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Division of Competences between the European Union and the Member States

- The topics under discussion in the Convention have been in the centre of debates in the EU Member States during many decades. In Estonia, at the same time, the issues of the future of Europe have attracted the attention of Estonian experts only for some months. Therefore one may be tempted to get overenthusiastic and try to create a completely new design for the future of Europe. However, it would be rational to take the political realism as the starting point and to keep in mind that the EU today is an accumulation of ambitions and opportunities of the negotiators of the treaties that the European governments have enounced through the past decades. We should realise that a radical change of the course would not only involve changes in the individual questions, but would inevitably change the balance between the EU institutions and the Member States. Further, it should be kept in view that the result of the Convention would probably not be a vision of an entirely new Europe, but hopefully suggestions for some rearrangements in the present system.

- Above all, it is essential to remind that the current division of competences operates in practice and the substantial conflicts have rarely occurred. Therefore there is no need for a radical reform; rather some aspects of the division of powers should be clarified. It is important to maintain the basic principle of the functioning of the Union – the principle of conferred powers, pursuant to which the European Union / European Community enjoys only those powers conferred on them by the treaties. Hence instead of radically changing the system, the different categories of powers should be better classified, whenever possible, in order to determine exactly who does what.

- There is no point to draft a formal catalogue of competences, as it would unjustifiably curtail the Union's dynamism and ability to step in if needed. Contrary to what is all too often claimed, the treaties already contain a certain catalogue of competences. However, the problem is that the relevant provisions are scattered throughout the treaties with different legal meaning and the powers are not worded precisely enough. The very nature of the Union means that the EU and national levels share responsibilities. We cannot, therefore, draw up a catalogue of competences with watertight divisions between the different levels.

  The intervention of the Union / Community into the legal systems of the Member States is a result of unanimous consent of all the Member States and article 308 has not been misapplied. However, often the meaning of article 308

is misunderstood – it does not allocate the Community new powers but enables the Community to adopt a measure to fulfil the EC Treaty objectives in cases the Treaty itself does not envisage a concrete legal basis. This article has had profound consequences and it is due to it that the Community managed to develop and adapt to changes. Therefore flexibility in the form of article 308 should remain built into the system. The system of powers must be capable of evolving and adapting to social, economic and political changes that might take place in the future. Thus, instead of abolishing article 308, it would be reasonable to specify the other provisions of the Treaty in order to make them suitable to serve as a legal basis.

- It can be identified that the principles of subsidiarity and proportionality have not been successfully followed. At the same time it is obvious that the incomplete application of these principles has been the political decision of the Member States. Nevertheless, it seems rather unlikely that the creation of a new body would change the track - the institutional system of the EU is too complicated for such novelties.

  During the last session of the Convention various ideas have come up in relation to establishing a new entity, whether comprising the judges from the constitutional courts of the Member States or the members of national parliaments. In fact both bodies would prevent their members from duly fulfilling their duties in home countries and would not add any substantial degree of democratic legitimacy. Whether the indirectly elected Council of Ministers alone or jointly with the directly elected European Parliament has adopted a measure, the common sense presumes that they have, as well, considered the principle of subsidiarity. Still, the question remains what to do in case the expectations failed, i. e. how to better implement the control mechanisms? Of course the European Court of Justice could control the exercise of powers, but even if the Court of Justice assesses the issue too political to judge on, no new body would help. The alternative would be the more responsible attitude in applying subsidiarity by the European institutions. It should be recalled that in its *White Paper on European Governance*, the European Commission has already conceded to withdraw from proposals that might contradict with the principles of subsidiarity and proportionality.

- It is easy to argue that in the fields the Union should not act according to the principle of subsidiarity, the powers should be returned to the Member States. However, the policies are so intertwined and powers shared that a radical reform would substantially undermine the achievements of the integration. For example the renationalisation of the common agricultural policy would have serious consequences on the implementation of the competition policy. Nevertheless in principle it is correct that the deepening of integration cannot be a purpose in itself anymore. In case it is commonly held that the integration has reached an optimal level, it would be reasonable to stop. On the one hand if it is found that the powers to decide on an individual issue should be returned to the Member States, these powers should be returned. On the other hand, with regard to the recent emission of the common currency and the unforeseen consequences it might have on the economic and monetary

integration, it is premature to argue that the ceiling of the integration has been attained.

- The European institutions themselves can best decide the question, whether the Union has a power to legislate in a concrete field. Primarily it is important to stress the role of the Council of Ministers – the representatives of the Member States should know best what issues they would like to regulate on the European and what on the national level. Lots of discussion has been devoted to the need to involve the national parliaments more in the decision making process. Apparently, here it is rather difficult to adopt an arrangement binding on Member States – every country should preserve the right to decide on its own constitutional architecture. The most appropriate way to have the voice of national parliaments heard goes through their respective governments. National parliaments would best help themselves by exploiting to a wider extent their powers vis-à-vis their own governments.