Does the Emperor Really Have New Clothes?
A Critical Assessment of the Post-Lisbon Regime of Division of Competences

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1. Introduction

Since the EU is an extremely complicated political entity it has numerous different political and legal layers.[1] One of these is the distribution of powers between the Union and the Member States. The study of the new regime of Union competences is highly relevant in these years since it allows us to arrive at important conclusions. These conclusions are not solely of constitutional character,[2] but also highlight certain general tendencies. Interestingly, the history of the Treaty Establishing a Constitution for Europe[3] was a sharp indication that a federal scenario is still unimaginable under recent socio-political conditions, however, this did not mean that the drafters of the treaty neglected the use of certain elements of federalism while designing the new European constitutional architecture. The Post-Lisbon regime of vertical division of powers is one of the best examples of this, since it reflects an evidently federal approach even though the federal nature of the new constitutional setting is still highly debated.[4]

This brief article is not a simple description of the vertical distribution of powers in the Union,[5] but aims to reflect upon certain dimensions thereof from a critical point of view. Basically, three theses will be elaborated in order to highlight some controversies surrounding the recent regulation of Union and Member State competences. It must also be mentioned that the following theses are by no means definitive statements; they are merely starting points for the broader academic discussion.

The theses are as follows:

(1.) The reform of competences introduced by the Lisbon Treaty can be regarded neither a real revolution nor even a significant evolution, since it is of a strong conservative nature. That being said, the transformation of the legal framework of the vertical division of powers did not establish a qualitatively new regime. It only systematized and codified the achievements of the earlier case-law of the European Court of Justice (thereafter: ECJ) and some former treaty provisions.

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[1] For a general discussion see: N. Nugent, *The Government and Politics of the European Union*, Palgrave Macmillan, New York, 2010.

[2] For a constitutionalism oriented analysis see K. Lenaerts, Federalism: 'Essential Concepts in Evolution – The Case of the European Union', 21 No. 3. *Fordham International Law Journal*, 1998, pp. 746-753.

[3] Treaty Establishing a Constitution for Europe [2004] OJ C310/01.

[4] For a clear-cut argumentation that the European integration has always had a federal nature *see*, R. Schütze, *From Dual to Cooperative Federalism: the Changing Structure of European Law*, Oxford University Press, Oxford, 2009, pp. 1-4.

[5] For the description *see*, P. Craig & G. de Búrca, *EU Law: Text, Cases and Materials*, Oxford University Press, Oxford, 2011, pp. 73-102.; K. Lenaerts & P. van Nuffel, *European Union Law*, Sweet and Maxwell, London, 2011, pp. 124-130.

(2.) However, the real achievement of the changes is the coherent introduction of a federal attitude and vocabulary. The text of both the Treaty on the European Union (thereafter: TEU) and Treaty on the Functioning of the European Union (thereafter TFEU) relies on essential terms rooted in federalism such as for instance "exclusive", "shared" or "member state" competences. Therefore, the distribution of powers between the Union and the Member State is articulated in a clear federal way. Indeed, it can be regarded a real novelty compared to the prior-Lisbon regime evolving in the context of delicate and sophisticated political and judicial compromises.

(3.) Lastly, although the new regime was obviously inspired by a federal mindset it cannot be equated with a real federative government. The supranational level is incomparably "weaker" and less powerful in substantive terms than the central governmental level of real federations. Many important competences that would make the EU a real and functioning federal state are still lacking. As a result, fears of a silently emerging United States of Europe or European Super State are manifestly unfounded in a public law sense.

2. An imperfect conservative reform

In the words of political philosophy, "conservative reform" seems to be a suitable term to describe what happened with the distribution of competences between the EU and the Member States following the Lisbon reforms. Although it would be rather tempting to consider this term an apparent contradiction, this is certainly not the case. Conservative political philosophy generally accepts that the change in the order of things is both unavoidable and necessary. Therefore, conservative authors do not deny the necessity of transformation, what they frequently and vehemently debate are its nature and features. For example: Michael Oakeshott argues that a slow and gradual, that is to say, spontaneous transformation is much more favorable than a line of fast, direct and intentional acts aiming to comprehensively reform a certain segment of life.[6] Thus, "conservative reform" is a plausible term for characterizing those processes that gradually, softly and organically change a given situation shifting into another one.

As a preliminary remark it should also be mentioned that the reform of the entire system of European Union competences has been a constant claim of both the European political elite and the European civil society in the last fifteen years. Besides featuring in the general scholarly and political discussion, it was also reflected in official European Union documents. A declaration attached to the Nice Treaty[7] had already mentioned the necessity of this reform which was one of the main issues that gave birth to the Laeken Declaration[8] and the following constitution-making process leading to enactment of the Lisbon Treaty. To be precise, both declarations emphasized the necessity of a clear delimitation of the European Union and Member State competences. The declaration on the future of the European Union attached to the Nice Treaty simply pointed out the problem on an official level, since it indicated it as one of the main questions to be discussed in this respect.[9] The Laeken Declaration provided a more detailed analysis, broadening the scope of official awareness. Its main message was that the division of competences had to be clarified and simplified; furthermore, this regime was also to work in a more transparent way. In order to achieve these aims, it explicitly claimed a

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[6] *Cf*. M. Oakeshott, 'On Being Conservative', *in* M. Oakeshott, *Rationalism in Politics and Other Essays*, Liberty Fund, Indianapolis, 1991, pp. 407-437.

[7] 23. Declaration on the future of the Union. 5. OJ C 80/85.

[8] Laeken declaration on the future of the European Union. http://european-convention.eu.int/pdf/lknen.pdf

[9] The declaration also mentioned the status of the Charter of Fundamental Rights, the simplification of the Treaties' wording, and the role of national parliaments. So, it pointed out key questions of the future constitutional development.

"clearer distinction" among the different types of competences including the exclusive ones, the shared ones, and the competences of Member States.[10] In sum, the reconsideration of the former regime of the distribution of powers between the supranational and Member State levels of government was an essential component of the constitution-making process launched in 2001; however its precise substance was still open to debate.

Upon analyzing the changes brought about by the Lisbon Treaty one may conclude that they did not radically transform the existing competence regime although they integrated a new framework and various new elements into the corpus of European public law. The actual setting of the division of competences is based on both the TEU and TFEU. The TEU establishes the underlying principles for sharing and exercising competences in Article 3 and 4 with special regard to the demarcation of Member States competences as well as the limits of Union competences. In addition, Title I TFEU (Articles 2 – 6) sets forth detailed rules by defining the nature and scope of the various competences as well as listing their specific policy areas. Thus, as of recently, the distribution of competences is spread out in seven independent articles. That being said, the European Union received a newly designed legal framework for exercising competences incorporated into the treaty architecture. It should not be forgotten, that in the earlier phases of the development of integration the problems of the vertical division of powers were decided by the ECJ on a case-by-case basis.[11]

However, although the emergence of such a new "competence clause",[12] the beating heart of each federal system, is certainly a new element of European public law, emphasis must be laid on the fact that the drafters of the treaty simply codified pre-existing solutions in the great majority of the cases. Indeed, the substance of this "competence clause" consisting of seven treaty provisions predominantly stem from pre-Lisbon public law developments. The majority of these were former treaty provisions and various earlier case-law achievements; both generally approved by the *communis opinio doctorum* of legal scholars. Therefore, this transformation can only be termed a "conservative reform" instead of a real revolution as the focal point thereof were the developments lying in the past. All in all, the Lisbon reform refined the legal framework of the division of competences – e.g. it created new articles precisely delimiting Union and Member State competences, it also introduced new terms into the text of these articles –, nonetheless it did not add any qualitatively new elements that would call into question the former constitutional setting.

As a first illustration, the case of exclusive Union competences should be mentioned. Article 3 TFEU precisely sets forth those five areas – the customs union, competition rules for the internal market, monetary policy for those member states who participate in the final stage of monetary integration, conservation of marine biological resources, and common commercial policy – where the EU has exclusive competence in the classical sense of the term. Moreover, the second paragraph of this article handles the question of the conclusion of international agreements. It sets forth that the Union possesses exclusive competence if the conclusion of an international agreement is required by a legislative act, or is necessary to exercise an internal competence, or insofar as it may affect common rules or alter their scope.

Let's take a closer look at these exclusive competences! The exclusivity of the Union's competence in the area of customs unions and monetary policy of the Euro-zone would not have been seriously questioned in the pre-Lisbon setting. Both the spirit and the wording of

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[10] Laeken declaration pp. 3–4. http://european-convention.eu.int/pdf/lknen.pdf

[11] *See*, in detail: J. Weiler, 'The Transformation of Europe' 100 *Yale Law Journal*, 1990-1991, pp. 2413-2453.

[12] By this term „competence clause" I mean the sum of those constitutional provisions that regulates the distribution of power between the federal and member state level of government in a federation. They can appear in many forms, there is a considerable diversity at that field, but – as comparative public law points it out promptly – their function is the same: delimiting various levels of competences. Compare: The Constitution of the Federal Republic of Austria Arts. 10-15.; La constitution belge Arts. 74 and 77.; Basic Law for the Federal Republic of Germany Arts. 70-75.; and The Constitution of the United States Art I 8-10 §.

the Treaty on the European Community made this obvious.[13] Furthermore, the academic literature also accepted their exclusivity without reservation.[14] In addition, emphasis must also be put on the fact that the ECJ had already stressed the exclusive nature of the European Community's competences in the area of common commercial policy in relation to trade in goods[15] and the conservation of marine biological resources with respect to fishery.[16] The sole novelty among these competences is the appearance of the establishment of competition rules with regard to the functioning of the internal market as it has not been considered an exclusive competence so far. However, the ECJ has already accepted its exclusive nature in a judgment.[17] Furthermore, the presence of the case-law of the ECJ is also overwhelming regarding the provisions related to external competences, since they also rely on certain principles emerging from it.[18]

Thus, the list of exclusive competences as framed by the Lisbon Treaty is definitely not a surprising one in the light of earlier constitutional developments. If one also checks the list of shared competences incorporated in Article 4 TFEU one will immediately realize that it essentially mirrors the pre-Lisbon state of affairs.[19] What is important in this respect is that the precise "configuration of power sharing"[20] can only be determined if one reads them together with the detailed rules of the relevant chapters of the TFEU.[21] In conclusion, it can be argued that the substantive scope of the treaties – although the relevant provisions were considerably retailored and refined by the drafters of the treaty on a textual level – have not changed substantially.

In fact, by introducing these two categories of competences the drafters of the treaty tried to create a coherent setting for the division of powers between the European Union and the Member States by arranging the earlier fragmented developments and achievements into a logically coherent, essentially federal framework. However, and this is the most striking point, it failed to transform the existing state of affairs substantially. Undoubtedly, this was a reform; nonetheless it was not more than a precise systematization of the pre-existing components. That is why it can be labelled a "conservative reform".

However, contrary to all systematization efforts other parts of the new regime are still illogical and incoherent.[22] One could say that this reform also had its internal limits mostly due to certain political controversies. One can find references in Article 4 (3-4) TFEU – it should not be forgotten that Article 4 is principally dedicated to shared competences – to other

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[13] *See*, for example: as for customs union: Art. 26 TEC declaring that the Common Customs Tariffs shall be fixed by the Council; as for monetary policy: Art. 108 TEC emphasizes that ECB must carry out its task independently without taking instructions from any external entity including Member States.

[14] *Cf.* K. Lenaerts & P. van Nuffel, *Constitutional Law of the European Union*, Thomson, Sweet and Maxwell, London, 2006, pp. 97-98.

[15] *Cf.* Opinion of the Court of 11 November 15 in *1/75, Draft OECD Understanding on a Local Cost Standard* drawn up under the auspices of the OECD, [1975] ECR 1355.

[16] *Cf.* the case-law starting with Judgment of the Court of 14 July 1976 in *Joined Cases 3–4/76 and 6/76, Cornelis Kramer and others*, [1976] ECR 1279.

[17] *Cf.* Judgment of the Court of 14 September 2010 in Case C-550/07 P, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. European Commission*, [2010] ECR I-08301.

[18] *Cf.* R. Schütze: 'Lisbon and the Federal Order of Competences: A Prospective Analysis' 33 No. 3 *European Law Review*, 2008, pp. 713-714.

[19] *Cf.* Lenaerts & van Nuffel, *supra* note 14, p. 97. arguing that "virtually all Community powers are non-exclusive" meaning that with the exception of the four exclusive competences (common commercial policy related to trade of goods, common fishery policy, customs union and monetary policy) at that time each power related to the main policy areas were shared between the Community and the Member States.

[20] P. Craig, 'The Lisbon Treaty, Process, Architecture and Substance' 33 No. 2. *European Law Review*, 2008, p. 147.

[21] *Cf.* Article 2(6) TFEU stating that „the scope of and arrangements exercising the European Union's competences shall be determined by the provisions of Treaties relating to each area.

[22] This dimension has already been comprehensively analyzed by Schütze, *supra* note 18, pp. 714-721.

types of competences. Research, technological development, space, development cooperation and humanitarian aid are the main fields where the European Union has "a certain" competence. However, surprisingly, these competences can only imply activities (including the implementation of programs and common policies) that do not prevent Member States from exercising their competence on the same fields. One thing is clear from this wording: these do not fit the classical federal tripartition of competences by their very nature. They are not shared competences as they cannot overrule the same Member States competences, therefore, their place in Article 4 is highly questionable.[23]

Parallel competence might be a proper choice to name them, but in reality this seems controversial since it can hardly be imagined that they will never intersect the same competences of Member States, as would be the ideal case. For instance, European research and innovation framework programs necessarily interfere with the same national activities to a certain degree as they set forth research priorities and allocates research funds.[24] Thus, the exercise of the Union's "parallel" competence in the field of research and development is always capable of partially influencing the same national policies; that is, in practice the national authorities necessarily loose some segments of their autonomy. Therefore, it may seem a pure illusion to talk about parallel competences in this respect, since the way the Union level exercises its "parallel" competences necessarily affects the attitudes of national players thereby also influencing their competences.

Furthermore, the following categories of competences are even more obscure and problematic than those mentioned earlier. Article 5 TFEU empowers the Union to exercise certain coordinating competences in the field of economic policies, employment policies and social policies. It is argued that the main reason for the emergence of these co-ordinating competences was a political compromise, since in the framework of the Convention the parties could not reach an agreement on the question whether these areas should be put under the umbrella of shared or complementary competences.[25] Lastly, Article 6 TFEU lists seven so-called complementary competences[26] by emphasizing that the acts of the Union in these matters cannot even result in the harmonization of the rules of the Member States.[27] Thus, the post-Lisbon competence regime is also composed of numerous atypical competences and that makes the whole picture even more complicated.

In sum, the new regime of power distribution is also based on atypical competences besides the classical ones. They can be labeled as parallel, co-ordinating or supplementary competences. Common to all of them is that in case they are exercised by the Union this cannot lead to the expiry of the own competences of the Member States, however, they definitely influences those. That is to say, they fluctuate somewhere between the shared and exclusive Member States competences, therefore their substantial scope and real normative value still remains a question. One may argue that co-ordinating competences would be normatively more powerful than complementary ones;[28] nevertheless the real added value of

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[23] *Cf.* Id. 717.

[24] *E.g.,* The Commission's Green paper on the European Research Area explicitly mentions that public authorities of the Member States have to work on removing "legal, administrative and practical barriers" in order to "establish a single and open European labour market for researchers". Although the impact of these efforts have been rather limited until these days due to the non-compulsory nature of coordination it certainly has influenced the national legislators and authorities as an important external factor when designing the framework of national research activities. Indeed, it seems to be impossible to design national research and development policies without taking into account the EU's priorities in this field. *Cf. The European Research Area: New Perspectives. Green paper. 04.04.2007*, European Commission, Brussels, 2007, p. 11.

[25] Schütze, *supra* note 18, p. 717.

[26] Protection and improvement of human health; industry; culture; tourism; education, vocational training, youth and sport; civil protection; administrative cooperation.

[27] Article 2 (5) TFEU

[28] Schütze, *supra* note 18, pp. 717–718.

this division is unclear yet. All in all, their introduction as *sui generis* categories is quite confusing in from a constitutional point of view, therefore, their reconsideration and simplification should be an important task for the next revision of the Treaties. Moreover, their presence also indicates that the internal limits of this reform are closely related to the controversial nature of European political reality.

Thus, some further systematization and clarification would still be favorable in order to make the recently installed regime more transparent and comprehensible. Until such time it cannot be argued that the Laeken goals were fully and perfectly achieved.

3. A federal approach and vocabulary introduced

Based on the above, the Lisbon reform did not substantially modify the actual *status quo* of the division of competences between the European Union and the Member States. However, this lack of substantial transformation does by no means lead to the conclusion that it did not bring any new elements into the constitutional architecture. Both the spirit and the wording of the articles dealing with competence distribution changed comprehensively, unambiguously indicating a federal-turn in the attitude of the founding treaties.

If one examines the prior-Lisbon framework of distribution of competences one striking feature will appear at the outset. The treaties – both the TEU and Treaty establishing the European Community (thereafter TEC) – were seemingly reluctant in applying classic terms of federalism while setting forth precise rules. Of course, this was not surprising in the era when the Community was born, since the first, embryonic decades were preeminently dedicated to economic integration, namely the establishment of a common market. Purely political questions were of a secondary importance on the agenda of the evolving Community. In addition, the failure of both the European Political Community and the European Defence Community in the 1950s sharply pointed out how limited the range was for any ambitions of supranational and political integration at that point in time.[29]

However, the integration process had gradually acquired a political character,[30] while the Maastricht reforms, with special regard to the establishment of the three-pillars structure, definitely paved the way for a political union. And, questions on the federal nature of this continuously evolving political integration could legitimately have been posed in this context.[31] However, the drafters of the treaty did not insist on the reconsideration of competences in a federal manner neither in Amsterdam, nor in Nice. In a perhaps slightly surprising way, the last version of the TEC kept the a legal framework that was essentially designed at the very beginning of the integration.[32] Thus, although the political, economic and even the judicial context of the integration had been transformed to a considerable degree, the legal provisions dedicated to the exercise of the competences remained essentially within the framework of a non-federal paradigm.

When defining the exercise of the powers of the Community, the TEC predominantly relied on terms such as "task",[33] "purposes",[34] "activities",[35] "limits",[36] or "powers conferred

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[29] *Cf.* Weiler, *supra* note 11, p. 2410., Schütze, *supra* note 4, p. 44.
[30] *Cf.* G. Harpaz, 'European Integration in the Aftermath of the Ratification of Lisbon: Quo vadis?' 11 No. 1. *European Public Law*, 2011, pp. 73-78.
[31] As for instance: Weiler, *supra* note 11.; Lenaerts: *supra* note 2.
[32] In the Treaty Establishing the European Economic Community Articles 2 and 3 were dedicated to lay down the principles of the activities of the Economic Community. Article 2 indicated the main tasks of the EEC, while Article 3 provided a list of the principal activities.
[33] Article 2 TEC.
[34] Article 3 TEC.
[35] Id.
[36] Article 5 TEC.

upon".[37] Although both the substantive scope of the treaties and the legislative activities of the Community could be coherently explained employing these concepts,[38] they were unable to deliver such a clear and structured picture as a federalist setting could have offered.[39] One may conclude that the legal framework of competence distribution dealt with its subject-matter in a rather pragmatist and operationalist attitude within the prior-Lisbon constellation. That being said, the system relied on vague terms with no explicit constitutional meaning. Their presence resulted in a lack of solid constitutional background; indeed, the precise content and scope of competences had to be established by the ECJ on a step-by-step basis.[40]

The sole exception was the expression "exclusive competence" that was added to the TEC by the Maastricht Treaty in 1992.[41] Its inclusion might have been regarded as a sign of a silent transformation, since it was the first moment when a clearly federal concept appeared in the founding treaties. However, albeit very tempting, such a conclusion should be considered with caution. First of all, it should be borne in mind that the term "exclusive competence" was solely mentioned in the context of subsidiarity.[42] Hence, it was not introduced as a *sui generis* constitutional concept in order to indicate the exclusive sphere of the Community's competences. It only had an explanatory and illustrative value by pointing out that the requirement of subsidiarity could not be applied where the Community had an exclusive competence. Therefore, it could not be considered more than the counterpoint of shared competences subjected to the requirements of both subsidiarity and proportionality. The only conclusion that could have been deduced from the appearance of this term in Article 3b is that the Community had certain exclusive competences, but their precise area and scope remained unsettled on the level of the treaty.

As a result, the prior-Lisbon constitutional regime was seemingly unenthusiastic in applying classic federal concepts to describe the existing system of vertical division of competences. This is most likely due to the fact that the idea of euro-federalism had already been seriously challenged in the early history of the European integration – just think of De Gaulle's skeptical, deeply intergovernmental attitude.[43] Indeed, by the federally-neutral phrasing of the provisions concerned the Member States as masters of the treaties did not want to touch upon such a delicate question, namely the federal functioning of the Community, that could have threatened the *status quo* of integration, potentially jeopardizing all achievements already realized. It could easily be imagined that a complete or partial introduction of a classical federal phrasing into the text of the treaties would immediately have fostered strong political counter-reactions centered around the supremacy of national sovereignty.

However, this completely changed since the ratification of the Lisbon Treaty. Indeed, it introduced a completely new approach in the design of the constitutional framework dedicated to the organization of the exercise of competences.[44] In fact, by the introduction of a

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[37] Id.

[38] *Cf.* Lenaerts & van Nuffel, *supra* note 14, pp. 80-99.

[39] Professor Weiler argues that on the basis of Art. 2. and 3. EEC competences can be „derived in rather open-textured language". That is, they cannot be regarded as solid and precise constitutional basis as it would be a case with clear federal terms. Weiler, *supra* note 11, p. 2433.

[40] *Cf.* Id. 2431-2453.

[41] Originally, Article 3b TEC.

[42] Article 3b TEC declared that "in areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity (…)."

[43] On de Gaulle's attitude toward external relations, with special regard to the European integration see: J. Vernant 'Le général de Gaulle et la politique extérieure', 35 No. 6. *Politique étranger*, pp. 1970. 619-629.; S. Hoffmann, 'De Gaulle, Europe, and the Atlantic Alliance' 18 No. 1. *International Organization*, 1964. pp. 1-6.

[44] It should be noted that the majority of these provisions have already been set forth by the Draft Constitution, so the real paradigm-shift was made the drafters of the Convention. See: Treaty Establishing a Constitution for Europe, OJ 2004 C 310 Title III. Union competences Art. I-11 – I-18.

so-called "competence-clause" a qualitatively new attitude has just begun to fertilize European public law on an official level. The new "competence clause" – even if it is an incoherent and fragmented provision since some components are incorporated in the TEU, while others are regulated in the TFEU – can structurally be compared to those of the classic federal constitutions. Thus, it is of a seemingly federal nature, therefore, it can be regarded as a real improvement in comparison to the earlier attitude of the founding treaties generally neglecting federalism in this respect. That is to say, the conceptual framework in which the drafters of the treaty regard and manage the question of distribution of competences changed to a great extent.

There are some examples for illustrating the above statement. Firstly, both Article 4 (1) and 5 (2) TEU stress that the competences not "conferred upon the Union in the Treaties remain with the Member States".[45] By attributing such a high level of importance to the definition of the precise sphere of the Member State competences – all competences that were not transferred to the Union by an explicit treaty provision *in abstracto* – the drafters of the treaty subscribed to the very core of federalist thinking. More concretely, they accepted one of its basic tenets that in a federalist political system two precisely delimited spheres of governments work together in the same constitutional framework.[46] Obviously, these levels of government may cooperate in various ways, as the examples of dual and cooperative types of federalist structures may illustrate,[47] but the division of these two spheres of government remains fundamental. That is to say, these articles reflect strong federal commitments. Thus, in the eyes of the constitutionalizing power, the EU comprises and integrates two different politico-legal entities, the supranational, Union level and the Member States.

Furthermore, as a logical consequence of the earlier, apart from emphasizing the importance of the equality of Member States before the treaties Article 4 (2) TEU lists the key areas that will remain in the hands of the Member States. In doing so, this provision delimits the core of the political and constitutional existence of the Member States, that is, competences that cannot be overruled by acts of the Union. These can be grouped around the following key points: (i.) fundamental political and constitutional structures including the system of local and regional self-government; (ii.) defence of the territorial integrity; (iii.) maintenance of law and order on its territory; and (iv.) national security. These broader terms should be translated to the conventional language of constitutional law, but if we do so, it is possible to conclude that (i.) the competence to set up the internal constitutional and political structure autonomously; (ii.) military competences and (iii.) police competences will certainly preserve their place in the constitutional armoury of the Member States.[48] It is worthwhile mentioning at this point, that such a delimitation of exclusive Member State competences echoes to a great extent the US federal approach granting general "police power" to states.[49]

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[45] It is also striking that to what extent the underlying philosophy of this article reflects the approach of the Tenth Amendment of the US Constitution. For a detailed discussion of the legal interpretation of the Tenth Amendment *see*, D. C. Casto, Jr., 'The Doctrinal Development of the Tenth Amendment' 51 *West Virginia Law Quarterly*, 1948-1949, pp. 227-249.

[46] *Cf.* for example: Alexander Hamilton: *The Federalist No. 23. The Necessity of a Government as Energetic as the One Proposed for the Preservation of the Union*. http://www.constitution.org/fed/federa23.htm

[47] Schütze, *supra* note 4, pp. 4-10.

[48] It is worthwhile pointing out that Working Group V in the Convention defined a broader framework by discussing the subject-matter of statehood. It argued that national identity in a legal sense consists of two main parts with certain sub-components. The first one is centered around "the fundamental structures and essential functions", while the second one is related to "basic public policy choices and social values". However, the final version totally neglected the public policy choices and social values part. *Final Report of Working Group V*, Brussels, 4 November 2002. CONV 375/1/02 WG V 14. 11.

[49] For a general discussion in a broad constitutional context see: J. E. Novak & R. E. Rotunda, *Constitutional law,* 8th edn, Thomson-West, St. Paul (Minn.), 2010. p. 139. For an in-depth historical and analytical analysis

In sum, this is another important point to substantiate how close the recent constitutional philosophy of the Lisbon Reform is to the general heritage of federalism.

Furthermore, even if it is nothing more than a commonplace in the world of constitutional law, the division of exclusive, shared and Member States competences also reflects a definitively federal attitude. The definition of these groups of competences is a logical consequence of a constitutional philosophy that strictly delimits two distinct spheres of government, that of the federal or supranational and that of the Member State. Precise patterns of such a threefold division of competences are incorporated into the federal constitution of both Germany or Austria.[50] So, the drafters of the treaty followed the European line of federalist thinking on this point.

Moreover, the *expressis verbis* listing of exclusive and shared competences also implies another essential principle of federalism. This is the principle of enumerated powers setting forth that the federal level has no general scope of jurisdiction since its acts must always be linked to one of the competences enumerated in the text of the constitution or founding treaty.[51] US constitutional history teaches us that this principle may even have such a broad reading that made it possible to infer the doctrine of implied powers[52] with respect to enumerated federal powers. Nonetheless, its very core, i.e. that the federal government is able to act only if an explicit or implicit authorization emanates from the constitution, is still one of the essential cornerstones of federal legal architecture.

Considering the above, it is certainly not an overstatement to submit that an apparent federal-turn has taken place in the constitutional philosophy of the founding treaties. As for competence sharing between the Union and the Members States, the Lisbon reforms introduced both a clear federal attitude and a more or less coherent federal vocabulary. It is even more apparent if one compares the actual constitutional framework to that prior to Lisbon. Article 4 (1) and 5 (2) TFEU reveal that the drafters of the treaty regarded the Union as a political entity with two distinct levels of government. In addition, the threefold division of exclusive, shared and Member States competences also goes back to the roots of federal constitutional philosophy. This kind of a division of competences implies the principle of enumerated competences further reinforcing the federal references.

However, contrary to that presented earlier, this picture is not as clear as it could be since the inclusion of parallel, co-ordinating and supplementary competences also reflect the political reality of the recent stage of European integration. Therefore, the "competence clause" of the treaties does not have a completely federal nature, as the political compromises surrounding the entire constitution-making process had a considerable impact on it.

4. The shortcomings of the recent solution – substantive comments

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see: Santiago Legarre: The Historical Background of Police Power. 9 No. 3. *University of Pennsylvania Journal of Constitutional Law*, 2007, pp. 745-796. spec. pp. 781-793.

[50] Basic Law for the Federal Republic of Germany Arts. 70-75.; The Constitution of the Federal Republic of Austria Arts. 10-15.

[51] "This government is acknowledged by all, to be one of enumerated powers", argued Chief Justice Marshall in his landmark decision. Cf. *McCulloch v. Maryland* 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819) at 405. For a general introduction: Novak-Rotunda: *op. cit.* 139–150.; J. A. Barron & C. T. A. Dienes *Constitutional Law in a Nutshell*, Thomson-West, St. Paul (Minn.), 2009, pp. 74-79.

[52] Chief Justice Marshall argued that "but it may with great reason be contended, that a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution." *McCulloch v. Maryland* 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819) at 408. For a general analysis see: Novak & Rotunda, *supra* note 49, pp. 141-145.

Two insights have been revealed thus far. Firstly, the Lisbon reforms codified the existing *status quo* on the exercise of competences in the European Union. Secondly, the formation and the phrasing of the legal framework is of a clear federal nature, both its underlying constitutional philosophy and precise wording incorporate essential tenets of a federal structure. This last section, however, attempts to formulate some substantial comments by highlighting certain controversial points.

The starting point of this discussion is the simple fact that the recent setting of the vertical division of powers in the European Union has seemingly unambiguous federal aspirations. Each component – (i.) the inclusion of the competence clause, (ii.) the delimitation of the spheres of Union and Member States' government, (iii.) the general "police power" explicitly granted to the Member States, (iv.) the threefold division of competences and (v.) the presence of the principle of enumerated competences – underlines the impression that the exercise of competences operates on a clear federal basis in the Union. Taking one more step forward, this may also lead to a fundamental conclusion. In fact, the European Union, as far as the relationship between the supranational and member state levels goes, is a federal entity.

But is this really true? May we submit that the European Union is a federal constitutional structure? Of course, this question, due to the linguistic and conceptual uncertainties, that is, the terms federation, federal or federative have a considerable penumbra of uncertainty,[53] cannot be answered from a single point of view. Depending on either the approach or the given field of study authors may arrive at various conclusions.[54] In order to contribute to the ongoing scholarly discussion this article discusses this problem from a comparative perspective.

From a substantial point of view, the recent setting of division of powers between the European Union and the Member States cannot really be compared to traditional federal solutions. That being said, the new "competence clause" relying to a great extent on a federal constitutional philosophy, logic and vocabulary does not include that many essential powers that would be vital for the proper functioning of a real federation. Comparative public law points out that real federations have exclusive competence in the field of foreign policy,[55] military and defence policy,[56] or imposing federal taxes thereby founding the federal fiscal policy.[57] Naturally, member states may retain some fragments of the earlier exclusive powers, but it should be noted that these cannot compete at all with concomitant federal competences.[58] Indeed, the European Union still lacks these powers, only a very limited and sometimes controversial coordination, if any, has started to emerge in these fields.[59] Member

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[53] Cf. H. L. A. Hart, *The Concept of law*, Clarendon Press, Oxford, 1978, pp. 124-125.

[54] Cf. for example: Lenaerts: *supra* note 2, p. 747. In this article professor Lenaerts argues that federalism can have various interpretations and these also influence us in the understanding of the EU's structure. Or, Professor Schütze pointed out the constitutional structure of the European Union has a clear federal nature, and it can be compared to cooperative federalism. Schütze, *supra* note 4, p. 352.

[55] Basic Law for the Federal Republic of Germany Art. 73 (1).; The Constitution of the Federal Republic of Austria Art. 10 (1) 2.; The Constitution of the United States Art I 10 §.

[56] Basic Law for the Federal Republic of Germany Art. 73 (1).; The Constitution of the Federal Republic of Austria Art. 10 (1) 15.; The Constitution of the United States Art I 8 §.

[57] The Constitution of the Federal Republic of Austria Art. 10 (1) 4.; The Constitution of the United States Art I 8 §.

[58] For example: Art. 32 (3) of the German Basic Law provide certain international treaty-making competences for the Member States in relation with their sui generis legislative power. However, the same article also requires the consent of the Federal Government to these treaties, thus the federal level has a veto power in this case. Moreover the Federal Constitutional Court emphasized in a decision that the Member States cannot have an autonomous foreign policy on the basis of this Article. Cf. J. Throne, *Federal Constitution and International Relations. University of Queensland Press*, st. Lucia, 2003, p. 53.

[59] See for example: Title V Chapter 1 and Chapter 2 Section 1 TEU (Common foreign and security policy), Title V Chapter 2 Section 2 TEU (Defining a broad framework for military and defence cooperation), Title VIII Chapter 1 TFEU (Economic policy).

States are obviously unwilling to give up, or to partially transfer these areas of action to the Union, since they are still regarded as the core elements of national sovereignty. Therefore, the supranational government in the EU has considerably less room to act in substantive terms than in a truly federal system.

Furthermore, there are other points in the recent design of the distribution of competences that impede the construction of an efficient federal constitutional framework. Almost two hundred years ago, when establishing a truly federalist interpretation of the US constitution, Chief Justice Marshall argued that the powers of the federal government emanated directly from the people.[60] That is, in Marshall's opinion the source of the powers of the federal government was the people, and not the North-American states. Consequently, the federal government could in no way be limited by the states in general, although they certainly had such aspirations as reflected by 19th century US constitutional history. As a result of this construction, only the Constitution may impose limitations on the acts of the federal government, the component states were deprived of this opportunity.[61]

Marshall's reasoning, linking the powers of the federal government to the American people, simply closed down those lines of constitutional argumentation that may have attempted to raise claims based on the sovereignty of the states as a substantial barrier of governmental power. In addition to its constitutional relevance, Marshall's approach had a clear political dimension since it made it possible to refute "states' rights" political claims marked by strong republican and anti-federalist features.[62]

However, it is obvious that such a constitutional approach is unimaginable in the recently established setting of the division of powers in the European Union. Article 5 (1) TEU declares that the principle of conferral has a crucial role to play in limiting the exercise of Union competences, while Article 5 (2) TEU states that "the Union shall act only within the limits of the competences conferred upon it by the Member States". These provisions have detrimental consequence for any federalist argument. The fact that the Union competences are limited by the principle of conferral – implying that the Member States intentionally and explicitly transferred their powers to the supranational level of government – points out that the Member States are the primary source of Union powers – and not the people of Europe. The Preamble of the TEU also underlines the primary importance of the Member States in this respect. It only refers to the peoples of Europe four times[63] and it seemingly considers it an object of Union's policies, not an autonomous driving force behind the integration.[64] Therefore, the federalist approach directly linking the supranational level to the people as Marshall did in his seminal judgment is *prima facie* impossible within the constitutional context of the European Union. In a similar case, if at all, a reference to Article 5 (1) and 5 (2) TEU would immediately invalidate any US-styled federalist speculation. Therefore, federal

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[60] „The government of the Union, then (whatever may be the influence of this fact on the case), is, emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit." *McCulloch v. Maryland* 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819) at 404–405.

[61] Chief Justice Marshall set forth three criteria for the legality of federal acts: (i.) the end has to be legitimate, (ii.) the act has to be within the scope of the constitution, (iii.) the means has to be in harmony with the letter and the spirit of the constitution. *McCulloch v. Maryland* 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819) at 421. So, the State's potential objections cannot be relevant at all in assessing the legality of a federal act.

[62] *See*, Novak & Rotunda, *supra* note 49, pp. 141-143.

[63] Preamble alinea 6 TEU, (deepening the solidarity between Europe's peoples), Preamble alinea 9. TEU (promoting economic and social progress for the people); Preamble alinea 12 TEU (ensuring the security and safety of people in facilitating the free movement of persons); Preamble alinea 13 TEU (creating an ever closer union among the peoples of Europe).

[64] On the contrary, US Constitution regards the People of United States as the final subject of the whole constitution ("We the people of the United States […] do ordain and establish this Constitution for the United States of America"). To put it blunt, the TEU is for the people, the US Constitution is made by the people.

aspirations attempting both to neutralize the will of Member States in legitimizing the exercise of powers of the European Union and strengthen the power of the Union level would contravene the prevailing constitutional setting.

Consequently, Member States can still impose strict limits on the acts of the European Union since they are the fundamental source of its powers. This also means that they can easily impede a federal expansion of supranational competences.[65] In essence, the recent state of affairs can only be transformed into a more federative one in case the Member States agree to such transformation, thus, this seems to be a pure political question. Nowadays, in the era of the economic crisis, it is hard to imagine that Member States would give up more competence areas in the coming years, since the recent political developments in the European Union indicate that sovereignty is still a major concern of Member States in general.

Lastly, it is worthwhile mentioning that even Article 352 TFEU cannot be applied for the extension of the powers of the federal level as it happened in the history of US constitutionalism.[66] It is true that this article and its antecedents have played a role that is comparable to that of the "necessary and proper" clause of the US Constitution.[67] However, there are some differences and these call into question whether this article may be invoked as efficiently as its US counterpart was applied in order to provide implied powers to the US federal government to accomplish its ends. Chief Justice Marshall, when establishing the implied powers doctrine in respect to the enumerated powers, relied on both structural and textual interpretation. Firstly, he submitted that from the fact that the "necessary and proper" clause is situated within the enumerated powers it could be inferred that it was not a simple addition, but one of the enumerated powers itself.[68] Secondly, the phrasing of this clause, that is the lack of the adjective "absolutely", also indicated that the federal government is able to choose any appropriate means to make the exercise of its powers efficient.[69]

Chief Justice Marshall's linguistic argument is also valid in the context of Article 352 TFEU. One can find no reference to "absolute" necessity in the text of this provision. This article refers to the "policies defined in the Treaties" instead of "powers" as the "necessary and proper" clause does in the US Constitution, and no serious doubts can be raised in relation to the applicability of the article in establishing implied competences. However, as far as structural interpretation goes, the case is obviously different. Article 352 TFEU is not part of the section devoted to Union competences, instead, it is located in Part Seven (General and Final Provisions).[70] If one follows Marshall's argument the only logical conclusion is that Article 352 TFEU is not part of the Union powers but an additional provision to be applied in special cases. Therefore, it is impossible to argue that this article would be "an express recognition of the need to provide additional law-making powers"[71] to execute the originally enumerated powers. As a result, a US type extension of competences through the recognition

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[65] *Cf.* Opinion of the Court of 28 November 1996 in 2/94 *Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] E.C.R. I-1759. This opinion illustrates that the ECJ also had a very restrictive attitude in expanding competences to politically sensitive areas. That is, the principle that the Member States are the "Masters of Treaties" – not the supranational institutional level – is protected by the ECJ generally.

[66] *Cf.* Novak & Rotunda, *supra* note 49, pp. 141-145.

[67] The Constitution of the United States Art I 8 §. "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

[68] *McCulloch v. Maryland* 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819) at 353.

[69] Id. at 414–415.

[70] It should be mentioned that this clause had a different place in the structure of the Draft Constitution. The constitution-maker placed it into the Title III dedicated to the Union competences. See: Treaty Establishing a Constitution for Europe, OJ 2004 C 310 Title III. Union competences Art. I-18 (Flexibility Clause).

[71] Novak & Rotunda, *supra* note 49, pp. 145.

of the implied dimensions of enumerated powers must face serious challenges in the prevailing legal framework. Therefore, it is questionable if Article 352 TFEU can really be regarded as a real "necessary and proper" clause of the European Union constitutional order.[72]

In sum, the recent constellation of competence rules – albeit exhibiting a manifest federal shape – is far removed from a true federative regime yet. Some essential competences for an efficient and real federal way of functioning are still in the more or less exclusive power of the Member States. Moreover, the primary role of the principle of conferral as well as the position of Article 352 TFEU render any judicial activism leading to a federal transformation in respect of competences an illusion. Thus, the exercise of powers in the European Union is of a *sui generis* nature, situated somewhere in halfway between intergovernmental cooperation and federalism.

5. Conclusions – the Emperor is certainly not naked but weak

A telling way to formulate some conclusions can be the reconsideration of the famous tale by Andersen. This "metaphorical extension" may explain better the recent situation than the simple use of the normal language of legal scholarship. Applying the metaphor of the "Emperor" to the European Union, one may conclude that the "Emperor" in our case is certainly not naked, as was the case in the famous tale, since he got new, well-tailored clothes following Lisbon. At the same time he seems manifestly weak especially when compared to the other "Emperors" wearing similarly styled clothes. That is, although the Lisbon reforms reconsidered the entire framework of the distribution of competences in a seemingly federal way, they did not lead to the creation of a properly and efficiently functioning allocation of powers.

The shortcomings of the post-Lisbon regime of competence sharing have already become manifest in the last few years. One of the main reasons for the recent stalemate over the European debt crisis, with special regard to the fragility of Euro, might be that the European Union is unable to act and react as fast and efficient as would have been necessary in a European level crisis. The lack of vital exclusive and shared competences, mostly in the area of fiscal and foreign policies, hinder the European Union in delivering clear-cut and unambiguous responses to constantly emerging challenges. Contrary to all federal efforts, the competences necessary for an efficient crisis-management preeminently remained in the hands of national governments. These in turn have understandably focused predominantly on their own problems, trying to preserve these competences even if most of the problems and challenges have a clear trans-national and regional nature.[73]

In sum, the new federal-like, but essentially hybrid design of the division of powers between the European Union and Member States must prove its worthiness in a historically unprecedented situation, in the waves of both the global economic crisis and the European debt crisis. Perhaps, the Emperor will be able to answer these questions in his new outfit, however, this still remains an open question highly dependent on the whole European political scene.

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[72] *Cf.* Schütze, *supra* note 4, p. 135.

[73] Cf. H. von Rompuy, The Discovery of Co-Responsiblity: Europe in the Debt Crisis, Speech at the Humboldt University, 06.02.2012., p. 3.