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LEGAL PROTECTION AND ADMINISTRATION

YMPÄRISTÖ JA YHTEISKUNTA
ENVIRONMENT AND SOCIETY

Thilo Marauhn

Managing Diversity: Competitive Federalism in Light of the Lisbon Treaty

Introduction

When the Treaty of Lisbon[1] was signed on 13 December 2007, the then President of the European Council and Prime Minister of Portugal, *José Sócrates*, declared:

> "The European project is a project founded on the equality among States, mutual respect, close cooperation and tolerance. The European project does not eliminate nor minimise national identities, nor the States' specific interests; rather, it offers a multilateral framework of regulation from which benefits can be drawn for the whole and for each of the parts that participate in the project."[2]

This paper aims at a discussion of whether the changes brought about by the Treaty of Lisbon will improve the multilateral framework on which European integration is based. Compared to the existing legal framework based on the Treaty of Nice[3] and to the failed Treaty establishing a Constitution for Europe[4], does the Lisbon Treaty better serve the whole and each of the parts? Does the Treaty better manage diversity in an enlarged Eu-

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[1] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ 2007/C 306/01.

[2] Http://www.portugal.gov.pt/Portal/EN/Governos/Governos_Constitucionais/GC17/Documentos/
20071213_Eng_PM_Int_Assinatura_Tratado_Lisboa.htm.

[3] Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed at Nice, 26 February 2001, OJ 2001/C 80/01.

[4] Treaty establishing a Constitution for Europe, signed at Rome, 29 October 2004 OJ 2004/C 310/01.

rope? Does the Treaty of Lisbon overcome the political and institutional impasse that has limited Europe's capacity to act?

Obviously, not least with the latest enlargement in 2007, raising the number of member states to 27[5], the balancing of unity and diversity remains at the heart of the process of European integration. While such balancing may be looked at from the perspective of integration theories[6], it may also be discussed from the perspective of democratic governance as such[7]. This has not always been a core issue, neither for integrationists nor for their critics. However, taking a closer look at the distribution of legislative powers among member states and the Union, the management of diversity becomes a matter of democratic governance in Europe. It may be argued that the successful accommodation of the various interests of "each of the parts" and of "the whole" will be decisive for Europe's political future. In a paper published in 2004, political scientist *Johan P. Olsen*, University of Oslo, argued:

> "The quality of democratic institutions depends on their success in balancing unity and diversity, system coordination and unit autonomy – that is, the ability to act in a coherent and purposeful way and at the same time respect and accommodate legitimate diversity and conflicts."[8]

The need to review the European Union's constitutional framework had already been highlighted in a Declaration annexed to the Treaty of Nice in 2001[9].

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[5] Treaty between the Kingdom of Belgium, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Republic of Bulgaria and Romania, concerning the accession of the Republic of Bulgaria and Romania to the European Union, OJ L 157/11 (21 June 2005).

[6] For a general overview see *B. Rosamond*, Theories of European integration, 2000, *passim*.

[7] A number of interesting papers have been collected in *B. Kohler-Koch* and *F. Larat* (eds.), Efficient and democratic governance in the European Union, 2008.

[8] *J. P. Olsen*, Unity, diversity and democratic institutions: Lessons from the European Union, The Journal of Political Philosophy 12 (2004), pp. 461–495.

[9] Declaration No 23 on the Future of the European Union, annexed to the Nice Final Act, OJ 2001/C 80/85; for an assessment of the Declaration and its contribution to the constitutional process within the European Union cf. *B. de Witte*, The Nice Declaration: time for a constitutional treaty of the treaty of the European Union?, The International Spectator 36 (2001), pp. 21–30.

The political rationale for such a review can be found in the accession of ten new Member States in 2004, meaning an enlargement in membership from 15 to 25[10], with the accession of Bulgaria and Romania in 2007 to 27 Member States as of today. While the Treaty of Nice and related agreements had paved the way for such enlargement by reforming voting procedures, the Laeken Declaration of December 2001[11] committed the EU to improving democracy, transparency and efficiency. One of the most ambitious efforts to this end, the Treaty establishing a Constitution for Europe, however, notwithstanding it being signed at a ceremony in Rome on 29 October 2004, failed for lack of ratification[12]. This failure meant a political crisis for European integration, even though politicians couched their reaction in euphemistic terminology such as the need for a "period of reflection"[13]. The impasse was

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[10] Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, OJ L 236/17 (23 September 2003).

[11] Laeken Declaration on the Future of the European Union of 15 December 2001, available at http://ec.europa.eu/governance/impact/docs/key_docs/laeken_concl_en.pdf (Annex 1, pp. 19–27).

[12] For a discussion of the impact of failure on the European constitutional process see *U. R. Haltern*, Pathos and patina: the failure and promise of constitutionalism in the European imagination, European Law Journal 9 (2003), pp. 14-44; see also *R. Streinz*, The European Constitution after the failure of the Constitutional Treaty, Zeitschrift für öffentliches Recht 63 (2008), pp. 159–187.

[13] Declaration by the Heads of State or Government of the Members States of the European Union on the Ratification of the Treaty Establishing a Constitution for Europe (European Council, 16/17 June 2005), available at http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/85325.pdf: "To date, 10 Member States have successfully concluded ratification procedures, thereby expressing their commitment to the Constitutional Treaty. We have noted the outcome of the referendums in France and the Netherlands. We consider that these results do not call into question citizens' attachment to the construction of Europe. Citizens have nevertheless expressed concerns and worries which need to be taken into account. Hence the need for us to reflect together on this situation. This period of reflection will be used to enable a broad debate to take place in each of our countries, involving citizens, civil society, social partners, national parliaments and political parties".

overcome in 2007 when Germany, having taken over the rotating EU Presidency, declared the so-called "period of reflection" over[14] and member states moved towards the Lisbon Treaty.

Since relationships between the EU and its Member States, as well as among EU Member States (meaning the relative power of Member States), have always been a source of potential conflict, and thus potential stumbling blocks in the process of European integration it is worthwhile to discuss whether the Treaty of Lisbon has properly addressed the issue enhancing the EU's capacity to balance unity and diversity. This paper aims at providing a critical analysis of the Treaty and its predecessors in this regard by taking up the notion of "competitive federalism". The starting point will be an analysis of the principles on the distribution of powers between the Union and its Member States as laid down in the Treaty of Lisbon with particular reference to the principle of subsidiarity. Thereafter, the notion of competitive federalism will be taken up, discussing its relevance for multilevel governance systems. Then, we will apply the notion of competitive federalism to the Union as it stands today and as it may develop in the future. Finally, and referring to "National law and Europeanization"[15], I will try to at least provide a partial answer to the question whether and how regulatory competition might further the process of European integration by managing diversity within the EU.

The distribution of competences between the Community and its member states *de lege lata*

Article 5 EC Treaty and the "Kompetenz-Kompetenz"

It is a useful starting point to briefly recall the general approach of EC law to the distribution of competences between the Community and its member states[16]. The most important provision in this regard is Article 5 EC Treaty

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[14] Http://www.euractiv.com/en/future-eu/constitutional-treaty-reflection-period-archived/article-155739.

[15] This was the overall topic of the law conference on the occasion of the centenary of the Finnish Academy of Science and Letters in Helsinki, 2008.

[16] Taken as a general background to the distribution of competences we may refer to *K. Lenaerts*, Some reflections on the separation of powers in the European Community, Common Market Law Review 28 (1991), pp. 11–35.

as it stands today[17]. Its paragraph 1 reads as follows: "The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein."

This provision makes it clear that the Community is only entitled to act – more specifically: it is only entitled to adopt secondary legislation – if the Treaty, explicitly or implicitly, confers such power upon the Community. The Community thus differs from states because it is not competent to define its own competences. The so-called "Kompetenz-Kompetenz"[18] (the competence to decide on competences) is derived from sovereignty and basically understood as one of the most important characteristics of statehood legally defined[19]. While it is clear that the Community lacks such competence, it is not quite clear who actually enjoys this power as far as the process of European integration is concerned[20].

As the Swiss philosopher *Francis Cheneval* argued in November 2004 on the occasion of a meeting of the Swiss Association for Philosophy of Law and Social Philosophy:

> "Since sovereignty is unbundled at the meta-national level and not reproduced in a unitary form, the different regimes of sovereignty form a structure of overlapping and cross-cutting territories. Sovereignty gets diffused in the system; it is in all official institutions of the system and in no single one in an exclusive manner."[21]

He goes on to argue that the "… 'Kompetenz-Kompetenz' resides with all states in so far as they act together and together only."[22]

In effect this means that sovereignty cannot be attributed to a single entity, neither the Community nor the member states individually. The final say

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[17] Cf., in particular, *A. Dashwood*, The Limits of European Community Powers, European Law Review 21 (1996), pp. 113–128.

[18] This notion is not without problems, see *G. Beck*, The problem of "Kompetenz-Kompetenz". A conflict between right and right in which there is no praetor, European Law Review 30 (2005), pp. 42–67.

[19] For a contextual approach to the distribution of competences in EU law see *M. Nettesheim*, Kompetenzen, in: A. v. Bogdandy (ed.), Europäisches Verfassungsrecht. Theoretische und dogmatische Grundzüge (Heidelberg, 2003), pp. 415–477 (at pp. 415–418).

[20] *Nettesheim* refers to the notion of "konsoziativer Föderalismus" (ibid., at p. 420).

[21] *F. Cheneval,* Constitutionalizing Multilateral Democratic Integration, Archiv für Rechts- und Sozialphilosophie, Beihefte 105 (2006), pp. 30–44 (at p. 35).

[22] Ibid., at p. 35.

in the overall direction of European integration thus no longer is clearly located in a particular place. It is embedded in the interrelationship between various actors, with EU law offering "a multilateral framework of regulation" – as described by the then President of the European Council and Prime Minister of Portugal, *José Sócrates*, in 2007[23]. Translating this into legal doctine, Article 5, para. 1, of the EC Treaty is an expression of the Community being a multi-level system (similar to but different from a federal one, it may be argued[24]), with a strong presumption in favour of member state competence.

While paragraph 1 of Article 5 of the EC Treaty thus assigns competences (it is a rule on the distribution of such competences, in German: "Kompetenzverteilungsregel"), the two following paragraphs of Article 5 EC Treaty must be understood as limiting the exercise of existing EC competences (in German: "Kompetenzausübungsschranke"). Let me briefly recall that Article 5, para. 2, EC Treaty establishes the principle of subsidiarity, stipulating the following:

> "In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community."

It is noteworthy that this paragraph sets off by referring to "areas which do not fall within its exclusive competence", thereby re-affirming that this paragraph only applies to areas where there is already a Community competence[25].

Article 5, para. 3, EC Treaty lays down the principle of proportionality – I may add, not in general[26], but with specific reference to the exercise of

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[23] http://www.portugal.gov.pt/Portal/EN/Governos/Governos_Constitucionais/GC17/Documentos/

20071213_Eng_PM_Int_Assinatura_Tratado_Lisboa.htm.

[24] See *S. Oeter*, Föderalismus, in: A. v. Bogdandy (ed.), Europäisches Verfassungsrecht. Theoretische und dogmatische Grundzüge (Heidelberg, 2003), pp. 59–120.

[25] On subsidiarity see *N. Emiliou*, Subsidiarity: An Effective Barrier against the "Enterprise of Ambition", European Law Review 17 (1992), pp. 383–407.

[26] For an analysis of proportionality in general see *N. Emiliou*, The principle of proportionality in European law (London 1996), *passim*.

competences by the European Community: "Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."

Summing up the above recollection of what is laid down in Article 5 of the EC Treaty, it seems – at least *prima facie* – to establish clear principles on the distribution and the exercise of competences as between the Community and its Member States. However, what seems clear as a matter of principle often lacks clarity when it comes to the details of day-to-day disputes about the exercise of competences. Thus, it is no surprise, that it has never been easy to identify exclusive[27] and concurring competences on the basis of the Treaty as such. Even more, the interpretation of Article 5 EC Treaty, as such, has been subject to dispute; in particular, the principle of subsidiarity has hardly ever been applied in clear-cut terms[28].

This is, however, no surprise: the Treaty only lays down the constitutional framework[29] for the distribution of competences. It does not offer more than such framework, a framework on which the whole and each of the parts must build in order to derive the benefits referred to in the introduction above. The Treaty as such does not "produce" such benefits. They must be developed through political processes – and one of the approaches to such processes is the concept of competitive federalism which we will come back to after some further legal analysis. The self-imposed limitations of the Treaty as a framework can also be illustrated by reference to the implied powers doctrine[30] and to Article 308 EC Treaty[31]. While this paper will not discuss the details of distinguishing between substantive and functional attributions of competence, it should be borne in mind that Article

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[27] *R. Schütze*, Dual federalism constitutionalised. The emergence of exclusive competences in the EC legal order, European Law Review 32 (2007), pp. 3–28.

[28] *G. A. Bermann*, Taking Subsidiarity Seriously, Federalism in the European Community and the United States, Columbia Law Review 94 (1994), pp. 332–456.

[29] For a review of applying contitutional terminology to the process of European integration see *C. Möllers*, Verfassunggebende Gewalt – Verfassung – Konstitutionalisierung, in: A. v. Bogdandy (ed.), Europäisches Verfassungsrecht. Theoretische und dogmatische Grundzüge (Heidelberg, 2003), pp. 1–58.

[30] *S. Stadlmeier*, Die "Implied Powers" der Europäischen Gemeinschaften, Zeitschrift für öffentliches Recht 52 (1997), pp. 353–388.

[31] See generally *R. Schütze*, Organized change towards an "ever closer Union". Article 308 EC and the limits to the Community's legislative competence, Yearbook of European law 22 (2003), pp. 79–115.

308 EC Treaty, in particular, has further contributed to a degree of complexity which probably is adequate in light of the complexities of real life, but which has never been easy to understand neither by lawyers nor by politicians nor by the general public. Hence, it is no surprise that the Community has often had problems in selecting the proper legal basis for its activities.

De lege lata *types of competences*

Having outlined the principled framework, it is useful to move one step further and to turn to a characteristic feature of all multi-level governance systems (and in particular all federal systems): the distinction between various types of competences. With regard to the EC Treaty, doctrine and jurisprudence have, until today, distinguished exclusive, concurring and parallel competences[32]. The Treaty itself has not been explicit with regard to these types of competences. In terms of political practice, it is noteworthy that, traditionally, the Council (more open to the position of member states, i.e. "the parts") has taken a restrictive view whereas the Commission (rather focusing on "the whole") has taken a much broader perspective on what might be a Community competence, and even more so, an exclusive competence.

In the following, we will briefly recapitulate jurisprudence of the ECJ and pertinent writings on the general distinction between exclusive, concurring and parallel competences. To begin with, it seems to be generally accepted that Community competence in the fields of the common commercial policy (Article 133 EC Treaty)[33], the common customs tariff (Article 26 EC Treaty)[34], fishing rights and the conservation of marine resources[35] according to Article 102 of the 1972 Act of Accession[36], and with re-

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[32] *R. Schütze*, The morphology of legislative power in the European Community, Yearbook of European law 25 (2007), pp. 91–151.

[33] ECJ, *Donckerwolcke v Procureur*, Case 41/76, [1976] ECR 1921.

[34] ECJ, *Sociaal Fonds voor de Diamantarbeiders v Indiamex*, Cases 37 and 38/73, [1973] ECR 1609; *Aprile Srl, in liquidation, v Amministrazione delle Finanze dello Stato,* Case C-125/94, [1995] ECR I-2919.

[35] ECJ, *Commission v United Kingdom*, Case 804/79, [1981] ECR 1045.

[36] Act concerning the Conditions of Accession and the Adjustments to the Treaties, OJ L 73/35 (27 March 1972).

gard to the Community's internal rules on organizational and procedural matters is exclusive[37]. The question of whether or not the Community enjoys exclusive competence in other policy fields, however, has remained highly disputed.

While exclusive competences are the exception, concurring competences are the rule. This means that member states are free to act until and to the extent to which the Community has adopted secondary legislation itself. It has to be borne in mind that this does not mean that after the adoption of such secondary legislation the Community competence transforms into an exclusive one. Rather the principle of subsidiarity remains applicable and may eventually force the Community to re-consider its secondary legislation in light of new circumstances[38].

As to the third category, namely parallel competences, these have not been discussed intensely. Nevertheless, they are a characteristic feature of one of the most important areas of Community law, namely competition law. In particular, after the adoption of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, it has become clear that municipal and EC law are applied in parallel[39].

Exclusive, shared and supporting competence: What does the Lisbon Treaty say?

The need for reform

This distinction between exclusive, concurring and parallel competences has been modified and further developed by the Treaty of Lisbon. Such modification and development were already at the heart of the Draft Treaty

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[37] Exclusiveness bars member states from legislating themselves; see *E. D. Cross*, Pre-emption of Member State Law in the European Economic Community: A Framework for Analysis, Common Market Law Review 29 (1992), pp. 447–472; see also *R. Schütze*, Supremacy without pre-emption? The very slowly emergent doctrine of Community pre-emption, Common Market Law Review 43 (2006), pp. 1023–1048.

[38] *A. G. Toth*, Is Subsidiarity Justiciable?, European Law Review 19 (1994), pp. 268–285.

[39] *K. Lenaerts* and *D. Gerard*, Decentralisation of EC competition law enforcement, World Competition 27 (2004), pp. 313–349.

establishing a Constitution for Europe[40]. Before analyzing the new distinctions, we will have a brief look at the background of the debate:

It is worthwhile to recall that at the end of the 1980s and increasingly during the 1990s, the Community and its institutions were accused to interpret and apply the provisions related to its competence under European law in an expansive and possibly even illegal manner. As *Martin Nettesheim*, European law, University of Tübingen, has explained:

> "Some observers had the distinct impression that the apparent fixed competence limits were, in the hands of the EU institutions, simply dissolving and making way for an authority without bounds, which was used to commit ever new, more extensive violations."[41]

Nettesheim concedes:

> "These fears were not entirely without justification: even in pro-European circles it is now acknowledged that when unanimity was required, the Member States still holding a right of veto treated the question of competence as a political problem. Its legal dimension first gained significance when there was a move to the majority principle in the Council, and as the EU began to encroach upon the competence of individual countries, players without political co-determination rights became involved."[42]

It is against this background that the division of competences became an essential issue of controversy when the discourse about drafting a European constitution began. Virtually every paper addressing the problem of constitution-building in Europe, and thus participating in the discourse, addressed the question of competence. Hence, there was an impressive degree of political and academic discourse in place. This same degree of debate was missing during the debate of the Convention working on the text of the constitutional instrument. As *Nettesheim* observes: "During the work of the Convention, however, treatment of the question of competence was some-

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[40] Cf. generally *C. D. Classen*, The draft Treaty Establishing a Constitution for Europe. A contribution to the improvement of transparency, proximity, and efficiency of the European Union, German Yearbook of international law 46 (2003), pp. 323–352.

[41] *M. Nettesheim*, The Order of Competence within the Treaty Establishing a Constitution for Europe, in: H.-J. Blanke and S. Mangiameli (eds.), Governing Europe under a Constitution. The Hard Road from the European Treaties to a European Constitutional Treaty (Berlin Heidelberg 2006), pp. 309–343 (at p. 323).

[42] Ibid., 323.

what eclipsed. It triggered significantly less dispute than discussions prior to assembly of the Convention had led to expect."[43]

This is, indeed, surprising, given that multi-level decision-making and the distribution of competences lies at the heart of every federal system and is decisive for whether or not the system is capable to manage the inherent tension between unity and diversity[44]. Turning to the debate and what the Draft Treaty establishing a Constitution for Europe suggested, two schools of thought can be identified:

The first one considers the question of competence in terms of efficiency, thus finding plausibility in the tension between an economically liberalized Community and socially responsible member states. The second considers the question of competence against the background of the concept of political unity, arguing that only a "one stop" economic and social policy can satisfy the responsibility for public interest. In effect, the Draft Treaty establishing a Constitution for Europe laid down a graduated system of socio-economic competence, not a uniform one. While the Draft Treaty upheld the much disputed flexibility clause of Article 308 EC Treaty, the continued existence of which was the subject of heated debate in the Convention, a certain clarification was reached through listing and typing. The Draft Treaty defined the various types of competence, and the issue areas placed in the hands of the EU were assigned to a type of competence. This has rightly been considered by commentators as "a true gain in quality terms in a number of respects"[45].

Finally, the interpretative issue of exclusive competences was at least partly solved by the Draft Treaty establishing a Constitution for Europe, which subscribed to an interpretation according to which, as regards the term exclusive competence, it does not depend on who can deal with a certain task, but whether a task assigned to the EU can only be adequately fulfilled if the Member States are absolutely and permanently prevented from acting.

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[43] Ibid., 310.

[44] See *J. P. Olsen*, Unity, diversity and democratic institutions: Lessons from the European Union, The Journal of Political Philosophy 12 (2004), pp. 461–495.

[45] *Nettesheim*, supra note 41, at p. 324.

The approach of the Lisbon Treaty

In how far does the Treaty of Lisbon take up these issues[46]? Does the Lisbon Treaty improve the existing "framework of regulation from which benefits can be drawn for the whole and for each of the parts that participate in the project"?[47]

In the Lisbon Treaty, the distribution of competences for various policy areas between member states and the Union is explicitly split among the following three categories[48]: exclusive, shared and supporting competence. Article 2A, paragraph 1, of the Treaty of Lisbon stipulates:

> "When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts."

With regard to shared competences, paragraph 2 of Article 2A of the Treaty of Lisbon is slightly more complex. It states:

> "When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence."

Finally, Article 2A, paragraph 5, of the Treaty of Lisbon explains so-called supporting competence:

> "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."

The same paragraph clarifies: "Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations."

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[46] On the Lisbon Treaty and the political context see *P. Craig*, The Treaty of Lisbon, Process, Architecture and Substance, European Law Review 33 (2008), pp. 137–166.

[47] Http://www.portugal.gov.pt/Portal/EN/Governos/Governos_Constitucionais/GC17/Documentos/20071213_Eng_PM_Int_Assinatura_Tratado_Lisboa.htm.

[48] See generally, *R. Schütze*, Lisbon and the federal order of competences. A prospective analysis, European Law Review 33 (2008), pp. 709–722.

Looking at the issue areas attached to particular types of competences, the following can be noted:

Exclusive competence covers the customs union, the establishing of 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, and the common commercial policy. This is more or less what has been considered as exclusive competence for many years. Shared competence covers the internal market, social policy, for aspects specifically labelled in the Treaty, economic, social and territorial cohesion, agriculture and fisheries, excluding the conservation of marine biological resources, environment, consumer protection, transport, trans-European networks, energy, the area of freedom, security and justice, and common safety concerns in public health matters, again limited to those matters labelled in the Treaty. Finally, supporting competences are available in the areas of the protection and improvement of human health, industry, culture, tourism, education, youth, sport and vocational training, civil protection, and administrative cooperation.

Whether or not the Lisbon Treaty really is an improvement has been subject to academic and political debate. Some commentators have praised an increase in clarity and, hence, in legal certainty[49], while others have perceived the Treaty as reducing transparency and departing from the constitutional aims of the Laeken Declaration[50]. From my perspective it is far too early to assess and evaluate the changes brought about by the Treaty because any judgment to this end will only be solid once the Treaty has been tested in political and judicial practice. For the time being, it is possible to give a prognosis on the basis of past experience and of an interpreation of the text as such. However, experience within the process of European integration shows that treaty law (i.e. primary or – as some call it – constitutional law of the Community) only lays down a frame-

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[49] See *S. Constantin*, Rethinking subsidiarity and the balance of powers in the EU in light of the Lisbon Treaty and beyond, Croatian Yearbook of European law & policy 4 (2008), pp. 151–177.

[50] For a discussion of the complex reaction to the Lisbon Treaty see *M. Dougan*, The Treaty of Lisbon – winning minds, not hearts, Common Market Law Review 45 (2008), pp. 617–703; see also *J. Snell*, "European constitutional settlement", an ever-closer union, and the Treaty of Lisbon – democracy or relevance?, European Law Review 33 (2008), pp. 619–642.

work for political and judicial action, neither less nor more. Lawyers, political scientists, economists, and political practicioners alike should always bear in mind that the integration is a multifaceted process, and not a narrow, mono-causal or dead straight exercise. It is against this background that we will now briefly consider the notion of competitive federalism.

The notion of competitive federalism

Having analyzed the provisions of the Treaty of Lisbon on the division of competences between the European Union and its member states, we will now step back from legal discourse and introduce the concept of competitive federalism. While this paper does not argue that competitive federalism is the best approach to a meaningful interpretation of some of the changes brought about by the Treaty of Lisbon, the concept provides some insights that may be helpful in evaluating the contribution of the Lisbon Treaty to the further development of European integration.

In particular, competitive federalism may illustrate how successful and meaningful integration can be made compatible with decentralized structures and with increasing diversity in an enlarged European Union. Some analysts have taken up economic theories on federalism in this regard in order to argue in favor of integrating locational competition among member states, regions and municipalities into a federal conception of the European Union[51]. Such locational competition is perceived as an essential element of European integration. It is argued that decentralized government decisions (whether at the national, the regional or the local level) are only compatible with progressive integration if the overarching structures allow competition among the constituent units of each level of government[52].

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[51] See, with reference to the *Centros* case (ECJ, *Centros Ltd v Erhvervs – og Selskabsstyrelsen*, Case C-212/97 [1999] ECR I-1459), *S. F. Deakin*, Two types of regulatory competition: competitive federalism versus reflexive harmonisation, The Cambridge Yearbook of European legal studies 2 (1999), pp. 231–260.

[52] *W. Kerber*, Applying Evolutionary Economics to Economic Policy: the Example of Competitive Federalism, in: K. Dopfer (ed.), Economics, Evolution and the State: The Governance of Complexity (Cheltenham 2005), pp. 296–324.

But what does competitive federalism mean? In very basic terms[53], competitive federalism means that regional (or local) governments compete with other regional (or local) governments. In other words, governments compete for people, and people are free to choose which regional or local government they want to live under. This requires, obviously, a degree of mobility among citizens – but in Europe, with the four freedoms, in particular, with free movement of persons, such mobility (in principle) is available. Even more so, investors will benefit from any such competition because they will choose the most attractive environment for their investments. Indeed, it is noteworthy that with European integration competition between member states, regions, and localities has increased. However, before turning to an assessment of the regulatory or constitutional framework of European law (and the relationship between European and municipal law in light of the Lisbon Treaty), the idea of competitive federalism needs some specification.

Traditionally, the economic theory of federalism[54] has focused on public goods and taxes, with only very limited analysis addressing legal rules and regulations. However, over time, federalist theory has been combined with ideas about law and economics allowing for the development of an economic theory of legal federalism. While political scientists were ahead in explaining multi-level governance, economists have joined the search for an "optimal design of a multi-level legal system"[55], discussing how to balance centralization and decentralization of legal competences. This also gives rise to the question in how far European integration, as a multi-level legal system, should leave room for a certain degree of free choice of law.

As far as economic criteria for the optimal vertical allocation of legal competences in a multi-level legal system are concerned, scholars have identified the following factors: costs, heterogeneity, knowledge and innova-

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[53] For an introduction see *T. Lenk* and *K. Kaiser*, Competitive Federalism – Understandings and Institutional Settings, in: G. Färber (ed.), Spatial aspects of federative systems (Speyer 2005), pp. 33–66.

[54] See, more generally, *B. R. Weingast*, The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development, The Journal of Law, Economics and Globalization 11 (1995), pp. 1–31.

[55] *W. Kerber*, European Systems of Private Laws: An Economic Perspective, in: F. Cafaggi and H. M. Watt (eds.), Making European Private Law: Governance Design (2008), pp. 64–97 (at p. 75).

tion, political economy problems, path dependence, additional normative criteria and regulatory competition. In the following, I briefly present some ideas developed by political economist *Wolfgang Kerber*, University of Marburg[56].

1) As to ”costs”, different kinds of welfare losses may be caused through the vertical allocation of legal rules or regulations. Indeed, additional costs may be attached to more complex multi-level legal systems compared to a unitary legal system, with a much simpler structure.
2) At the other end of the scale, ”heterogeneity” provides arguments related to advantages of decentralisation. Here, a well-known argument in economic theory of federalism is that a decentralised legal system, leaving room for the adoption of different legal rules at lower levels may be much better suited to fulfil the preferences of citizens of different regions or localities.
3) Turning to ”knowledge and innovation”, there are indeed constraints upon the problem solving capacity of legal rules rooted in limited knowledge. Such limitations may eventually cause regulatory failure. Often, problem-specific knowledge is available much easier (sometimes only) at the local or regional level.
4) The degree of centralization or decentralization in a multi-level legal system, which is more suitable to avoid regulatory failure or to solve pertinent problems, is an issue that must be looked at from the perspective of political economy.
5) However, the optimal vertical allocation of competences is not only a problem of political economy but it may also depend on the historical legal development, in other words on ”path dependence”. Even from an inherently legal perspective, it is easy to argue that future legal evolution will depend on the development of the law in the past.
6) Finally, it should not be forgotten that there are additional normative objectives, which may be pursued through pertinent laws and regulations.

Based on these factors, it can be argued that if there is a minimum extent of decentralization and if private parties are mobile between the lower level jurisdictions, then, these jurisdictions are in competition because private parties will opt for the most attractive jurisdiction. As *Kerber* has made clear, ”Decentralization and mobility lead inevitably to inter-jurisdictional competition”[57]. Furthermore, ”the extent and kind of competi-

[56] Ibid., at pp. 76–78.

[57] Ibid., at p. 81.

tion depends on the degree of decentralization and the extent of mobility rights"[58].

If it is true that decentralization and mobility must be coupled with regulatory competition in order to successfully pursue political and economic integration then the territorial structure of jurisdictions and their respective competences must be clearly defined, and individuals and undertakings must be free to choose between jurisdictions.

Applying competitive federalism to the Lisbon Treaty

A better framework for regulatory competition?

As has been explained above, one of the essential pre-requisites of meaningful regulatory competition within the European Union is a clear definition of competences between the Union and its member states. Only if and in so far as member states are competent to adopt laws and other rules, it is possible to develop competing regulatory approaches.

The Lisbon Treaty contributes to a better framework for regulatory competition because it provides for a much clearer distinction between competences attributed to the Union and those attributed to its member states. While the new provisions are far from perfect, they – for the first time – provide for a textual basis for such distinction which is no longer exclusively in the hands of Commission and member state governments or the Court. Irrespective of a complete evaluation of the degree to which the Lisbon Treaty improves democratic governance, it can be argued that inclusion of such provisions in the Treaty enjoys a higher degree of democratic legitimacy than the development of pertinent distinctions by the Court of Justice.

Another feature of the Lisbon Treaty deserves our attention: it provides for a greater role for national parliaments in the process of multilevel governance[59]. National parliaments are now directly involved in the work of the Union alongside European institutions. They enjoy rights of information, they are involved in monitoring subsidiarity, they participate in mechanisms evaluating policy in the field of freedom, security and justice, and they have a role to play in procedures aimed at reforming the treaties. All

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[58] Ibid., at p. 81.

[59] *P. Kiiver*, The Treaty of Lisbon, the national parliaments and the principle of subsidiarity, Maastricht Journal of European and comparative law 15 (2008), pp. 77–83.

this has been laid down in a Protocol to the Lisbon Treaty on the Role of National Parliaments in the European Union[60]. While this Protocol does not directly touch upon competitive elements of federalism, it implicitly supports trends towards more competition between national regulators, since their active involvement in EU legislation will not only give them an option to present their regulatory ideas, but – given that all national parliaments will get involved in this process – they will discuss among themselves regulatory approaches and thus insert a degree of competition into the political process as such. It is true that this is not regulatory competition as outlined above but much more a form of political competition, however, taking into account the distinct regulatory approaches which member states present within this process.

In addition, national parliaments will have a chance to control subsidiarity more closely. As subsidiarity is justiciable only to a limited extent[61] it is very important that appropriate control mechanisms have moved from the judicial to the political field. As can be taken from the Protocol, any national parliament may label a proposal for EU action which it believes does not respect the principle of subsidiarity. Should one third of national parliaments consider that the proposal is not in line with subsidiarity, the Commission will have to re-examine the proposal with a view to taking a decision on whether to maintain, adjust or withdraw it; should a majority of national parliaments agree with the objection without the Commission subsequently withdrawing or adjusting it, the Commission is obliged to explain its reasons; in this case, the European Parliament and the Council will have the final say in whether or not to go ahead with the proposal[62].

Diversity as an asset: regulatory competition in Europe

Diversity within a system of multi-level governance is an essential asset of European integration. If pursued further it will better meet individual preference and strengthen the Union's innovative potential.

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[60] Protocol on the Role of National Parliaments in the European Union, OJ C 306/148 (17 December 2007).

[61] *A. G. Toth*, Is Subsidiarity Justiciable?, European Law Review 19 (1994), pp. 268–285.

[62] For an evaluation see also *P. Straub*, Das Frühwarnsystem zur Subsidiaritätskontrolle im Vertrag von Lissabon als Hürde vor weiterer Zentralisierung in der Europäischen Union?, Jahrbuch des Föderalismus 9 (2008), pp. 15–27.

With the latest enlargement in 2007 the European Union has grown to 27 member states. Compared to its beginnings in 1952 when six states signed the Treaty of Paris establishing the European Coal and Steel Community, and in 1957 when the Treaties of Rome were signed by the Six, the process of European integration must be considered a success story. However, enlargement as such has never been considered and never will be a success in itself. Without continuous progress towards deepening integration, the Community (and the Union) would still signal change compared to earlier periods of European history but would not be as attractive to its members and from the outside as it indeed is, all criticism notwithstanding.

Looking back at the more than 50 years of European integration and at the various stages of enlargement, there have always been debates as to the management of the inherent conflict between widening and deepening. The growing diversity between member states whether in economic, social, political or cultural terms has never been easy to handle. When the Treaty establishing a Constitution for Europe failed, some believed that this was also due to the focus on too much homgeneity and too little diversity. The Treaty of Lisbon, which after endorsement by the Czech parliament enjoys prospects of really entering into force, includes a number of features which promise a better management of diversity in the future.