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Working group V « Complementary Competencies »

Subject : **Comments from the Commission's representative in response to Mr Altmaier's note on the distribution of competencies**

EUROPEAN COMMISSION

Brussels, 1 August 2002

COMMENTS FROM THE COMMISSION'S REPRESENTATIVE IN RESPONSE TO MR ALTMAIER'S NOTE ON THE DISTRIBUTION OF COMPETENCIES

Generally speaking, the Commission supports the idea of grouping the basic rules governing the distribution of competencies in a single chapter of the future constitutional treaty. This would improve the clarity and transparency of the system.

The proposal to include in this chapter the basic principles involved (Union action restricted to the competencies it has been allocated, subsidiarity and proportionality, primacy of Community law) is welcomed, as is that for defining the types of action by means of which the Union can exercise its competencies.

However, some amendments need to be made to the scheme described in the note in question, if the said scheme is to constitute the basis for our working party's activities.

I. Functional and sectorial competencies — Priority clause

The distinction the note makes between functional and sectorial competencies and the conclusion it draws from it — that a clause giving priority to sectorial competencies should be introduced — run counter to the fundamental concepts on which the Union is founded.

Unlike the nation states, whose existence and activity do not hinge on any aims, the Union was created to attain specific objectives. As a result, some of its key competencies (for example, to prohibit discrimination (Article 12 EC), maintain fair competition (Articles 81 to 89 EC) and establish the internal market (Articles 94 and 95 EC)) were allocated with a view to achieving these objectives, irrespective of the sectors and often by means of action extending to several different areas at the same time. The practice of allocating certain strictly defined competencies in specific areas is largely a new development (specifically from the Maastricht Treaty onwards) which has been grafted onto the functional approach and which is in keeping with it (cf. Article 153 EC on the competencies relating to consumer protection, for example). The two approaches, functional and sectorial, are inseparable and any theoretical distinction between the two is artificial.

The idea of consistently giving priority to exercising a sectorial competence rather than a functional one is therefore incompatible with the system for allocating competencies to the Union and might gravely jeopardise its smooth running.

The example of the competence for the internal market offers a telling illustration of this point. As the Commission has already emphasised in its second contribution, which was circulated as a working document to the working group (WD 7), obstacles to the free movement of products and services across borders may result from existing disparities in internal legislations on safety and health and on environmental and consumer protection. The national authorities, the business community and the citizens are the first to call on the Union to intervene to reduce or dismantle these obstacles and guarantee freedom of movement in the single market. Contrary to some ideas that have recently been floated, a great deal of action is still required from the Union if it is to establish the internal market and make it work. This will take the form of eliminating the disparities in national legislations that hamper free movement and not, of course, eliminating legislations themselves. Action by the Union must take into account the requirements of health, safety and the environment, etc. which cause these disparities. This is not only a political imperative for the Union's institutions but also a legal obligation which is enshrined in the Treaty[1].

If the priority clause envisaged by the note were to be applied, it would be impossible for the Union to take action to dismantle these obstacles whenever a question relating to, say, safety and health, the environment or consumers arose. Sectorial competence — which sometimes rules out harmonisation of national legislation and sometimes provides for only a minimum degree of harmonisation — would always take precedence and would thus render void the principles and rules governing freedom of movement (Articles 94 and 95 EC and also Articles 28 to 30 and 43 to 55 EC). The practical consequence would be to neutralise and then to reopen the whole question of the internal market as a viable long-term enterprise meeting all these key requirements.

Consequently, no distinctions should be made between sectorial and functional competencies. The right way to choose which type of competence to exercise, taking account of the unique nature of the Union's system, is that adopted by the Court of Justice and referred to in the second contribution mentioned above (WD 7), which

[1] See Articles 6, 152 and 153 of the EC Treaty on the integration in other policies of environmental, health protection and consumer protection dimensions respectively. More particularly Article 95 paragraph 3 requires that these matters be taken into account when measures are taken to harmonise national legislations.

focuses on the principal, overriding aim, or "centre of gravity", of the action envisaged. This type of criterion, which is objective and verifiable, also comes with all the safeguards provided for by the Treaty for exercising functional competencies (e.g., for internal market, see again WD 7) and could be included in the principles governing the exercise of competencies by the Union.

II. Structure

A) Trimming down the chapter on competencies

The note in question envisages the chapter of the future treaty on competencies as including matters having no direct link with them. They include the "Christophersen" clause, the hierarchy of norms and instruments, the organisation of executive powers at Community level and the obligation to justify any acts.

All these aspects should certainly be dealt with suitably in the future treaty. However, they should not be incorporated in the chapter in question in order not to restrict or change their political and legal scope. Moreover, a chapter which is too full of fairly diverse matters is more liable to be complex and difficult to implement rather than be an aid to greater transparency and clarity. The affirmation of respect for national and regional identities advocated in the "Christophersen" clause, for example, should be in the first part of the future treaty in line with the current Article 6(3) EU, because this clause sets out a general principle of interpretation without restricting the exercise of the competencies allocated to the Union.

B) Categories of competencies

In its first contribution addressed to the members of the working party ("delimitation of competencies: a matter of scale of intervention"), the Commission emphasised that any approach based on establishing a classification of the Union's competencies would not in itself be sufficient to achieve the desired objective of clarification and to answer the basic question of "who does what?". What is more, any such classification is a potential source of conflict when it comes either to deciding in general terms whether a particular policy is to be assigned to this or that category or to establishing which policy — and, by extension, which category — covers a specific measure. Evidence of this are the problems encountered with national systems structured on the cataloguing of competencies.

The note in question suggests that a list of the Union's competencies be drawn up with a breakdown into three categories (Union competencies, common Union and Member State competencies, complementary competencies of the Union in the Member States' spheres of competence). This

would take the form of a political declaration, the sole aim of which is to show citizens how the tasks assigned to the Union in all the various areas are graded.

This doubtless has advantages but also a number of disadvantages. The first is that any such list very much resembles a catalogue of the Union's competencies, something that the vast majority of the members of the Convention rejected at their plenary meetings in April and May. Moreover, given its style as a political declaration and given its content, which can only be of a general nature, any such list risks giving rise to conflicting interpretations and misunderstandings in connection with the legal provisions of the future treaty that will actually assign competencies to the Union. In order to deal with these disadvantages one idea could be to take a lead from the proposal in question, not with a view to drafting a specific provision on the competencies but rather to rework Article 3 EC as it currently stands. In other words, the proposal is not to draw up a list (or a catalogue) of the Union's competencies but to present in a more structured way and within the context of a provision appearing in the first part of the future treaty, the policies and measures falling to the Union in line with the responsibilities, large and small-scale, that are the Union's.

By way of contrast, the provisions shown in the chapter of the future treaty dealing with competencies should focus on clarifying the way in which the European Union exercises its competencies, with particular reference to the intensity of Community action whilst indicating, for specific areas, the desirable degree of intensity for any such action.

The effectiveness of any Community action must, in any event, be ensured. To this end, it is essential, in the opinion of most of the members of the Convention as well as in that of the European Parliament (see the Lamssoure report), that any such action must remain flexible.

Consequently, there is a case for rejecting the proposal set out in the note in question that related to areas for "common competencies" -according to which action by the Union should be restricted to general rules, framework directives and legal coordination- and, instead, for retaining scope to ensure that in principle in these fields the whole range of possible action remains available for the Union to exercise its competencies in line with the requirements and in compliance with the principle of proportionality (in this respect see the example of transport policy which is mentioned in the Commission's first contribution to the working party, to which reference was made earlier).

III. Other aspects

The note merely sketches out some other proposals and this is therefore not the place for a final judgement of them. However, it is worth mentioning at this stage in the proceedings some passages which could require subsequent amendments, particularly the legal concept of "case of doubt" about competencies being in the hands of the Member States as a matter of principle, the idea of applying

the principle of subsidiarity to cases where action by private sector could be envisaged and of "relegating" Article 308 EC to a simple criterion for exercising competencies.
As regards the latter proposal, the Commission stresses that the vast majority of the Convention's members clearly expressed their intention to maintain a mechanism similar to Article 308 and, furthermore, it refers to the suggestions for reforming this provision which it made in its first contribution addressed to the working party.

Annex

ANNEX

Some members of the working party mentioned some specific cases to illustrate the risk of Community action to complete the internal market encroaching unlawfully on national powers. These are (1) freedom of movement provided for by the Treaty and the consequences for national social security systems and (2) linguistic requirements for the labelling of food products.
In order to enable the working party to discuss all the relevant points, some clarification is required.

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(1) The Court's case law on free movement and the national social security systems (Articles 28–30 EC, 49–55 EC and the judgements Decker of 28 April 1998, case C-120/95; Kohll of 28 April 1998, case C-158/96 and Smits-Peerbooms of 12 July 2001, case C-157/99)

Clearly, the Member States are responsible for the organisation and delivery of health and medical care services (Article 152(5) EC). However, the relevant products and health services are — like any product or service — subject to the rules on free movement in the internal market[2]. The Court of Justice was called upon to decide how safeguarding these national powers could be reconciled with compliance with the freedoms of the internal market.
The principles which it established are as follows:

- Community law does not prejudice the Member States' powers to organise their social security system.
- In exercising these powers, the Member States must, however, comply with Community law, particularly the provisions on free movement of goods and services in question.
- Certain national rules may affect the free movement of these goods and services. For example, rules concerning conditions of reimbursement (refusal, prior authorisation) in cases where social insurees wish to use suppliers of medical products or suppliers of medical services in another Member State may have the effect of discouraging these patients from accessing these markets. In such cases, these rules constitute an obstacle to trade.

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[2] It should be pointed out here that, whilst the purchase of health goods and services is largely financed by public social security services, there is also a "private" market which is fairly large: between 7.6% (Luxembourg) and 43.7% (Greece) of total expenditure on health.

- Such obstacles may, however, be justified if they are necessary for imperative reasons of the public interest and are in proportion to the objective which they pursue. Amongst these imperative reasons, the Court of Justice has explicitly cited maintaining the financial balance of national social security systems and controlling costs, maintaining a balanced hospital and medical service accessible to all and, more generally, a capacity for care or medical competence in the territory of the Member State concerned and guaranteeing sufficient and permanent accessibility to a balanced range of health care.

In the cases in question, the Court of Justice examined each instance to determine whether the obstacles existed and whether they were justified by imperative reasons of the public interest. In some cases it decided that such justification did not exist[3]; and in others it acknowledged that it did[4].

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(2) Linguistic requirements on the labelling of food products (Articles 28–30 EC and Council Directive 79/112/EEC of 18 December 1978 and judgements Piageme I of 18 June 1991, case C-369/89, Piageme II of 12 October 1995, case C-85/94, Goerres of 14 June 1998, case C-385/96, Geffroy and Casino of 12 September 2000, case C-366/98. New rules provided for by Council and European Parliament Directive 97/4 of 27 January 1997 (for the text currently in force see Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000).

Article 14(2) of Directive 79/112/EEC provides that "the Member States shall, however, ensure that the sale of foodstuffs within their own territories is prohibited if the particulars (...) do not appear in a language easily understood by purchasers, unless other measures have been taken to ensure that

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[3] In Decker, the obstacle arising from the need for prior authorisation by the health insurance scheme to obtain a lump sum reimbursement for a pair of spectacles purchased in another Member State was not justified because reimbursement would have been the same if the spectacles had been purchased in the Member State of affiliation.

[4] In Smits-Peerbooms, it was accepted that prior authorisation for the health insurance scheme to pay for treatment in another Member State could be required with a view to verifying whether the treatment was regarded as "customary in the professional circles concerned" and whether any establishment with a contract with the affiliated member's health insurance scheme offered this treatment.

the purchaser is informed". This provision — like all provisions on labelling — had the essential aim of ensuring that consumers can properly understand the label.

The Court of Justice interpreted this provision together with the general principle prohibiting obstacles to the free movement of goods (Article 28 EC) and ruled that dictating the use of a specific language to label food products without allowing another language easily understood by purchasers to be used or information for purchasers to be provided by other means was contrary to Community law. Although in most cases the language required for labelling has to be the language of the Member State or region on whose territory the products are marketed, it should be acknowledged that certain types of labelling can in practice easily be understood without being, strictly speaking, in the language of the consumers[5]. The Court of Justice confined itself to emphasising that the requirements to amend labelling in these cases would be manifestly disproportionate to the objectives pursued and would prove to be a protectionist measure which should be prohibited.

In view of the foregoing and given the complex and sensitive nature of this issue, Directive 97/4/EC replaced Article 14(2) of Directive 79/112/EEC by a new Article 13a which, *inter alia*, provides that "Within its own territory, the Member State in which the product is marketed may, in accordance with the rules of the Treaty, stipulate that those labelling particulars shall be given in one or more languages which it shall determine from among the official languages of the Community". This provision is reiterated in Article 16(2) of Directive 2000/13/EC which is the instrument currently in force on this matter. It follows that at the present time Community legislation leaves the Member States free to decide upon the linguistic rules applicable whilst respecting the Treaty.

[5] French speakers, for example, clearly understand non-French terms if there is only a difference in spelling (1 litre, 1 liter).