THE EUROPEAN CONVENTION

THE SECRETARIAT

Brussels, 15 July 2002

Working Group V

Working document 9

Working group V «Complementary Competencies »

Subject: Note by Peter Altmaier on "the division of competencies between the Union and the Member States"

As requested by the chairman of WP V on competencies I submit a document on the method of competence-division. Report is based on the EP´s eminent „Report Lamassoure". Essential elements of the Commission´s, Mr. Farnleitner´s and Mr. Christophersen´s written observations as well as from oral contributions in the meeting have been taken into account.

The present note consists of four parts:

- Part I provides a first ***provisional draft of ideas for a general set of competence-rules*** with regard to a forthcoming constitutional-treaty.

- Part II ***explains*** the proposals set out in Part I.

- Part III contains some ***general considerations*** with regard to the ***political importance*** of the competence-debate.

- Part IV reflects ***ideas*** on how the principle of Member States sovereignty could be better expressed.

The note aims to reflect the consensus in the meeting. In some cases, dissenting views are referred to.

The provisional scheme set out in Part I aims to facilitate the attribution of specific policies and matters to well-defined categories, methods and instruments, especially in the field of complementary competencies.

Part I: **First provisional draft of ideas for a general set of competence-rules**

Chapter X

The competencies conferred upon the Union

Article 1

(The competencies)

(1) The competencies of the Union:

- *The common foreign, security and defense policy*[1]
- *International relations in fields of EU-competence*
- *The internal market*
- *The customs´ Union ...*

(2) The common competencies of the Union and the Member States:

- *The protection of the environment*[2]
- *Transport*
- *Social policy ...*

(3) The complementary competencies of the Union in areas of Member States´ competence:

- *Education*[3]
- *Culture*
- *Research*
- *Labour market ...*

---

[1] The following examples demonstrate how short the headings in art. 1 should be

[2] See previous footnote

[3] See previous footnote

(4) The comptences conferred by this article can be exercised solely on the grounds, within the limits and according to the modalities laid down in articles 2 and the following articles

Article 2

(General provisions on the exercise of competencies)

(1) Principle of the attribution of competencies and presumed Member States´s competencies in case of doubt

(2) Competence-categories

(3) Principle of subsidiarity

(4) Principle of proportionality

(5) Priority-clause

(6) Hierarchy of instruments

(7) Principle of primacy of EU-law

(8) Hierarchy of methods and scale of intervention

(9) Obligation to give reasons for choice of instruments and methods

(10) Principle of national implementation and execution[4]

(11) Flexibility-clause (revised art. 308)

[4] The monitoring-rights of the Commission should also be dealt with by this paragraphe.

(12) Christopherson-clause (based upon Article 6.3. EU-Treaty):

„The Union shall respect the national identities of the Member States, their constitutional and political structures including regional and local subdivisions, State/church-relations ...“

(13) The above mentioned principles shall apply to every action of the Union, compulsory or non-compulsory, in conformity with the specific provisions laid down in article 3.

Article 3 and following articles
(Special provisions on the exercise of competencies)

At this place, the already existing Treaty-articles where competencies are attributed with regard to different policy-areas and –matters, will be re-examined and completed be the allocation of specific instruments and methods of intervention as referred to in the provisions of art. 2.

Part II: Explanatory remarks

On the basis of and inspired by the existing system of the Treaties - which should in no way be overthrown but improved, systematised and clarified - the different written and oral proposals have been combined and interconnected to a coherent concept.

1. The creation of a new chapter in the constitutional treaty

Today, there is no specific chapter on competencies in the Treaties. Competencies, general principles for their exercise, methods and instruments are dealt with by many

different articles in different places. This makes it exceedingly difficult to understand their functioning.

I therefore suggest to insert a separate new chapter in the forthcoming constitutional treaty, dealing with all aspects of Union-competencies and their exercise.

2. The political statement

In order to give citizens a clear picture on „who is responsible for what", the order of competencies must be short and should be described in a simple and easily understandable language. This excludes lengthy provisions on conditions, modalities, instruments, methods and intensity of action at this stage.

The first article of the competence-chapter should therefore be drafted as a political statement for the citizens, indicating what the competencies and responsibilities of the Union are.[5]

3. The discrepancy between political clarity and legal security

An article as proposed above will citizens help to understand where the main-responsibilities of the Union lie. But it can impossibly serve as a precise legal basis for the definition of the exact scope of the Union´s competencies. In order to avoid any misunderstanding, a safeguard-provision must be added to the article.

I propose to state in the final paragraph of the first article that the conferred competencies can only be exercised according to the provisions laid down in the following articles.

[5] Art. 3 EC-Treaty which has created a lot of confusion could subsequentlety be deleted.

4. No catalogue but categories

There was a broad consensus in the Convention that neither a so-called „catalogue" nor a „negative-catalogue"[1] (indicating the Member States competencies) was opportune. It is the merit of the EP´s „Report Lamassoure", that it would allow instead to clarify the competencies of the Union by attributing specific policy-areas and matters to three different competence-categories. This approach is widely accepted.

On the basis of the EP´s „Report Alain Lamassoure", three different types of categories shall be defined by the constitutional treaty and specific policy-areas shall be attributed to them.

5. The definition of the competence-categories

There is some confusion on how the different categories should be defined. But there is consensus that

- The first category should comprise areas falling within the main responsibility of the Union.

  There are however different opinions whether it should be confined to „exclusive competencies" or whether „almost exclusive" matters should also be taken into account; doubts about „concurrent competencies" and whether the internal market should be considered as exclusive or concurrent competence; most of the documents refer to it as areas „completely within the scope of EU-competence" where the whole scale of intervention is available (both with regard to methods and instruments; the principles of subsidiarity and proportionality should nevertheless be applied). The Member States would have no power to act except if explicitly authorised by the EU to do so.

- The second category should comprise areas where the responsibility is shared between the Union and the Member States (either in a horizontal or in a vertical way).

  Here the principles of subsidiarity and proportionality would even be more important; in principle, both the EU and the Member States take action in these fields. According to the matter/policy concerned, EU-action can be confined to general rules, framework-directives, legal-co-ordination etc. – the general criteria for this should be defined in art. 2 of the competence-chapter, the specific conditions in the following articles.

- The third category should cover areas where the main-competence lies with the Member States but the Union enjoys complementary competencies in order do deal with marginal aspects; legal-harmonisation would be explicitly excluded, other legally-binding acts would only be allowed in exceptional cases.

A concrete definition is needed but difficult to draft at this stage of the debate. The author will present a proposal on the basis of debates in coming meetings if wished so by the members of WP V.

6. The names of the categories

Already the names of the categories should indicate the nature of the competencies and to whom they are allocated.

> ***Following a proposal made by Mr. Farnleitner, the title of the competence-chapter should read as follows: „The competencies conferred upon the Union".***

By this, it is clarified that <u>all</u> competencies of the Union, exclusive, shared or complementary, are conferred upon it by the Member States as „Masters of the Treaties".

With regard to the first category, the name „The Union´s own competencies“ has been proposed. It could give the wrong impression tat these competencies are not derived but genuine EU-competencies. I therefore suggest the more neutral wording:

„The competencies of the Union“

With regard to the second category, almost all documents use the name „Shared competencies“. I would prefer a less „technical“ term and therefore suggest the wording:

„The common competencies of the Union and the Member States“[1].

It is rather difficult to find a convincing name for the third category: As a matter oft fact, these competencies lie with the Member States and the Union can only deal with marginal aspects. In order to avoid the wrong impression that the Union would enjoy substantial competencies in theses areas, I suggest the following wording:

„The complementary competencies of the Union in areas of Member States´competence“

7. Policy-areas and policy-matters

It would be preferable to allocate traditional policy-areas like environment, social security or education to the different competence-categories. This can easily be done in the second and third category. In the first category however, this would not be enough to clarify the Union´s competencies: Exclusive or almost exclusive EU-competencies relate only to few areas of policy, but in many cases to policy matters (e.g. internal market, freedom of movement etc.).

It is therefore unavoidable to allocate not only traditional policy-areas but also single policy-matters to the different categories of art. 1 of the competence-chapter

8. The special provisions on the exercise of competencies

Given the fact that art. 1 – according to my suggestion – would rather be a political statement and not a legal basis for EU-action, all details relating to the precise scope and of the exercise of the competencies have to be dealt with in separate articles.

In order to avoid the competence-chapter becoming too long[1] and difficult to understand, I suggest the following solution:

> ***Article 2 of the competence-chapter shall deal with all general provisions applying to all EU-action - regardless what category and what policy are concerned.***
>
> ***Article 3 of the competence chapter shall deal with specific provisions for specific areas, derogating – when necessary – from the general principles laid down in Article 2.***

9. The principle of allocated powers

There is consensus that the Union shall have no competence other than explicitly conferred upon it by the constitutional treaty. Also on the general presumption that in case of doubt the competence shall lie with the Member States[6]

> ***The principles of allocated powers and presumed Member State´s competence shall be inserted in paragraph 1 of article 2.***

[6] Proposal made by Mr. Farnleitner

10. The principle of subsidiarity

There is an overwhelming agreement that the principle of subsidiarity shall be the fundamental principle for EU-action. There are however different views on it´s concrete scope and wording.

For example: Today, the principle of subsidiarity deals only with the question „whether" action is taken by the EU or by the Member States and is restricted to areas not of the exclusive competence of the Union. One could think of applying it also with regard to the relationship between the Union and the private sector. In this case, the distinction between exclusive an other EU-competencies would become obsolete. The details should be subject to further debate (esp. in WP I).

The principle of subsidiartiy shall be inserted in paragraph 2 of article 2 as general principle for EU-action.

11. The principle of proportionality

This principle which is so far not expressed in a separate paragraph deals i.a. with the question „how" EU-action should be taken. In this context, it should be stipulated that the lowest adequate scale of intervention (both with regard to methods and instruments) shall be chosen for all forms of EU-action.

This principle should be formulated as separate paragraph and should imply the commitment to chose the lowest necessary level of intervention when action is taken on behalf of the Union.

12. The relation between „functional“ and „sectorial“ competencies: The „priority-clause“

It is difficult to understand that EU-action in the same area can sometimes be based either on sectorial competencies (e.g. environment protection) or on functional competencies (e.g.. internal market). Dependent of the drafting of a coherent system of competence-categories and allocated areas and matters, it should be tried to establish a priority-clause in art. 2 of the competence-chapter:

> ***The functional powers conferred upon the Union (esp. with regard to the internal market) shall not apply to sectorial policy-fields and matters explicitly conferred upon the Union***

13. The hierarchy of norms

Several proposals are aiming at establishing a hierarchy of norms for EU-action. This relates to the question if regulations, directives, decisions or recommendations are the appropriate instrument for EU-action. Given the enormous complexity of the matter, it can – in this context – not be developed in detail[7]. But it is important to conclude that

> ***A clear definition and hierarchy of norms should be listed in art. 2 of the competence-chapter***

14. The principle of the primacy of Community-law

This principal has been developed by the Court of Justice and is one of the core-principles of Community-law. Accordingly, contradictous national laws are derogated by

[7] The author is prepared to do so in a further note if required by WP V

Community law and the Member States must respect and comply with it. For a better understanding of the working of the EU-system it is important that

The principle of primacy of Community-law shall be enshrined in art. 2 of the competence chapter

15. The hierarchy of methods and scale of intervention

It is the merit of the Commission´s proposal that it clearly explains the insufficiency of a mere definition of competence-categories. A better delimitation of competencies can only be achieved if clear criteria will be established by the constitutional treaty on what methods and what scale of intervention are available for specific policy-fields and matters attributed to the different categories.
The following methods for EU-action could be envisaged and defined by the constitutional treaty:

- Uniform regulation[8]
- Minimum Harmonisation
- Harmonisation
- Legal-co-ordination[9]
- Mutual recognition
- Joint action
- Promotion (i.e. Financial support programmes)
- Non-binding Co-ordination of national policies

[8] As set out on p.6 of the Commission´s document

[9] When national legislation is not harmanised but legally-coordinated to deal with cross-border aspects e.g. in the field of freedom of movement (see regulation 1408/71 on social security for migrant workers)

(EU-action is confined to the exchange of information and the evaluation of best-practise comparisons. Co-ordination outside matters allocated to the three competence-categories has to be restricted to the exchange of experience and information)

- Execution
  (The EU executes its own legislation obeying sit own administrative rules)

A clear definition and hierarchy of methods and intensity of EU-action should be listed in art. 2 of the competence-chapter

16. Instruments and methods must be justified

It follows from the principle of proportionality, that whenever EU-action is taken, the lowest possible adequate level of intervention should be chosen both with regard to instruments and matters. Compliance with this provision can be much better controlled (by the involved institution, by the citizens and by the ECJ) when reasons are given for the concrete choice of methods and instruments for every single EU-act. Following a proposal from the Commission,

The obligation to give reasons for the choice of instruments and methods shall be included in art. 2 of the competence-chapter

17. The future role of Art. 308

There have been proposals to delete Article 308 if a satisfactory delimitation of competencies can be found.

So far, a majority in the convention wants to preserve that article in order to allow some degree of flexibility for the future. In this case, the article should be reformed to make clear that it provides not a independent „competence-competence“ but only allows to

deal with specific aspects with regard to existing competencies (expanded „effet utile“). This should be better reflected in it´s wording and also by inserting it into the article on the exercise of competencies and not in the final provisions of the constitutional treaty.

The question whether Article 308 should also allow a retransfer of competencies (no longer needed) from to Union to the Member States deserves further examination with regard to some constitutional problems (Member States as Masters of the Treaties)[10].

There would be no constitutional problem to allow that legal acts adopted by unanimity could be removed by qualified majority.

Article 308 should be revised and inserted in article 2 of the competence-chapter.

18. The „Christopherson-clause“

The proposal from Mr. Christophersen, to expand art. 6 par. 3 EU-Treaty (the Union shall respect the national identities of its Member States; Union Model) would have as effect an additional safeguard for the Member States with regard to the effects, the exercise of „functional powers“ could have on their internal structures and national competencies. Such a clause would not automatically mean that these powers would have no effect at all in the listed areas, but would limit or even exclude „negative“ effects of EU-action in these fields. To avoid misunderstandings: „Functional powers“ have worked in the common interest of everybody and will remain an important part of EU-competencies; their acceptance could be improved by the Christophersen-clause. The important question of what areas should be listed in such a clause will be subject for political debate in WP V.

One could also add a provision that EU-action in an area of EU-competence does not give any entitlement to also regulate important aspects of policies under the competence of the Member States.

[10] See in particular p.9 of Mr. Farnleitner´s document

Art. 6 par. 3 EU-Treaty should be expanded and moved to art. 2 of the competence-chapter

19. The implementation and execution of EU action

As a rule, the implementation and execution of EU-action (legislation, programmes etc.) shall be a matter for the Member States if not otherwise provided by the constitutional treaty. Of course, the principle of homogeneous application of EU-law requires monitoring-rights and capacities for the EU in some areas.

The principle of national implementation and execution of EU-action should be listed in art. 2 of the competence-chapter

20. The specific provisions on the exercise of competencies

The extended number of general rules with regard to the exercise of competencies will allow to confine the specific provisions to the absolutely necessary mini-mum. If – for example – complementary competencies would be legally-defined as areas where any kind of harmonisation of national policies is excluded, it would no longer be necessary to repeat this statement with regard to every single matter concerned. Art. 3 of the competence-chapter can therefore be considered as derogation from the general principles laid down in art. 2.

Subsequently, by art.3 the different policy-fields and matters indicated in article 1 will be complemented by special references to their scope (e.g. if it should be more restrictive), to the norms and instruments (which are allowed or forbidden) and the methods and the scale of intervention. This would also be the right place to act according to the „Community Model“ pro-posed by Mr. Christophersen (definition of protected interests of the Member States in the field of EU-competence).

Part III:

The political importance of the competence-debate

A. The political importance of the competence-debate

1. A clear competence-order is required by the democratic principle

The democratic principle requires that citizens shall have the right to chose between different political concepts.

In a multi-layered political system, where action is taken by different „players" at different levels (EU, Member States, regions, local entities) the citizen is entitled to know, what is decided on which level, i.e. „who is responsible for what". Even if such distinction is sometimes difficult to make, when several levels are involved, ***the citizens must have a clear idea where the main-responsibilities for specific politics lie***: With the Union or with the Member States.

This can only be achieved by a clear competence-order in a constitutional treaty, drafted in a simple and easy understandable language.

2. A clear competence-order is in the interest of both the Union[11] and the Member States

Over the years, the original competence-order of the EEC has been complicated by new treaties and amendments, inserting new competencies, methods and instruments. Moreover, the parallel existence of „functional powers" (e.g. basic freedom, internal

[11] In the following, the notion of „Union" is not used in its strict legal sense but covers the whole range of EU/EC-activities set out in the different treaties and protocols

market, competition, state-aids), sectorial powers (e.g. agriculture, environment protection) and flexibility clauses (art. 308) have lead to considerable confusion as to the reach of the Union´s action in certain areas. ***Today, it has become impossible - even for experts - to define the exact scope of the conferred competencies. For almost every political action, a legal base can be found in one or another article of the Treaty.***

As a result, the Union is often blamed for exceeding its competencies, interfering with the Member States own competencies and over-regulation. This undermines the acceptance of EU decision-taking and allows euroscepticism to flourish. It is therefore in the Union´s own interest to have its „marge of manoeuvre" (i.e. it´s competencies) clarified and recognised. It also needs some new competencies in areas where European action is needed to cope with new and future challenges.
On the other hand, it is in the legitimate interest of the Member States, to understand better the limits of possible EU action and the range of their own legislative and executive responsibilities: The continued existence of Member States requests core-areas of national prerogative where EU-action is excluded or confined to marginal aspects.

3. The link between competencies and efficient decision-taking

In recent years, the theoretic scope of Union-competence has grown enormously, but the exercise of the conferred competencies became ever more difficult and complicated.. Heavy procedures, sophisticated systems of checks and balances, intergovernmental structures and the requirement of unanimity even in important fields of first-pilar Community-legislation ***made it in many cases impossible for the Union to take necessary decisions in due amount of time***. Proposals are pending for years and decades and once adopted, their content has often been so far softened, that the original objectives cannot be attain any more. After enlargement, there is a real threat – at least in some areas – of complete paralysis and collapse of the decision-making process.

It undermines the legitimacy of the Union if important matters are assigned to the Union but not properly exercised (or exercised at all).

One the other hand, the unclear scope of Union-competence is an important reason for some Member States to resist general majority-voting in the Council and the abolishment of intergovernmental structures: They fear a considerable loss of national competence if the decision-making process would become so efficient that the Union could act whenever it is considered necessary or opportune. At the Nice-summit, on the eve of enlargement, it was therefore not possible to extend qualified-majority-voting to any area of political importance. The unanimity-requirement has created a „negative competence-division“ with-out any positive effect.

If we want the decision-making process to be improved and efficient, we must therefore reassure the Member States, that a reformed Union will not misuse its new capacities to interfere with Member States responsibilities. The only way to provide such a guarantee is a better and clearer order of competencies.

4. Is the acquis untouchable ?

The „acquis communautaire“ is defined as the totality of the Union´s competencies and legislation acquired over 50 years of integration. Sometimes it is argued that no aspects or parts of the acquis might be touched upon by the work of the Convention and the forthcoming IGC. Such an „one-way“-approach has no basis in the Treaties and would even endanger the integration-process.

On whatever level (european, national, regional) legislation is taken, it must be subject for future re-examination, amendment and possible revision if no longer needed. The same applies to the repartition of competencies between the different levels: Once agreed, it can always be modified in both directions if things have changed or new challenges have to be faced. If it is true that further areas of responsibility should be transferred to the Union, it should be examined if other areas currently handled at European level could be re-transferred to the Member States. Otherwise, Member States would be very reluctant in granting new competencies to the Union, even in areas where it is undoubtedly needed.

5. Some flexibility is needed, unlimited flexibility would harm

It is uncontested that some flexibility is needed to meet future challenges and changes. This flexibility can be achieved by an attribution of methods and instruments to specific competencies, by an adapted and more precise wording of flexibility-clauses like art. 308, and by the role, the European Court of Justice will continue to play.

However, flexibility does not mean, that every kind of action in any field of politics will be possible without treaty-amendment. Such an unlimited flexibility would create a competence-competence for the Union and would be without precedent – even not in Federal States. In the constitutions of Federal States like the U.S., Switzerland, Belgium or Germany, core-competencies attributed to one level cannot not be moved to another level without formal amendment of the constitution. Even in the early stages of integration, it was not possible to base all and everything on functional clauses like the former Art. 100 or flexibility-clauses like the former art. 235: Treaty-amendments were required to extend the scope of EU-competence to new areas like environment protection, foreign and security policy or home affairs and justice[12].

It would therefore be harmful if the constitutional treaty would provide greater flexibility and larger potential competencies for the Union than is the case in federal constitutions elsewhere in the world: It would immediately provoke criticism not only from eurosceptics and endanger the achievement of the urgently needed institutional reforms.

> **The above-mentioned arguments have been used either in documents referred to or by participants of the meeting. It was my impression that we reached a general consensus on the political importance of having a better and clearer competence-division – notwithstanding some different views as regards methods and content.**

[12] In this context, it should be examined how the efficiency and speed of Treaty-revision-procedures can be improved – but this is not for WP V.

PART IV:

For reflection: A European Super-State is not the aim

In the past, the competence-debate has been fuelled by wide-spread suspicions that the Union could attract more and more competencies and would slightly grow into a centralised European Super-State with little or no substantial competencies left for the Member States. This was considered as a major threat for their sovereignty. Of course, most of the fears and suspicions are not justified, but they are real and could harm the integration-process.

Amongst the members of the Convention, there is a broad consensus, that a European Super-State is not the aim. There is even a general agreement that the Member States will continue to play an essential role not only as „Masters of the Treaties" but also with regard to their own competencies in all areas not explicitly conferred upon the Union.

One could therefore possibly consider to create a specific provision in order to reflect the above-mentioned consensus by the constitutional-treaty itself. Such a provision could comprise the following elements:

- The Union is based upon (independent) Member States pooling parts of their sovereignty in the common interest to achieve and secure freedom, peace, stability, prosperity and welfare ...

- The Member States preserve the right to leave the Union[13] in accordance with the modalities laid down by the Treaty and with the optional right to join the European Economic Area (EEA) instead

This would be a **clear political statement** (easily understandable for the citizens) and also a **safeguard** for the Member States when the Unions legal order will be interpreted and further developed by the jurisprudence of the ECJ.

[13] This question was raised by several participants of the last meeting of WP V