimum harmonisation competences is that they restrict the very *competence* of the European Union to legislate and not only the European Union's *exercise* of that competence. Secondly, the splitting of the two formerly united groups of competences has another disadvantage: it will disaggregate one policy area into distinct competence types. We see this danger materialised in the new Treaty with regard to the European Union's competence in the area of public health. While it was previously possible to describe "public health" as a complementary competence of the European Community, the Lisbon re-definition requires us to say that the European Union has *two* public health competences: under Art.4(2)(k), the European Union enjoys a *shared competence* for "common safety concerns in public health matters", while it also enjoys a *complementary competence* for the "protection and improvement of human health". And public health will not be the only "competence cocktail" within a policy area. [51] In ***E.L. Rev. 720*** the Title dealing with the European Union's competences in the area of social policy, we find the competence norm of Art.153 TFEU which reads as follows:

"1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields:

(a) improvement in particular of the working environment to protect workers' health and safety; …

(i) equality between men and women with regard to labour market opportunities and treatment of work;

(j) the combating of social exclusion;

(k) the modernisation of social protection systems without prejudice to point (c).

2. To this end, the European Parliament and the Council:

(a) may adopt measures designed to encourage cooperation between Member states through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of laws and regulations of the Member States;

(b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings."

The constitutional mechanics of this legal base are as follows: para.1 lists the various competence areas that allow EU intervention in pursuance of social policy objectives. For all these competences, the European Union will be entitled to adopt "measures designed to encourage cooperation between the Member States" that must not involve any harmonisation of national laws. This seems to make Art.153 TFEU a *complementary* competence in the light of the definition offered in Art.2(5) TFEU. But how can that be in the light of the "exhaustive" list that Art.6 TFEU purports to offer? Social policy is not listed there. And it is not the only constitutional absentee. [52] Paragraph 2(b) then distinguishes between two groups of social policy competences. For those fields mentioned in sub-paras (a)-(i), the European Union is entitled to legislate by means of directives so as to lay down minimum requirements. Since the establishment of European minimum standards will, *ipso facto,* harmonise national laws to the extent of outlawing national provisions below the mandatory floor, these competences, ***E.L. Rev. 721*** then, cannot be complementary competences. They are, under the new definition, *shared* competences. Article 153 thus provides the European Union with shared and complementary competences. And if this was not enough, Art.5(3) TFEU also establishes their status as coordinating competences. One competence, three types! Here, the Reform Treaty mocks us and erodes the idea of a competence typology to breaking point: instead of allocating each policy area to *one* specific competence type--the primary function of all federal competence typologies--the competences typology under the Reform Treaty will allow multiple qualifications. This can hardly be said to establish a better division and definition of competences in the European Union.

Conclusions: Lisbon--"bad" constitutional law for competences

Would the Lisbon Treaty improve the federal competence typology? This note has argued that the Laeken mandate would not be achieved. First, the definition of originally exclusive competences has only imperfectly codified the constitutional status quo. Secondly, Art.3(2) TFEU seriously misrepresents the jurisprudence of the European Court on subsequently exclusive competences in the external sphere. Thirdly, shared competences will be re-defined by using the vocabulary of concurrent competences. The latter are based on automatic field pre-emption and thus at odds with the constitutional reality of European law which is presently characterised by a nuanced pre-emption practice. However, in contrast to German federalism, the European Union's future shared

competences seem to only limit the *exercise* and not the *existence* of the shared competences of the Member States. Fourthly, why have the competences listed in Art.4 paras 3 and 4 as well as Art.5 TFEU remained "unnamed"? In the light of their definition, why did the Treaty-makers not expressly refer to them as, respectively, parallel and co-ordinating competences? And are these two "special" types supposed to be constitutional hybrids between shared and complementary competences? Fifthly, the restriction of complementary competences to those legal bases that only allow for non-legislative measures is problematic. The definition not only marginalises the constitutional distinctiveness of "minimum harmonisation" competences by assimilating them to the category of shared competences. More importantly: the definitional reductionism will increase the number of "competence cocktails" that mix various competence types within one policy area. Finally, although not the subject of this note, the specific character of CFSP competences will be retained in the reformed Treaties despite the formal abolition of the Maastricht pillar structure.

In many ways, by way of conclusion, the chance to enhance the constitutional clarity of the European Union's federal order of competences will be missed. Worse, the Lisbon Treaty--if it ever enters into force--may represent a serious step backwards. Instead of three clear-cut competence categories, the Reform Treaty would give us three official and a number of "unofficial" competence types, none of which impresses by defined contours. Nor will there be any clearer distinction *between* different types of competences.

Hard cases are said to make bad law. This is equally true for constitutional reform. However, while one may allow pragmatism occasionally to win over principle in hard cases, this should not so easily be allowed for constitutions. After all, the task of constitutions is to define the very *principles* on which societies are based. Constitutions ***E.L. Rev. 722*** should be the poetic expression of a legal order and as such short and clear. [53] The failure to obtain greater legal clarification through the establishment of clear(er) constitutional principles may have serious consequences for the legitimacy of the European legal order. For the "ability to criticise the system is a key factor of democracy": "Citizens must be able to understand the [legal and social] system so that they can identify the problems, criticise it, and ultimately control it." [54]

Lisbon would not deliver clear principles for the European Union's federal order of competences and in this respect it will make "bad" constitutional law. This criticism should not be taken to condemn the Lisbon compromise *in toto*. In the tradition of previous Treaty amendments, the Lisbon Treaty has its positive and negative sides. However, in the event the constitutional reform shipwrecks at the Irish coast, it may be comforting to have known the latter.

Durham Law School. Thanks go to P. Koutrakos for comments and suggestions.

Footnotes

1 S. Krislov, C.-D. Ehlermann & J. Weiler, "The Political Organs and the Decision-Making Process in the United States and the European Community" in M. Cappelletti, M. Seccombe & J. Weiler, *Integration through Law* (Walter de Gruyter, 1986), Vol.1--Book 2, 3, p.17.

2 P. Pescatore, "Some Critical Remarks on the "Single European Act"' (1987) 24 C.M.L. Rev. 9, 15.

3 The Single European Act was famously criticised by Pescatore, "Some Critical Remarks on the "Single European Act"' (1987) 24 C.M.L. Rev. 9, 15. The eminent former judge confessed: "I am among those who think that forgetting about the Single Act would be a lesser evil for our common future than ratification of this diplomatic document." The latter was described as "a flood of verbose vagueness". The Treaty on European Union found a memorable criticism in D. Curtin's phrase of the "Europe of bits and pieces". The Maastricht Treaty amendments were said to have "no overriding and consistent constitutional philosophy behind the proposed reforms". On the contrary, the European legal order was "tinkered with in an arbitrary and *ad hoc* fashion by the intergovernmental negotiators in a manner which defied, in many respects, its underlying *constitutional* character" (*cf.* "The Constitutional Structure of the Union: A Europe of Bits and Pieces" (1993) 30 C.M.L. Rev. 17, 17-18). For the Amsterdam Treaty it was said that, "the devil is not in the detail": "The problem lies in the accumulation of texts, breeding ever deepening intransparency. Change which is not intelligible is likely to cause alienation" (*cf.* S. Weatherill, "Flexibility or Fragmentation: Trends in European Integration" in J. Usher (ed.), *The State of the European Union* (Longman, 2000), p.18). Finally, the Nice Treaty again encountered the strong voice of P. Pescatore, who raised the "criticism of amateurishness" of the "legal *bricolage* in the Nice documents" which constitute "a patchwork of incoherent additions to the provisions of the EU and EC Treaties" (Guest Editorial, "Nice--The Aftermath" [2001] 38 C.M.L. Rev. 265).

4 Weatherill, "Flexibility or Fragmentation" in Usher (ed.), *The State of the European Union,* p.8

5 Laeken Declaration of December 15, 2001 on the Future of the European Union.

6 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C 306/1. In the following, this note will refer to the Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2008] OJ C15/1.

7 While the Lisbon Treaty would simplify the legal instruments of the European Union by abolishing the specific legal instruments under the existing Second and Third Pillar, the retention of the distinction between legislative and non-legislative acts

may have the opposite effect, see M. Dougan, "The Treaty of Lisbon 2007: Winning Minds, Not Hearts" (2008) 45 C.M.L. Rev. 617, 647.

8 For a summary and a positive evaluation, see Dougan, "The Treaty of Lisbon 2007" (2008) 45 C.M.L. Rev. 617, 690.

9 Would the Lisbon "re-organization" bring Europe closer to its citizen? For a negative response, see S. van der Bogaert, "The Treaty of Lisbon: The European Union's own Judgment of Solomon" (2008) 15 *Maastricht Journal of European and Comparative Law* 7, 19.

10 On the status quo of the federal order of competences in the EC legal order and the potential reform avenues, see R. Schütze, "The European Community's Federal Order of Competences: A Retrospective Analysis" in M. Dougan and S. Currie (eds), *Fifty Years of the European Treaties--Looking back and Thinking Forward* (Hart, forthcoming).

11 Laeken Declaration of December 15, 2001 on the Future of the European Union.

12 Article 1 (reformed) TEU states: "The Union shall replace and succeed the European Community."

13 Title V of the reformed EU Treaty expressly refers to the "specific" nature of the CFSP. Article 2 TFEU acknowledges the special character of these competences by dedicating them a separate para.4. For an analysis of the specific nature of the "old" CFSP competences, see P. Eeckhout, *External Relations of the European Union* (OUP, 2004), Ch.11 as well as P. Koutrakos, *EU International Relations Law* (Hart, 2006), Ch.11.

14 Article 2 TFEU.

15 One should concur with V. Michel that "*le dessaisissement des Etats n'implique pas une attribution corrélative et automatique d'une compétence similaire à la Communauté. Les impératifs de la libre circulation des marchandises, principe fondamental de la Communauté, s'imposent avec la même force aux institutions communes, qui ne peuvent, comme les Etats, y porter atteinte … La compétence perdue par les Etats ne se retrouve donc pas à l'identique dans le chef de la Communauté*" (V. Michel, *Recherches sur les compétences de la communauté européenne* (L'Harmattan, 2003), p.175). On the concept of "abolished competences", see D. Simon, *Le système juridique communautaire* (PUF, 1998), p.83.

16 R. Schütze, "Dual Federalism constitutionalised: the emergence of exclusive competences in the EC legal order" (2007) 32 E.L. Rev. 3, 22-23.

17 Article 20(1) (reformed) TEU states: "Member States which wish to establish enhanced cooperation between themselves *within the framework of the Union's non-exclusive competences* may make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties, subject to the limits and in accordance with the detailed arrangements laid down in this Article and in Articles 326 to 334 of the Treaty on the Functioning of the European Union" (emphasis added).

18 For the opposite conclusion: D. Dittert, *Die ausschliesslichen Kompetenzen der Europäischen Gemeinschaft im System des EG-Vertrags* (Lang, 2001), p.171.

19 For the constitutional re-transformation of the "conservation of marine biological resources" competence into a de facto shared competence, see R. Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (OUP, forthcoming).

20 On the genesis of that principle, see R. Schütze, "Parallel External Powers in the European Community: From "Cubist' Perspectives Towards "Naturalist' Constitutional Principles?" [2004] 23 Y.E.L. 225, 248-250.

21 *Opinion 1/94 (WTO Agreement)* [1994] E.C.R. I-5267; [1995] 1 C.M.L.R. 205 at [95] (emphasis added).

22 This good point is made by P. Craig, "Competence: clarity, conferral, containment and consideration" (2004) 29 E.L. Rev. 323, 330.

23 *cf.* Art.209 TFEU for the European Union's development policy, Art.214(4) TFEU for humanitarian aid and the Protocol on External Relations of the Member States with regard to the crossing of external borders.

24 *Commission v Germany (Open Skies)* (C-476/98) [2002] E.C.R. I-9855; [2003] 1 C.M.L.R. 7 at [87]. For *Opinion 1/76* see: *Opinion 1/76 (Inland Waterways)* [1977] E.C.R. 741.

25 The newly formulated "residual" competence of the European Union--the equivalent of Art.308 EC--is found in Art.352 TFEU. The provision provides a competence where: "action by the union should prove necessary, within the framework of the policies defined by the Treaties, to attain one of the objectives of the Treaties."

26 Article 216(1) TFEU states: "The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding act of the Union or is likely to affect common rules or alter their scope."

27 M. Cremona, *A Constitutional Basis for Effective External Action? An Assessment of the Provisions on EU External Action in the Constitutional Treaty,* EUI Working Paper 2006/30, pp.10-11 (emphasis added).

28 Consider the interpretation given to the ERTA doctrine in *Commission v Germany (Open Skies)* (C-476/98) [2002] E.C.R. I-9855. There, the Court found that common rules would be affected "where the Community has achieved complete harmonization in a given area" or where the international agreement fell "within an area which is already largely covered by such rules" (at [110] and [108]).

29 Ironically, the Presidium of the European Convention (CONV 724/03 Annex 2, 71) had explained its decision not to change the wording of the equivalent provision in the draft Constitutional Treaty with the following statement: "This paragraph remains unchanged given that very few amendments were put forward for it and it faithfully reflects Court of Justice case-law on the Union's exclusive competence to conclude international agreements."

30 Article 4 TFEU states that EU competences will be shared "where the Treaties confer on it a competence which does not relate to the areas referred to in Article 3 and 6", that is, areas of exclusive or complementary EU competence.

31 The Community may, however, decide to "cease exercising its competence". This re-opening of legislative space arises "when the relevant EU institutions decide to repeal a legislative act, in particular better to ensure constant respect for the principles of subsidiarity and proportionality". See Declaration 18 in relation to the delimitation of competences.

32 Article 72 German Constitution states: "(1) On matters within the concurrent legislative power, the Länder shall have power to legislate so long as and to the extent that the Federation has not exercised its legislative power by enacting a law. (2) The Federation shall have the right to legislate on these matters if and to the extent that the establishment of equal living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest. (3) A federal law may provide that federal legislation that is no longer necessary within the meaning of paragraph (2) of this Article may be superseded by Land law." M. Nettesheim claims that the re-definition of shared competences in the Constitutional Treaty was a conscious move towards German federalism. The formulation in Art.I-12(2) Constitutional Treaty--the textual basis for Art.2(2) TFEU--would "make … clear that the constitution-makers intended a genuine pre-emptive effect as envisaged by Article 72 of the German Constitution": "Not the supremacy of Community secondary law, but the constitutional competence itself deprives the Member States of their competence to act" (M. Nettesheim, "*Die Kompetenzordnung im Vertrag über eine Verfassung für Europa*" (2004) 39 *Europarecht* 511, 529 (translation--RS)). In a similar vein, C. Calliess has argued that the reformed shared competences of the Union correspond to the German idea of concurrent competences; cf. C. Calliess & M. Ruffert, *Verfassung der Europäischen Union* (Beck, 2006) at 245 (translation--RS): "The Member States lose their competence in relation to a particular field at the moment and to the extent that the Union exercises its competence."

33 Craig, "Competence: clarity, conferral, containment and consideration" (2004) 29 E.L. Rev. 323, 334.

34 Protocol No.25 on the Exercise of Shared Competence: "With reference to Article 2 of the Treaty on the Functioning of the European Union on shared competence, when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole [competence] area."

35 On the various pre-emption types in the EC legal order, see R. Schütze, "Supremacy without Preemption? The very slowly emergent Doctrine of Community Pre-emption" [2006] 43 C.M.L. Rev. 1023.

36 See the discussion on "complementary competences", below.

37 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (106/77) [1978] E.C.R. 629; [1978] 3 C.M.L.R. 263 and, *Ministero delle Finanze v IN.CO.GE.'90 Srl* (C-10/97-22/97) [1998] E.C.R. 6307; [2001] 1 C.M.L.R. 31.

38 See above fn.32.

39 This is the power enjoyed by German courts when dealing with a conflict between federal and state law.

40 This reading is confirmed by the Declaration concerning (su)primacy attached to the Lisbon Treaty: "The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law."

41 V. Michel, *Recherches sur les compétences de la communauté européenne* (L'Harmattan, 2003), p.133.

42 As regards the Constitutional Treaty, see J. Wuermeling, "*Kalamitaït Kompetenz: Zur Abgrenzung der Zustäandigkeiten in dem Verfassungsentwurf des EU-Konvents*" (2004) *Europarecht* 216, 223: *"Nicht adäquat ist die Zwitterstellung, die die Regional-, Entwicklungs- und Forschungspolitik einnehmen (Art. I-13). Sie tauchen bei den geteilten Zustäandigkeiten auf, dem Inhalt nach geht es aber allein um Foöderma%EFnahmen. Insofern wäre es richtiger gewesen, sie bei den ergäanzenden Ma%EFnahmen aufzufuührenn.*"

43 Article 210 TFEU (emphasis added).

44 The Presidium CONV 724/03 (Annex 2), p.68.

45 Article 2(6) TFEU states: "The scope of and arrangements for exercising the Union's competences shall be determined by the provisions of the Treaties relating to each area."

46 In this sense, Craig, "Competence" (2004) 29 E.L. Rev. 323, 338.

47 The term "complementary" competence is preferred, since it provides a lexical umbrella to include the verbs mentioned in Art.2(5) TFEU. Working Group V "Complementary Competences" strangely considered the term "inadequate" for being "too technical" and even more strangely suggested the term "supporting *measures*" to describe this *competence*. Behind this lay the wish of the Working Group to say that the European Union had no "competence" in these areas. How this view could have ever been squared with the enumeration principle remains a mystery. This category mistake was not the only error in the controversial Final Report (*cf.* Final Report of Working Group V CONV 375/1/02 Rev 1, p.1).

48 *cf.* Art.4(1) TFEU.

49 For a list of complementary competences in the EC legal order, see R. Schütze, "Cooperative federalism constitutionalised: the emergence of complementary competences in the EC legal order" (2006) 31 E.L. Rev. 167, 169-171.

50 This had been the suggestion of the Working Group V "Complementary Competences". It identified the exclusion of harmonisation with the idea that the European Union may adopt legally binding measures, "but that Union legislation (regulations and directives) may not be used" (Final Report of Working Group

V CONV 375/1/02 Rev 1, p.4). This position was confirmed by the Convention Presidium claiming that "the explicit exclusion of harmonization, implied that legislative competence lies with the Member States" (CONV 724/03, Annex 2, p.81).

51 For these "mixed" policy areas, the Working Group on "Complementary Competences" had proposed a "centre of gravity" test. Where a policy area allowed generally for the adoption of supporting measures and only exceptionally for legislative measures, it would be classified "*in toto*" as an area of complementary competence (Final Report of Working Group V CONV 375/1/02 Rev 1, p.5). Where the respective balance tilted in the opposite direction, such as for consumer protection, the area should be classified as a shared competence (Final Report of Working Group V CONV 375/1/02 Rev 1, p.9). However, this approach has not been consistently applied as the examples of fisheries, social policy and public health demonstrate. Moreover, the approach in itself is a declaration of intellectual bankruptcy in the light of the Laeken mandate: can the existence of "mixed" legal competences be squared with the attempt to strive for more transparency through a better definition and division of competences?

52 There are other competence areas in the TFEU that seem to only allow for the adoption of EU measures that "support, coordinate or supplement the actions of the Member States". They are: Art.19(2) on EU measures outlawing discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation; Art.79(4) on the common immigration policy; Art.84 on support measures in the field of crime prevention; Art.149 allowing "incentive measures designed to encourage cooperation between Member States and to support their action in the field of employment"; and Art.189(2) on the European space policy.

53 On poetry as the most concentrated form of verbal expression, see E. Pound, *ABC of Reading* (New Directions, 1960), p.36: "Dichten = condensare". Napoleon's *bon mot*--a constitution should be "short and obscure" shares its author's disregard for democratic institutions.

54 Final Report of Working Group IX "Simplification" CONV 424/02, p.1.

