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# The exercise of European competencies is the real problem, not the allocation of competencies in the treaties

**Nine points for the 2004 Intergovernmental Conference**

Compared with the challenges of globalisation and the demands made by the citizens on the European Union, the reach of EU competencies does not appear to be excessive at all. Indeed, in some areas such as foreign and security policy, they tend, if anything, to be too limited.

The question of how to allocate powers between the European Union and the Member States is unjustly the focal point of the current debate on competencies, though. What needs to be improved first and foremost is the way in which the Union *exercises* its competencies. Of course, this also involves the issue of political power.

The following steps should be taken at the 2004 Intergovernmental Conference based on a comprehensive prior clarification of the competence order as laid down in the treaties:

***Improving the existing competence order***

1. Making the competence provisions in the treaties more understandable and more visible;
2. Identifying competence categories already set out in the treaty (exclusive, directive and supplementary powers);
3. Resolving specific problems related to specific competencies.

***Improving the way in which competencies are exercised***

4. Reviewing the proportionality of specific practices of the Commission and Council (such as informal obligations on the part of the Member States to report to the Commission or the open co-ordination strategy);
5. Improving the transparency of legislative decision-making procedures (particularly in the Council).

***Strengthening the monitoring of competencies***

6. Strengthening the dialogue between the judges of the European Court of Justice and the national courts (by means of a Joint Chamber of European Supreme Courts);
7. Providing for a review-of-competence action in front of the European Court of Justice with the possibility for the Committee of the Regions to initiate proceedings;
8. Introducing supplementary mechanisms of *political* control by existing institutions of the way in which competencies are exercised;
9. Introducing mechanisms of control of the way in which competencies are exercised by means of political *procedures* (reports, an ombudsman for competence-issues).

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# The exercise of European competencies is the real problem, not the allocation of competencies in the treaties [1]

The expansion of qualified majority voting (QMV) and the further clarification of the relationship between the EU institutions and the Member States will be the central topics of the 2004 Intergovernmental Conference. The Member States will have to take account of the link between QMV and the allocation of competencies, though: the citizens want to know what it will really mean to expand the scope of the majority rule for the EU. Greater clarity in the question of who decides what in Europe is also a prerequisite for greater transparency and more democratic legitimisation in the EU.

## I. The underlying issue of the competence question: power politics

International developments have greatly weakened the ability of individual nation States to achieve their goals single-handedly. Consequently, for the Member States the EU represents the only way to regain the ability to take effective action - by acting in unison. Citizens expect the EU to perform effectively in all the important areas of their lives. For this to happen, competencies have to be bundled together at the European level. Sometimes this may entail limitations of policy-making leeway on the national level, thus conflicts over competencies are also power struggles.

The call for a better delimitation of competencies in the EU, indeed even for a reorganisation of the system, stems principally from the *German 'Länder'* (federal States), which for years have been complaining about a loss of power in the ongoing process of European integration. However, the issue of competencies is also increasingly being discussed in other Member States, such as France, albeit with different intentions. The priority in these Member States is to preserve the current status of integration (and to prevent a financial "loss of solidarity") but also to maintain the nation state's possibilities for taking effective action. It was against this background that the heads of State and government of the European Union decided that the next reform conference should examine "how to establish and monitor a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of solidarity". [2]

The *Länder* normally criticise an excessively broad exercising of crosscutting European competencies (e.g. the competencies related to the internal market), unnecessarily detailed rules, and the introduction of new mechanisms outside the confines of the treaty (e.g. the method of "open co-ordination"). Some *Länder* are particularly critical of the ever-decreasing regional freedom of action and policy-decision leeway at the *Länder* level, in particular in the area of regional economic policy (review of State aids and competition law). However, when considering this kind of criticism it must be borne in mind that there are inevitably interdependencies between European and national policies. The Community's ability to act vis-à-vis

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[1] "Powers" is the term used in the "Declaration on the future of the Union" annexed to the Treaty of Nice. Nice Treaty as published in the Official Journal, the English version of the initial document agreed upon in Nice used the word competencies. The treaties use the concept of ‚competencies' in Art. 5 para. 2 EC (the subsidiarity provision).

[2] Cf. the "Declaration on the future of the Union" annexed to the Treaty of Nice.

the outside world presupposes an internal legal order, which applies equally to all its members. Also, the extent to which specific *Länder* competencies are infringed upon is not that clear, when the *Länder* criticise rulings by the European Court of Justice on the grounds that the EU is, for example, shaping policy on sport or taking fundamental social policy decisions. The repeated call by the German *Länder* that some European competencies be shifted back to the Member States remains vague: the demand contained in the *Bundesrat* resolution on the opening of the 2000 Intergovernmental Conference that the EU should focus on "genuinely European tasks", without explaining what "genuinely European" is supposed to mean, illustrates this.

The true motives of some *Länder* may well lie in their interest in having some form of European competitive federalism introduced, especially in view of the connection these *Länder* try to establish between the issue of services of general interest (*Daseinsvorsorge)*, the control of competition and the delimitation of competencies. In the area of structural funding the fact that it is the Commission that is responsible is criticised. Particular objections are raised to the way the European Commission uses the instrument of State aid control, where the *Länder* feel they are losing last remaining policy-making options in the economic competition for investments.

However, Germany's *Länder* can not seriously be aiming at abolishing the State aid control regime of the treaties and the policy choices this system implies, for these elements are a fundamental objective of European integration and constitute one of the pillars of the single market. The Community's competence for monitoring State aids, in particular where State aids distort competition or threaten to do so and affect trade between Member States, is laid down in the treaty in a differentiated manner that still allows for Member States' policy choices (see Articles 87(2)a-c and (3)a-e EC). Furthermore, this Community competence does not amount to a general Community competence regarding the provision of services of general interest (*Daseinsvorsorge*).

## II. The current system of European competencies: no need for structural renewal, but problems in exercising competencies

No legal competence order will ever achieve perfection: not even the most artful wording can overcome the fact that there will always remain room for interpretation between actual issues arising in reality and provisions on competencies laid down in texts.

What are the elements of the current European system of competencies?[3] The system is based upon the principle of enumerated powers/competencies. It combines *positive definitions of competence* (what the EU may do), *negative definitions of competence* (what it may not do) and *principles governing the exercising of competence* (the 'how' aspect of competencies as opposed to the 'if' aspect, e.g. the principle of subsidiarity). Categories of competencies laid down in the treaties are the categories of exclusive European competencies and of non-exclusive European competencies.

Exclusive competencies at the European level typically involve specifically European tasks such as common commercial policy, the free movement of persons, services and capital, the Common Agricultural Policy or monetary policy. In the area of non-exclusive competencies, the European level is responsible for the European aspect of tasks, which also arise at Mem-

[3] A more detailed description is provided in the annex to this paper.

ber State level (competition, transport, the environment, industry, research, energy, combating crime, foreign and security policy).

The current debate around the issue of competencies tends to create the impression that competencies held at the European level keep increasing. However, a neutral assessment of the amendments made to the founding treaties by the treaties of Maastricht, Amsterdam and Nice indicates that there is rather a tendency to add exclusion clauses (negative definitions of competencies) to the treaties, clarifying what the European level may *not* do. Clauses of this kind increasingly prohibit the Community from harmonising the laws and regulations of the Member States in specific fields, which contradicts the claim about the unbridled expansion of the Community.

Moreover, not everything that comes out of Brussels, Strasbourg or Luxembourg and affects the most varied areas of life is an expression of "European regulatory competence". Frequently the Union merely prohibits something without actively regulating it. Certain 'powers', such as discrimination based on nationality or gender or the awarding of State aids that distort competition no longer are part of the competencies of any public authority in Europe, neither at the Member States' nor the European level (this is a phenomenon which has been labelled 'abolished powers', or *compétences abolies*).

Finally, the overall body of EU/EC powers does not appear to be that enormous because the European level often is 'merely' granted a legislative competence of rule making. Almost the entire realm of implementation and enforcement of rules by the executive or the judiciary, and in the European context also sometimes by the legislative branch (directives), leaves policy-decision room for manoeuvre at the Member State level. This room can be described as competencies of the Member States outside the scope of European competencies. This lack of competencies on the part of the EU/EC is illustrated in particular by the fact that it does not have competencies to enforce measures (for example, the collection of fines under European competition law has to occur through national procedures).

In sum, the analysis of the allocation of competencies between the EU and the Member States reveals no particular distinctive features that indicate serious problems. The competence provisions in the treaties appear as the result of a process extending over many years and of countless political compromises. They are shaped in a case-sensitive manner, which, all in all, yields a clearer profile of competencies than the mere listing of powers typical of federal systems. Indeed, such catalogues or lists are extremely imprecise because of the brevity of the descriptions of competencies (for example, Article 74(1), point 11 of Germany's Basic Law defines a federal competence for the "law relating to the economy"). While the European system of competencies may seem complex, it does not require structural renewal from scratch. Anyway, to completely rewrite the system of competencies, e.g. in a catalogue of competencies, does not seem feasible.

For lack of any obvious need of repair of the competence-related structure as such, the accusation that competencies at European level are boundless can - if at all - only be explained by *the way competencies are exercised* by the Community's institutions; in other words, from inadequate respect of the *principles of subsidiarity and proportionality*.

Alongside detailed arrangements governing the implementation of European law, this mainly involves restrictions on the implementation of EU programmes and structural funds. In its White Paper on "European governance" the Commission itself indicates that in future the implementation of Community law is to be organised so flexibly that regional and local

situations can be taken into account. Greater use is to be made of framework directives.

Two factors seem to be decisive here: the responsible, cautious application by the given institutions of the competencies attributed to them; and improved monitoring of this exercising of competencies. At present, the European Court of Justice has the final authority here and makes use of it (cf. the European Court of Justice's tobacco ruling). The control assured by the European Court of Justice is supplemented by claims of national constitutional and supreme courts with regard to their authority to issue final rulings on the reach of European competencies (see the Maastricht ruling by Germany's Federal Constitutional Court (*BVerfG*)).

## III. What to do and what not to do?

### First of all: take stock

- The starting point is a ***comprehensive preliminary assessment*** of the overall state of the European competence system, for example in the context of treaty simplification. This assessment must encompass the current state as well as the exercise and the monitoring of competencies. Where criticisms are justified and cannot be remedied by an adaptation of either *secondary law* or the *administrative practice* of the Commission (e.g. in the Common Agricultural Policy and structural policy), a *cautious correction of the respective treaty provisions* can then be undertaken.[4] A *re-allocation of competencies* on the basis of the subsidiarity principle may lead to the conclusion that additional powers have to be transferred to the EU. One obvious example is the growing need for the co-ordination of economic and monetary issues; another is the now greater need for common action in the area of foreign and security policy.

### Next: steps to improve the existing competence order

1. ***Making the competence provisions in the treaties more understandable and more visible*** (more understandable for example with respect to the Treaty of Nice version of Article 133, more visible for example regarding unwritten external competencies). – The line already pursued with the European Charter of Fundamental Rights of "making visible" the state of the law seems to be a better solution than a total re-organisation of the competencies. In this sense a competence charter, initially announced merely as a political statement, could make the European powers "more visible". Since it would refer to the current organisation of competencies, it would enhance its transparency without having to abandon the degree of differentiation achieved.
2. ***Identifying competence categories already set out in the treaty*** – The invention of new categories of competencies beyond what is set out in the treaty is not advisable since problems of delimitation and definition increase with the number of such categories. What is already expressly identified in the treaty (Article 5 EC) is the category of *exclusive powers* of the Community. Two other categories of competencies can be detected in the treaties: first, there are provisions that merely allow for the Community to take action by means of directives, which can be categorised as *directive powers*. Here the European level may only specify the result to be achieved, with the choices regarding the form of the measure

[4] This is why the Nice Declaration on the future of the Union only talks about the delimitation of powers, but not about a redistribution of tasks between the Union and its Member States.

and the method of implementation remaining at the national level. Second, where the treaties only provide for the Community to act excluding any harmonisation of the laws and regulations of the Member States, we propose the term *supplementary powers*.

3. ***Specific clarification*** – Competence-related problems can also be resolved through clarification and modification of specific competence provisions (for example, the conflict between the freedom of services and the Irish ban on abortion was resolved by a protocol to the treaties under which Community law does not affect certain provisions of the Irish Constitution). In this connection the suggestion of establishing a simplified treaty amendment procedure going beyond the amending procedure in Article 48 EU is worth considering. However, such a simplified procedure must be compatible with the constitutional law of the Member States.

   *Negative clauses*, which remove certain areas from the area of European competence in favour of the Member States, may make sense, but only if they are related to a respective positive allocation of competence: since the Member States will quite easily reach agreement on all kinds of negative areas, unless positive powers are invoked to offset these, there is a danger of an imbalance affecting Europe's ability to take effective action.

**Furthermore: measures to improve the way in which competencies are exercised**

4. ***Reviewing forms of EU action*** *(in particular 'soft' practices) based on the principles of proportionality and subsidiarity*[5] – The role of 'soft' practices such as imposing obligations on the Member States to report to the Commission or 'open co-ordination' by the Council is increasing in the EU's 'system of government'. Such practices have to be reviewed. The Commission's strategy of expanding its own room for manoeuvre and restricting that of the Member States and regions by imposing reporting obligations and controlling the flow of funding can be monitored by political means even if it is less amenable to control by legal means. However, there are limits to such scrutiny because there are interdependencies in the EU's dynamic multilevel system, which are not only politically desired, but also necessary (e.g. between competition policy and environmental policy). There is a difference between the legal concept of competence and the establishment of political objectives. Whilst it is true that the Council often gives only imprecise terms of reference for implementation of measures, it is often difficult to distinguish 'soft' practices from the co-ordination needed to achieve co-operation by the Member States with respect to the implementation of European law. At any rate, the respective minority for the comitology procedure should be given a right to appeal to the Council.

5. ***Greater transparency in decision-making procedures*** - To increase political accountability for European acts, initiatives submitted to the Commission by the Member States must be submitted in the Council. The Council should then reach a decision in a public meeting, taking account of the Commission's opinion. In principle, as a general rule the Council should meet in public session when acting as a legislator. This could also help to improve the coherence of the respective specialised Councils' work (the high number of Council formations needs to be subjected to a rigorous review anyway).

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[5] The function of the directive, for example, is to establish a binding legal framework to be filled in by the Member States.

**Finally: mechanisms to improve the monitoring of competencies**

6. *Instead of an additional 'Court of competencies':* ***Improving the competence situation through judicial dialogue*** - An institution which deals with competence-related issues as well, but which would comprise judges from the European Court of Justice and the national courts, could provide an additional forum for a dialogue between the courts at different levels and for perceiving competence-related sensitivities. Bearing this in mind, the establishment of a 'Joint Chamber of European Supreme Courts', which would not be conceived as an additional court beyond the ECJ handing down final judgements, is definitely worth considering.

   By contrast, an additional *Court of competencies* entailing the participation of national judges, as was also proposed recently by judges of Germany's Federal Constitutional Court (BVerfG), makes less sense. Resolving conflicts on competencies through courts may be a classical option for resolving such conflicts, but a court of competencies already exists in the form of the European Court of Justice. The introduction of an additional court with comprehensive jurisdiction would fundamentally alter the institutional structure in the EU/EC. Any party in front of the European Court of Justice would be tempted to appeal to the court of competence to rule whether the European Court of Justice itself is acting within the scope of its competencies in interpreting Community law. This would make such a court of competence a 'super-appellate body' outranking the European Court of Justice.

7. ***A review-of-competence action in front of the European Court of Justice*** - A review-of-competence action (by moving 'lack of competence' from the grounds admissible under Article 230 EC to a new article) would make it easier to review competence-related objections and make the existing ways of having competence-related issues reviewed by the European Court of Justice more visible. In addition, standing of the Committee of the Regions to initiate competence-related action in front of the ECJ could safeguard the protection of regional interests. By contrast, standing for regions or federal states to lodge competence-related suits would not be in keeping with the system of remedies in front of the ECJ.

8. *Complementing judicial review:* ***political control of the way in which competencies are exercised by the existing bodies*** – It is initially the existing institutions that are responsible for the political control of competencies: for all the institutions (the Commission, Council and Parliament), making use of competencies presupposes that the competencies in question are European competencies in the first place. It is in particular in the Council where a *control of subsidiarity and proportionality* could be improved. In difficult cases the competence/subsidiarity-control could be allotted to the Council of Justice Ministers as the appropriate forum for issues of proper legal form.

9. ***Monitoring competence by means of political procedures*** - A Parliamentary Subsidiarity Committee, comprising members of the Council and European Parliament, as well as MPs from the Member States and regional parliaments and issuing non-binding opinions, could ensure that interests stemming from within the Member States are duly articulated. Care would have to be taken to ensure that such a committee did not develop into an independent institution handing down final rulings. However, acts outside the legislative process, for example by the European Court of Justice or the Commission, would not be covered.

Another possibility would entail the creation of a new *second chamber of Parliament* comprising national MPs, although such a suggestion would inevitably run up against the resistance with regard to creating new institutions.

Even without any newly created political bodies, better results can be achieved by the political control of competencies than through (subsequently ignored) court-like rulings. Procedures which impose reports, slotting into the existing institutional structure are a viable option here: for the EU/EC, a *European competence official* or *ombudsman for competence-related issues*, charged with submitting an annual competence report to the European Parliament and national parliaments, could serve as a co-ordinating body and collection point for complaints about the Community's practice of exercising powers. Such a report could also be debated in the Member States' parliaments, and requiring the respective European institutions to adopt a position on such reports could enhance the effectiveness and sustainability of such a regular confirmation of the state of the competence order.

## Annex:

## The current allocation of competencies between the EU and the Member States

Generally speaking, a distinction can be made between positive and negative provisions on competencies. Positive provisions link the legal consequence of 'competence' (=powers) with the fulfilment of certain conditions. Negative competence provisions preclude powers.

A distinction is to be drawn between provisions attributing competencies and rules governing the exercise of competencies, the latter presupposing the existence of competencies and restrict or shaping it. This is the difference between 'if' (are there any powers at all) and 'how' (how are these powers to be exercised). The European competence order follows this systematic approach.

### *I. Positive provisions on competencies.*

Positive provisions on competencies are often summarised in ***competence catalogues or lists***, such as in Germany in Articles 72 *et seq.* of the Basic Law (GG), in Austria in Articles 10 *et seq.* of the Federal Constitution, in the United States in Article I, Section 8 of the 1787 US Constitution, or in Canada in Articles 91 *et seq.* of the 1867 Constitution Act. The main advantage of concise description topics in competence catalogues (for example: Article 74(1), point 11 of the Basic Law "the law relating to the economy") lies in having a high degree of flexibility, which provides the ability to act in changing circumstances without requiring frequent adaptations of the texts.

The European competence order deliberately does not follow this approach. Although competence lists or catalogues of positive provisions on competencies do indeed make it easier to gain an overview of who has which powers, the brevity of the description of competencies invariably leads to simplification. ***As a rule, the wording of European provisions of competencies is too differentiated to be listed in a competence catalogue comprising keywords***. Moreover, competencies are not just defined at one place in the treaty, but instead are

distributed throughout it. ***Article 3 EC*** provides an ***overview of the Community's spheres of activity***, but this general listing does not yet contain any powers to establish legal instruments (competencies): under the principle of enumerated powers (Article 5 EC), competencies must be expressly allocated.

A further distinction may be drawn between ***goal driven provisions on competencies and subject area driven provisions on competencies***: goal driven provisions emphasise a regulatory goal (for example the creation of a single market, Articles 94 and 95 EC), whereas subject-related provisions start from an issue requiring regulation (for instance European cross-border transport, Article 71 EC). The current European competence-order contains both categories. The boundary between the categories is actually not that clear: a regulatory goal is always also related to a specific subject area - the regulatory goal "establishment of the free movement of workers" concerns the "free movement of workers" rather than "agricultural policy" - and definitions of competencies based on a specific subject area can also be described as definitions of objectives. One example of this phenomenon is the issue of "Federal citizenship" mentioned in Germany's Basic Law (Article 73(2)), which could be described in an objective-oriented provision as follows: "A Federal citizenship shall be established. The Federation shall adopt the measures required to realise this objective".

***Catch-all provisions*** are a classic technique for ensuring that an institution endowed with competencies is able to act. Provisions of this kind date back as early as the 1787 US Constitution with the *'necessary and proper clause'* at the end of Article I, Section 8 which stipulates that the Congress may make all laws which shall be necessary and proper for carrying into execution the powers specifically cited in the Constitution. Community law also contains such a provision: under Article 308 EC the Community can take action whenever the Treaty has not provided for the necessary powers, yet action by the Community appears necessary in the course of the operation of the common market if one of the objectives of the Community is to be attained. A catch-all provision is required in the system of Community powers precisely because the Community has chosen not to have a competence catalogue with its resultant leeway for interpretation.

***Cross-sectional clauses*** related to economic activities are fundamental and thus characteristic of all bodies politic that are based on economic integration. There are corresponding provisions on competencies comparable to the Community's powers regarding the single market (Articles 94 and 95 EC) in the US Constitution (the *interstate commerce clause*) or the Swiss Constitution of 2000 (Article 95(2), Federal competencies to create a single Swiss economic area). In the European competence order such economy-related cross-sectional clauses are supplemented by Community competencies in the area of the environment (Articles 174 *et seq.* EC) and, to a lesser extent, by competencies related to social issues (such as Articles 125 *et seq.* EC) aiming at preventing environmental or social dumping in Europe.

***Unwritten competencies***: competencies in the area of external relations (conclusion of treaties between the Community and third parties) are not set out in the treaties, but have instead been developed by the European Court of Justice.

***Categories of competencies***: In Article 5 the EC Treaty itself distinguishes between the Community's ***exclusive*** and ***non-exclusive powers***. This dichotomy resembles the organisation of competencies under Germany's Basic Law, which distinguishes between exclusive and concurrent powers, which co-exist alongside the framework powers of the federal level. Other arrangements of competencies (e.g. as in Austria) establish competencies for the federal and the state level without any overlap, leaving each respective level of competence with exclu-

sive competencies only.

Exclusive powers at the European level typically involve specifically European tasks such as common commercial policy, the free movement of persons, services and capital, the Common Agricultural Policy or monetary policy. In the area of non-exclusive powers the European level is responsible for the European aspects of tasks which also occur at the national level (competition, transport, the environment, industry, research, energy, the fight against crime, foreign and security policy).

In certain areas the Community is explicitly barred from harmonising national laws and regulations, since the notion of subsidiarity is already reflected in the definition of the respective scope of competence. The Community's role here is essentially to promote and supplement measures taken, e.g. in the areas of public health, education, employment and culture.

In some areas, the means of action provided for by the treaties have only limited potential in terms of competencies, well below the threshold of uniform Europe-wide regulation. This applies in particular to foreign and security policy.

Other categories such as parallel, framework and complementary competencies are being discussed, but they are not explicitly mentioned in the treaties.

### *II. Prohibitive competencies (compétences abolies, abolished competencies)*

It is often assumed that European provisions prohibiting a specific behaviour or action also entail a competence at European level, yet that is not the case: certain competencies today no longer fall under the competencies of any public authority in Europe, neither the Member States' nor the European level's competencies. One example of this is the prohibition of discrimination based on nationality and gender; another concerns the ban on competition-distorting state aids. This means that there is no law of nature whereby a 'lesser' competence at the national level is automatically offset by 'greater' competence at the European level. In diametric opposition to this, the European level today has some powers that no Member State has ever had, because such powers are only conceivable at the European level. For instance, the power to create a European single market is to some extent a meaningless 'power' for a Member State. However, prohibitive competencies are occasionally used at the European level to supplement 'genuine' regulatory competencies (competencies to harmonise): one example is broadcasting, which is characterised by the co-ordinated use of the state aid control devices and competition-control and harmonisation-of-the-single-market legislation (broadcasting as a service).

### *III. Limitation of competencies through principles governing the way competencies are exercised*

Besides positive allocations of competence, at the European level there are principles governing the way in which competencies are exercised that aim at limiting competencies. These include the ***subsidiarity principle*** in Article 5(2) EC (for non-exclusive powers of the Community) and the ***proportionality principle*** in Article 5(3) EC, compliance with which means that measures taken by the Community may not go beyond what is necessary for achieving the objectives of the treaty.

### *IV. Limitation of competencies by stipulating the form of action*

Where competencies to issue ***directives*** exist, power is already limited by imposing that the form of action has to be a 'directive'. Under Article 249 EC, a directive "shall be binding, as to the result to be achieved, upon each Member State…but shall leave to the national authorities the choice of form and methods". This restricts the way in which competence can be exercised at the European level since it may not extend to the form and methods.

### *V. Negative provisions on competencies*

Negative provisions on competencies are found especially where areas of regulation are excluded from positive allocations of powers, as for example in Article 137(6) EC, which excludes pay, the right of association, the right to strike and the right to impose lock-outs from Community **social policy**, or in Article 152(5) EC, under which the Community fully respects the responsibilities of the Member States for the organisation of **health services** and **medical care**. Other examples of constraints on the EU's legal powers are found in the area of the common **foreign and security policy** (Article 17(3) EU, under which the EU must meet its NATO obligations); **internal security** (Article 33 EU, the responsibilities incumbent upon the Member States for the maintenance of law and order and the safeguarding of internal security in the co-operation between police and judicial authorities; Article 64(1) EC, the responsibilities incumbent upon the Member States for the maintenance of law and order and the safeguarding of internal security in the construction of a space of freedom, security and law); **the administration of justice** (Article 135 EC, customs measures shall not concern the application of criminal law or the administration of criminal justice in the Member States; Article 280(4) EC, the fight against fraud at European level shall not concern the application of criminal law or the administration of criminal justice in the Member States); the **provision of essential public services** (Article 16 EC, which ensures that services of general economic interest in the Member States are able to fulfil their mission); **employment policy** (Article 129 EC, no harmonisation of the laws and regulations of the Member States in the area of employment policy); and **education** (Articles 149(1) and 150(4) EC, strict observance of the Member States' responsibility for the content of teaching and the organisation of education systems and no harmonisation of laws and regulations in this area).

A negative provision on competencies can also be derived from Article 293 EC which provides for agreements between the Member States in certain areas: provided there is no other basis for competence, the areas cited in Article 293 EC lie outside the scope of Community competencies. Article 295 EC stipulates that the system of property ownership in the various Member States represents a barrier to the Community's competence. Article 296 EC contains restrictions on European competencies resulting from the essential security interests of the Member States. Lastly, most treaty annexes also contain constraints on European powers (see Article 69 EC).

The ***Treaty of Nice*** adds further negative provisions on competencies, in particular with respect to the law concerning **the right of residence** of citizens of the Union (Article 18(3) EC, no European jurisdiction regarding passports, identity cards, residence documents, social security and social protection); in the area of **social security** (Articles 137(2)(a) and (4) EC, European measures shall not affect the right of Member States to define the fundamental principles of their social security system and must not significantly affect the financial equilib-

rium thereof); and in **industrial policy** (Article 157 EC, no Community competencies for measures which contain tax provisions or provisions relating to the rights and interests of employed persons).

***Exceptions from the fundamental freedoms*** for ***public service*** and for the ***exercising of official authority*** (Articles 39(4) and 45 EC) and the provision of Article 46 EC (no prejudice to certain national measures on grounds of public policy, public security or public health) can also be seen as restrictions on Community competencies in the areas of the free movement of workers, free movement of services and the right of establishment.

Other negative provisions on European competencies may be seen in the ***fundamental rights of Union citizens*** (see also Article 6(1) EU), developed by the European Court of Justice and now set out in the Charter of Fundamental Rights of the EU, and ultimately, in a broad understanding of the concept of competencies, in the principle of legality (Article 6(1) EU).

It must be remembered that the ***fundamental freedoms*** of the single market not only bind the Member States but also establish limits for the EU/EC to the extent that their content also limits the reach of competencies at the European level. For example, the Community too must comply with the prohibition on quantitative restrictions and measures of equivalent effect. Article 157 EC (industrial policy) stipulates that the Community may not introduce any measures that could distort competition.

The ***national constitutional provisions*** which enable the Member States to participate in European integration can be viewed as more indirect barriers to European competencies. It does not matter in this context whether one sees the EU/EC more conventionally, in terms of international law, or in principle deems the advent of a kind of EU/EC Constitution to be a possibility. For Germany, for example, Article 23 of the Basic Law stipulates that Germany can only be member of a EU that is committed to democratic, social and federal principles and to the principle of solidarity, and that guarantees a level of protection of fundamental rights essentially comparable to that afforded by the Basic Law. These - or comparable - structural elements, which are also present in the Constitutions of other Member States, act as negative provisions on European competencies (albeit in an indirect way, as their main priority is to bind the respective member state's own public authority) as illustrated in particular by the example of fundamental rights protection, especially where these national constitutional elements cannot be modified due to 'perpetuity clauses' like Article 79(3) of the Basic Law.

Since the 1992 Maastricht Treaty such negative provisions on European competencies derived from the Member States' Constitutional orders have a place at the European level as well, where ***Article 6(3) EU*** stipulates that the Union shall respect the ***national identity*** of its Member States. This national identity surely includes constitutional identity as well.