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Subjet: Note from Michael Frendo on Classification of Competences and Interpretation by the ECJ

Classification of Competences and Interpretation by the ECJ

Abstract

This short paper for Working Group V suggests a possible classification of competences which can be incorporated in the new Treaty. It also proposes that the Treaty includes a clear indication that the ECJ shall not take cognisance, in its deliberations and decisions, of any act of the EU (or any of its institutions) which is, or relates to anything that is, outside the competence of the Union.

I. Classification of Competences

1. Competences can be classified into -

(a) Exclusive Competences of the European Union

Competences which belong exclusively to the Union. For example, Internal market issues should firmly be placed within this class of competences.

(b) Exclusive Competences of the Member States

Competencies which belong exclusively to the Member States. For example, issues such as Abortion and Euthansia should be firmly established within this class of competences.

Moreover it should also be stated generically that residual competences, that is, all matters which have not been attributed by the member states to the Union, rest firmly within the competence of the member states.

The use of the term “Exclusive Competences” is a “development” of the classification suggested in the Farnleiter paper. The proposed use of the term “Exclusive” is intended

to provide an indication of political balance, which can be easily communicated to the general public in each of the member states.

(c) Shared Competences

Competences which are shared between the Union and the Member States.

These come in two types - (i) Concurrent Competences and (ii) Complementary Competences

(i) Concurrent Competences are areas of competence where the Union and the Member States both have authority to act. However, as soon as the Union acts in these areas of competence, the Member States lose their competence to act in that specific area.

(ii) Complementary Competences which are areas of competence where the Union and the Member States both have authority to act. However the Union can only act non-legislatively to support the competences of the Member States.

II Clarification in the Treaty

2. The new treaty should classify competences as delineated above emphasising that while there are certain areas (such as internal market) which are the exclusive competence of the Union, there are other areas (such as abortion) which are the exclusive competence of the member states.

III Competences and Interpretation by the European Court of Justice

3. With regard to interpretation by the European Court of Justice we should take a cue from the BECTU case where the ECJ refused to take cognisance of the Charter of Fundamental Human Rights in its deliberations leading to judgement because this does not yet form part of the Treaties.

4. Now that the acquis has matured, there is less need for the ECJ to widely adopt the teleological approach which characterised its approach to decisions in the first decades of the Community.

In my view, therefore, the new Treaty should clarify that ***any act by any EU institution (eg. a EP resolution) which is not strictly within the competences of the Union shall not be taken into account by the European Court of Justice as a guideline, reference point, or otherwise as a source of law or of interpretation in its deliberations and decisions, since such acts do not form part of the competences as laid down in the Treaty.***

In my opinion, it is important that we ensure that the European Union is strongly effective where it HAS competence. On the other hand, for the credibility, and in the interest, of the Union itself, democratic principles demand that where the EU has **no competence whatsoever** (and therefore where competence rests exclusively with the member states), the Union should not "acquire" such competence through judicial interpretation of an act of a EU institution which relates to an area which is of exclusive competence of the member states.

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