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Working group V « Complementary Competencies »

Subject : Letter from Lord Tomlinson to Mr. Henning Christophersen, Chairman of the Working Group V

23 September 2002

[Dear Mr Christophersen,]

I am grateful to you for the chance to comment on the issues arising from our group's discussions, and the very interesting papers that you and others have submitted.

The more our group progresses in its fascinating deliberations, the clearer it becomes to me that what we are doing goes to the heart of the issues the Convention will address in a new constitutional treaty. In my view, this gives us a responsibility both to move forward in the complex area of seeking to provide citizens with a clear guide to who does what, and to do so in such as way as not to prejudice the shape of any treaty. I think our group has much to offer in terms of principles and solutions to specific issues. But I do not think it would be helpful for us to offer detailed prescriptions or treaty language at this stage.

That said, there clearly will be more work to do in this area once we have an idea of the framework of the constitutional treaty. Perhaps there will be a role for this group, or a similar one, to adapt our work to the framework. I would be interested to hear others' views on this.

On a related point, I share the Commission's caution about the scope of any eventual chapter on competences. Whilst I am not opposed to our group expressing views on issues closely related to competences, I too hope that we will contribute to the creation of a clear and transparent constitution . I therefore think that the "Christophersen clause" and matters relating to instruments should remain separate.

I will now focus on the core of the group's work – complementary competences. I share the view that we should establish a definition for complementary competences and that, because of their unique nature, this is the one area where we should explicitly list what this includes.

How exactly this is done will depend on the shape of the rest of the Treaties.
But for the category to be meaningful, it should include some restriction on the measures that can be taken by the Union in this area. Measures should be supplementary and exclude harmonising. But do we really want to go as far as saying that voluntary measures only should be allowed. Even if regulations and directives were barred, might we not consider the use of decisions? This would

already be a restriction on the current practice. The most obvious areas to categorise as complementary competences are Employment, Education, Vocational training, Culture and, Public health (partly), where harmonisation is already excluded. But we might also consider adding Trans European Networks (except for interoperability), Research and Development, where it would fairly easy to exclude harmonisation.

It is clear from our discussions, however, that in themselves complementary competences are for the most part unproblematic. The examples of "competence creep" members of the group have raised relate mostly to the use of the "horizontal" articles 94, 95 and 308. Indeed, even if limitations were included in the text of the complementary competence in question, it might not be sufficient to prevent "horizontal" principles impinging. Members have suggested various ways of limiting their use. I understand their concern, but am worried that these may cause more harm than good. I share the Commission's view that we should not assume we no longer need to pursue single market goals. Peter Altmaier's suggestion that Article 94/95 measures must always deal with "distortion of the conditions of competition" is particularly restrictive; measures aimed at removing barriers to freedom of movement do not also have to be aimed at removing distortions of competition. I would also not favour instead giving a specific legal base to everything that has already been based upon Article 94. Not only would this reduce the flexibility Article 94 provides, but it may also lead to the formal extension of competence to new and unintended areas.

I do nevertheless see merit in an article specifying that measures should only be taken on the basis of the most appropriate Treaty articles. But in formalising this concept in the treaties, we will need carefully to consider the relationship with existing case law.

I similarly favour the retention of Article 308 for the flexibility it provides – the requirement for unanimity with this article provides a safeguard against abuse.

Finally, I'd like to take up a few specific issues arising from other parts of Peter's paper. Peter has told us that he does not see his model as a catalogue of competences. We should be careful, however, that in drafting the detail, we do not inadvertently end up with one. Is Peter's system not in danger of being a little inflexible? I have reservations about lists – partly because I am not sure that they will aid understanding. To reflect fully the way business is done in the EU, they will need to be very complex. And if they are simple, but only illustrative, do they help our purpose?

Peter also proposes a hierarchy of norms. I am not sure that this should be retained as a conclusion of our group. This matter will presumably be part of the mandate for Giuliano Amato's group on simplification.

Lastly, I'd like to register continuing concern about the reference to CFSP as a competence of the Union. I listened to Peter's explanation, but remain confused. If we are talking about something other than a communitisation of CFSP (which I hope we are), perhaps we could look again at wording to get these ideas across.

I hope you find these thoughts useful, and I look forward to seeing you at the next meeting.

[Signed Lord Tomlinson]