THE EUROPEAN CONVENTION

THE SECRETARIAT

Brussels, 30 September 2002

Working Group V

Working document 26

Working group V « Complementary Competencies »

Subject : **Note from M. Paolo PONZANO, Commission's representative "Combining clarity and flexibility in the European Union's system of competencies"**

EUROPEAN COMMISSION

Brussels, 23 September 2002

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Combining clarity and flexibility
in the European Union's system of competencies

The main concern of the vast majority of the members of the Convention is to achieve a clearer, and if possible, simpler description of the distribution of competencies between the European Union and the Member States, while retaining the system's flexibility and dynamism. This concern highlights the tension between two opposing requirements, viz. on the one hand defining the respective responsibilities more accurately so that the peoples of Europe have a clearer picture, and on the other maintaining the flexibility needed to ensure effective action.

The Union's competencies under the present system

Discussions within the Convention and, in particular, this Working Party show that the present system has assets which deserve to be preserved and exploited to the full, particularly the fact that the Union's competencies are solely those conferred by the treaties and that the power of action for the institutions is delimited — which preserves the original sovereignty of the Member States — and also the fact that the treaties allow some degree of flexibility — which allows the Union to take action to cope with fresh situations requiring a common response.
On the other hand, it is often maintained that this system generates difficulties which are sometimes real difficulties and sometimes the result of a problem of perception or comprehension. Thus, for instance, the degree of Union involvement and therefore responsibility in the various areas in which it is called upon to act is not immediately clear. Indeed, Article 3 of the EC Treaty goes no further than to enumerate all the policies for which powers of action have been allocated to the Community, without any clear indication as to the hierarchy of responsibilities which ensues and the differences which exist between, for example, on the one hand, customs union, the internal market, external trade relations and, on the other, education, training, culture, civil defence and

tourism. Furthermore, the overlapping of the various provisions relating to competencies is particularly complex because of the way the treaties are drafted. This does not make them easy to interpret. Lastly, the checks provided for in order to ensure that the tangible exercise of competencies by the Union complies with the delimitation set out by the treaties — particularly the exercise of caution by the Community institutions to go only as far as is strictly necessary when adopting acts and the jurisdictional control of the legality of such acts carried out *ex post* by the Court of Justice — are considered insufficient.
Summing up, the problems of the current system would thus appear to stem essentially from its lack of clarity.

The changes needed

Solutions need to be found to these problems be they real or perceived as such. The system therefore needs to be adjusted while taking care to safeguard its qualities. More generally speaking, the changes considered must remain compatible with the foundations of the Union, particularly with its status as a *sui generis* entity which is different from that of the nation state, its vocation being to carry forward the major policy objectives as part of a dynamic and gradual process of integration.

Avoiding unbalanced solutions

In addressing this matter care must be taken not to pursue paths which would focus exclusively on the need for clarification and simplification and thus ultimately remove all flexibility from the system and introduce imbalance.

This would happen, for instance, if the option were taken to incorporate a catalogue of competencies into the Treaty. Given that the vast majority of the members of the Convention have already made it clear that they are opposed to this option, any solutions which would lead to a similar result are to be avoided. Consequently, the proposals to establish rigid categories of competencies and to mechanically link to each category restrictive legal consequences when it comes to the Union's powers to act would in practice — whatever the terminology used — constitute actual catalogues of competencies such as those which feature in certain constitutions. If one were to define the category of shared competencies by maintaining that the Union's action is limited, when it comes to areas classified in this category, to the adoption of framework laws, even in cases where implementation of the principles of subsidiarity and proportionality would argue in

favour of more detailed regulation, the system of competencies would lose all its flexibility. Actual practice shows us that in areas which fall under shared competencies, it is sometimes necessary to have comparatively detailed regulations at European level — for instance, in the transport sector, air safety standards.

Also running radically counter to the need for flexibility is the proposal to do away with Article 308 of the EC Treaty, which we agree within the Working Party to describe as a "flexibility clause". It is patently obvious that doing away with this article would prevent the Union from acting in unforeseen circumstances even when the national public authorities, the economic operators concerned and even the people were to so request and when the need for this action was clear. Recent experience has shown us in the most dramatic terms that such circumstances can arise at any time and that we must be in a position to react swiftly without having to wait for amendments to the Treaty.

An integrated and balanced proposal

We accordingly support a proposal which, based on a number of suggestions which have arisen within the Working Group, is designed to make good the shortcomings highlighted above by defusing the tension between the requirements for clarification and for flexibility and reconciling them in a balanced way.

Firstly, a policy-based approach

The first step in this process is to provide a clear image of the Union's range of responsibilities in one of the first provisions of the future constitutional Treaty. In other words, as advocated in the resolution adopted by the European Parliament on the basis of the Lamassoure report, the point is to make it clear via a simple reading of this provision that the Union's responsibilities are not the same in all areas and that if the objectives assigned to it are to be attained effectively, the Union can carry out very wide-ranging tasks with regard to certain policies and has to apply a less heavy hand in other areas.

In concrete terms, this could be achieved by re-drafting the present Article 3 of the EC Treaty in a more structured and articulated way which would allow a better distinction between the areas of action of the Union as a function of the scale of intervention required. For instance, it could be specified in which areas the Union is called upon to take action in its primary capacity (customs union, freedom of movement and approximation of legislation for the purposes of the internal

market, external trade relations, monetary union, etc.); in which areas the Union and the Member States can act together as a function of requirements (transport and communication, environment, economic and social cohesion, etc.); in which areas the Union takes action only in order to complement or support action taken by the Member States (education, training, culture, etc.). This presentation would, however, provide only a policy-based indication of the Union's responsibilities; in particular, no systematic and rigid legal consequence would stem from the three categories mentioned above as regards the Union's powers to act. Any provision designed to create systematic links between this classification and the legal system applicable should therefore be avoided. Moreover, it would not be appropriate to use the legal terminology specific to the various categories of competency (e.g. exclusive and concurrent competencies), but rather a political and non-technical terminology (e.g. main competencies, shared competencies and complementary competencies).

A second approach, based on the legal aspects

These latter remarks imply the need for the presentation in question to be backed up by a second approach, a legal one, to define in precise terms the binding criteria for framing action taken by the Union.

On this subject, we consider first and foremost that there is a need to incorporate into the future constitutional treaty the fundamental principle whereby the Union takes action only within the framework of the powers conferred upon it by the Treaty, a principle which could feature as the first paragraph of the re-drafted Article 3.

Secondly, again in the first part of the future Treaty and alongside the fundamental rights of the peoples of Europe, there should be provisions establishing clearly the pattern of relations between the Union and the Member States, and particularly the fundamental mutual obligations. Specifically, these provisions should set out the obligation for the Union to respect the identity of the Member States and their regions, as well as their sovereignty in relation to all powers and areas of responsibility which are not allocated by the Treaty to the Union. This must obviously not lead to the limitation of the scope and exercise of the competencies allocated to the Union to take account of the specific requirements of each Member State, for this would jeopardise the distribution of competencies established by the Treaty.

Thirdly, the future Treaty should also include a new title in the part devoted to the institutional system. This would group together the principles and rules governing the exercise of competencies by the Union and would bring an appropriate response to the current problem of fragmentation of treaty provisions relating to competencies. There can obviously be no question of grouping under this title all the provisions which directly or indirectly concern the different Union policies and the exercise of the relevant competencies. The concentration envisaged should be limited to the principles and the essential elements concerning the exercise of competencies in general. We feel that this title should include:

- The relevant general principles, i.e. the principles of subsidiarity and proportionality – the definition and scope of which could be specified beyond what is set out by the current Article 5 of the EC Treaty and by the Amsterdam Protocol on their implementation – and the principles whereby all Union action must be based on a Treaty provision and whereby, if an action is designed to achieve a number of different objectives, the legal basis to be used is that which corresponds closest to the main purpose, content and objective of this action (the "centre of gravity" principle). This latter principle should in particular make it possible to bring a clear and transparent solution to problems of conflict as regards the legal basis when a specific action would initially appear to be able to be founded on two or more different legal bases.

- A general provision on the possible arrangements for Union action. In line with suggestions made in a contribution we have already forwarded to the Working Group and which has been disseminated as working document No 7, this should include and define a typology of the different possible actions at Community level, classified as a function of the scale of the action : uniform regulation, harmonisation, mutual recognition and "interconnection" of the national legal systems, joint action, financial support programmes, coordination of national policies. These types of action would all be available to the Union in order to implement the competencies allocated; the choice of what course of action to actually take in a specific case would depend on an appreciation based in particular on the principle of proportionality – i.e. action should be limited to what is strictly necessary to attain the objectives set – and the specific reasons on which it is based should be stated in the legal act in question. For certain areas, moreover, it would be possible to specify the scale of intervention required for European action. It could be specified, for instance, that in certain areas covered by complementary competencies, the Union can in principle and save duly justified exceptions adopt only measures of coordination of national policies and financial support programmes.

- A flexibility clause along the lines of the current Article 308 of the EC Treaty. This would be a provision allowing the Union to act in the absence of a specific legal basis when such action proves necessary in order to attain the fundamental objectives set by the Treaty. The use of this flexibility clause should be backed up by all the conditions needed to limit its use to exceptional cases and should provide for the European Parliament to be associated via the codecision procedure. In order to reduce the use of this clause new legal bases for action in the areas for which today it is necessary to resort to Article 308 EC (e.g. energy, Community intellectual property rights, etc.) should be made explicit in the future Treaty.

- The provisions on checking compliance with the principles of subsidiarity and proportionality, with the exception of the jurisdictional control performed by the Court of Justice which would be covered by the provisions of the title of the future treaty concerning jurisdictional procedures. This would in particular involve the exercise of caution by the Community institutions to go only as far as is strictly necessary — which is currently provided for by the aforementioned Amsterdam Protocol — and other checks which might be proposed by the Convention on the basis of suggestions put forward by the Working Group which has focused its analysis on this matter.

Lastly, the more specific provisions concerning the Union's policies and the way in which the powers to act are exercised in practice in order to implement these policies, including the legal bases and the other rules which define the conditions and limits of Community action for each specific area, should feature in another part of the future constitutional Treaty, a part devoted specifically to the Union's policies.

Balance between the requirements of clarity and flexibility

Summing up, we feel that the combination of the policy-based approach and the legal approach can cater simultaneously for the requirements of clarity and flexibility. In actual fact, the pattern proposed provides through a comparatively small number of provisions in the future Treaty a clear picture of the Union's competencies, how they are graded, the principles and legal criteria framing the exercise of these competencies and the relevant checks, while leaving the Union's institutions some margin of manoeuvre to exercise these competencies effectively as a function of requirements and actual circumstances.

Replies to Mr Christophersen's questionnaire

On the basis of this pattern we can take a stand on certain of the matters raised in the note sent out by Mr Christophersen at the last meeting of the Working Group.

(1) The category of complementary competencies should be defined in a simple way through the policy-orientated presentation envisaged under an Article 3 as restructured and articulated. However, this definition should not come across as a formula which would systematically and generally limit the Union's powers to act in the areas which come under this category.

(2) These latter areas should not be changed in relation to the current situation as reflected in the note from the Convention Secretariat. This is, moreover, in line with the view of the majority of the members of the Convention.

(3) The relation between the exercise of the complementary competencies and of the functional competencies — particularly Article 95 of the EC Treaty — should be governed by the "centre of gravity" principle, on the understanding that the exact wording and designation of this principle would be the subject of a more precise formulation approved by the Working Group.

(4) The flexibility clause (Article 308 EC) should be safeguarded, subject to the adjustments suggested above.

(5) Relations between the Union and the Member States (the "Christophersen clause") should be covered by a provision included in the first part of the future constitutional treaty, which would set out the fundamental principles in this matter, in line with the suggestion outlined above.