

Working Group V

Working document 30

NOTE

from	Secretariat
to	Working Group V "Complementary Competencies"
Subject :	First draft report

FIRST DRAFT REPORT FROM WORKING GROUP V

The present first draft is meant to serve as a basis for our discussion on Monday Oct. 7th. Certain parts of the report are written in a fairly detailed manner in order to facilitate the discussion and should be shortened after such discussion.

The term “the majority of the group” and similar expressions used in the report will of course be revised in accordance with the discussion at the next meetings.

1. Introduction

Complementary competence in the TEC is a part of the general system of Union competence and covers national policy areas of significance for the identity of the Member States. While focussing on the issues of complementary competence and related areas the working group therefore had to devote considerable time to certain basic issues of competence.

2. Complementary competence should be renamed “assisting measures”.

The term *complementary competence* is inadequate. It is too technical, and it does not transmit the essence of the relation between the Member States and the Union in areas of complementary competence. Several members of the working group found that it was in fact misleading to speak of complementary *competence* and preferred terms like “Union measures in fields where member States are fully competent”. The working group agreed that the need for a short and expressive name would make the term “assisting measures” appropriate¹. This term is consequently used in the following parts of the report.

Recommendation

- *The term “complementary competence” should be substituted by the term “assisting measures” which better denotes the essence of the relationship between the Member States and the Union and the limited intensity of the measures, which the Union may adopt.*

3. A separate title on competence in a new Treaty

Following the guiding principle of greater transparency and a higher level of clarity the working group took as its point of departure that a “basic treaty of constitutional significance” should contain a separate title covering all issues of competence, and in particular:

- (1) Provisions giving a basic delimitation of the competence in each policy area;
- (2) Definition of the three categories of Union competence;
- (3) Conditions for the exercise of Union competence.

Each of these issues is further discussed below under point 4, 6, and 7 respectively with separate recommendations.

¹ Care should be taken to ensure satisfying translations into other languages.

One member of the group strongly felt that provisions for the retransfer of competence back to the Member States should be included in the separate title on competence. The large majority of the members felt that retransfer is covered sufficiently in point 8 of this report relating to TEC Article 308.

Many members of the group expressed the view that a new Treaty covering wide areas of competence for the Union calls for a rewriting of the preambular phrase of the TEC speaking of “an ever closer Union”. It was felt that a new Treaty should not give the impression that further transfer of competence to the Union is, at the present stage of European integration, in itself an aim and objective of the Union.

Recommendation

- *A new Treaty should comprise a separate title devoted to all issues of competence.*
- *It is suggested for further consideration in appropriate Convention bodies whether in the light of the overall result of the work of the Convention the preambular clause of the TEC concerning “an ever closer Union” should be rewritten in order to avoid the impression that, after adoption of a new Treaty, future transfer of competence to the Union is in itself an aim and objective of the Union.*

4. Basic delimitation of competence in a new Treaty

To meet the requirements of transparency and clarity a new Treaty should contain a short, crisp and easily understood delimitation of the competence granted to the Union in each sphere of action. The group was well aware that it is difficult to separate the policy provisions of the current Treaties from their competence provisions. A detailed definition of all Union competence would consequently make the treaty less short and clear, thus not contributing to the overall objective of clarity and transparency¹. However, that difficulty would be considerably reduced if only the *basic delimitation* of the competence in each policy area is described, while leaving the precise and

¹ Reference is made to a similar position in CONV 250/02 from the Convention secretariat

detailed definition of competence – intertwined as it is with the objectives of the policy to be pursued - in the existing Treaties¹. A separate article in the new Treaty would make clear that the competence in each policy area should be exercised in accordance with the provisions of the relevant existing Treaty articles.

Some members of the group also argued that the basic scope of the competence transferred from the Member States to the Union is necessarily a matter of a “constitutional importance” and thus belonging in a “basic Treaty of constitutional significance” which will always require that amendments are ratified in all Member States.

The majority of the working group agreed that the overriding interest of providing the citizens with a short and clear picture of the distribution of competence as well as fundamental constitutional considerations should lead the Convention to opt for such basic delimitation of competence to be part of a new Treaty.

Recommendation

- *A basic delimitation of Union competence in each policy area should be part of a new Treaty.*

5. Defining and classifying categories of competence²

Assisting measures

Broad agreement existed in the working group that:

- assisting measures cover treaty provisions giving authority to the Union to adopt certain measures of low intensity with respect to policies which continue to be the responsibility of

¹ The following examples may illustrate the term *basic delimitation of competence*”:

- The basic delimitation of competence with respect to the free movement of workers might be given the following wording: “The Union has [shared] competence to adopt measures to bring about freedom of movement of workers.”
- The basic delimitation of competence with respect to the common commercial policy might be given the following wording: “The Union has [exclusive] competence to adopt measures in the field of commercial policy.”
- The basic delimitation of competence with respect to education might be given the following wording: “ The Union may adopt assisting measures in the field of education .”

² The working group did not consider classification of subject matters currently falling under pillar 2 and 3, since any such classification would greatly depend on a number of policy choices belonging to other fora of the Convention.

the Member States, and where Member States have not transferred their legislative competence to the Union;

- assisting measures enable the Union to support and complement the national policies where there is a common Union and Member States interest to do so;
- Assisting measures may take the form of financial support, administrative cooperation, pilot projects, guidelines and many other forms. It is optional for Member States to avail themselves of Union financial assistance provided under assisting measures;

A review of the acts adopted in the fields generally described as falling under assisting measures¹ shows that the overwhelming numbers of acts are resolutions, recommendations, action programmes, and other “soft” instruments. However, decisions of a legally binding nature are also occasionally used. The most characteristic treaty articles dealing with assisting measures expressly provide that the Council may not harmonise national legislation. In a general sense this implies that the Union cannot “legislate” and corresponds well with the notion that Member States have retained their legislative competence. It would be logic to conclude that Union legislation (regulations and directives) cannot be adopted as assisting measures.

However, before such conclusion can be reached it is necessary to consider certain aspects of the budgetary law of the Union. The Court of Justice² has made clear that “implementation of Community expenditure in relation to any significant Community expenditure presupposes not only the entry of the relevant appropriation in the budget of the Community, but in addition the prior adoption of *a basic act* authorising that expenditure”. It is thus clear that assisting measures must necessarily allow the Council (and as the case may be the European Parliament) to adopt such basic act. But nothing in the judgement requires such basic act to have the form of a regulation or a directive. In the case before the Court the basic act authorising expenditure had the form of a decision *sui generis*. No requirement of the Community law therefore necessitates that implementation of Union expenditure must be based on a regulation. A decision does fulfil all requirements of EC budgetary law³.

¹ See WD 1 of working group V

² case C-106/96 (of 12. May 1998)

³ Regulations may of course be necessary to establish a binding regime for the financial control over credits allocated from the Union budget in a given sector, notably the fixing of a regime for control on the spot of sums paid to the recipients etc. Such regulations may already now, and should certainly under a new treaty, be based on the Treaty provisions relating to budgetary competence.

On this background the majority view in the working group was that the requirements of clarity justified that a definition of assisting measures contained an element, that such measures include non-binding acts such as recommendations, resolutions, programmes, guidelines, etc and binding legal acts such as decisions, but exclude Union legislation (regulations and directives).

In a few areas (consumer protection, customs cooperation and development cooperation) Community legislation in the form of regulations and/or directives are clearly authorised and often used. The majority of the working group held, that it would be better to maintain a strict definition of assisting measures and consequently classify such areas under shared competence. Any other solution would in fact blur the important distinction between shared competence and assisting measures. This consequence of this choice is treated below under point 6.

Recommendation

- *Assisting measures should be defined in the new Treaty on the basis of the following elements:*
 - *Assisting measures apply to policy areas where the Member States have not transferred competence to the Union;*
 - *Assisting measures allow the Union to support national policies where this is in the common interest of the Union and the Member States;*
 - *Assisting measures authorise the Union to adopt recommendations, resolutions, guidelines, programmes, and other legally non-binding acts as well as decisions of a legally binding nature, to the extent specified in the relevant articles of the “secondary Treaties”. Union legislation (regulations and directives) may not be adopted under assisting measures;*
 - *Credits from the Union budget may be allocated under assisting measures. It is optional for the Member States to avail themselves of such credits.*

Exclusive competence/shared competence

Having considered the definition of assisting measures, the definition of exclusive competence must be defined. Shared competence will comprise matters being neither assisting measures nor exclusive competence.

The essential feature of matters falling under exclusive competence of the Union is that Member States may only act in such fields if authorised by the Union. Based on this common point of departure two different views were expressed in the group with respect to the *criteria* to be applied for classification under exclusive competence.

According to one view exclusive competence should be renamed “Union competence” and the criteria for classification under “Union competence” should primarily be political. All competence, where the Union would have *total or primary responsibility* should be classified as “Union competence”. According to this view the central objective should be to make clear to the Union citizens all the areas where the Union should play the leading or exclusive role.

According to another view classification under exclusive competence must be based on purely legal considerations because it has far-reaching legal consequences. The criteria for classification should remain unchanged. Only matters where it is essential that the Member States do not act on their own, even if no Union solution can be found, should be classified as exclusive competence.

In support of this other view it was further pointed out that it follows from the TEC that the principle of subsidiarity does not apply where the Community has exclusive competence (It would make no sense to consider if Union action is more effective than national action in areas where Member States have no power to act on their own). It was also pointed out that enhanced cooperation does apply to matters of exclusive competence. A broad political classification of policies as “Union (exclusive) competence” would have serious negative consequences in these respects.

A full analysis of the merits of the two views makes them reconcilable. The first view, emphasising political *responsibility* rather than legal *competence*, aims at providing citizens with the best possible insight into the political distribution of overall responsibilities. The second view gives priority to the many unwarranted legal consequences of categorising many new areas as exclusive competence, which until now have been considered shared competence or even intergovernmental cooperation.

The first view may be met by a rewriting of article 3 and 4 of the TEC describing the tasks and responsibilities of the Union. It would no doubt be helpful to the general public if the tasks and responsibilities of the Union were described in a manner so that policies that fully or primarily fell to the Union to pursue would be described in a way that made this distribution of responsibility clear.

The second view may be met by maintaining the existing definition and criteria for exclusive competence.

Recommendation

- *It is suggested for further consideration in relevant bodies of the Convention that TEC art 3 and 4 be rewritten in such a manner that policy areas where the Union shall be fully or primarily responsible are identified as Union responsibilities;*
- *Exclusive competence and shared competence should be defined in the new treaty in accordance with existing legal practise, and areas of exclusive and shared competence respectively determined in accordance with the existing criteria.*

Open method of Coordination

(Text not yet available)

6. Areas of assisting measures

(Text to follow upon further discussion based on a separate working paper)

7. Principles on the exercise of Union competence

A Treaty title on competence must contain a chapter on the principles applicable to the exercise of Union competence. Principles of direct relevance to the workings of the group are covered in some depth in this report. Others are covered cursorily thereafter.

The principle of allocated powers

The principle of allocated powers contained in the TEC art 5(1) is a basic principle of Union law. In a narrow sense it establishes a fundamental condition for the exercise of any Union activity.

In a wider sense the principle is a vital safeguard for the Member States ensuring that powers not allocated to the Union remains with the Member States. In the opinion of the majority of the working group the latter aspect of the principle of allocated powers ought to be expressly stated in the Treaty.

The Court of Justice has established that powers of the Union may follow not only from explicit Treaty provisions but also implicitly from the Treaty¹. Some members of the working group felt that it would be useful to specify that an assumption in favour of national competence should apply where competence is not expressly allocated to the Union. Others held that a Treaty provision explicitly stating that powers not transferred to the Union remains with the Member States automatically establishes such assumption in favour of national competence.

Recommendation

- *An explicit text that all powers not conferred on the Union by the Treaty remains with the Member States should be inserted into a new Treaty.*

Respecting the national identity of Member States

The Group discussed ways to clarify that the Union respects certain core responsibilities of the Member States. There was broad support for doing so by elaborating the fundamental principle, today enshrined in TEU Article 6(3), that the EU shall respect the national identities of its Member States. The purpose would be to provide added transparency, by way of exemplification, of what constitutes essential elements of national identity, which the EU must respect in the exercise of its competence.

Drawing inspiration from suggestions made by Members of the Group an exemplification of the core responsibilities of the member States could be divided into two groups:

- *Fundamental structures and essential functions of a Member State* e.g., (a) political and constitutional structure, including regional and local self-government, (b) national citizenship, (c) territory; (d) the constitutional status of churches and religious societies; (e) national defence and the organisation of armed forces; (f) the structure for application and enforcement of law, including the use of coercive measures; (g) languages

¹ See f.i. Case 22/70 *ERTA* [1971] ECR 263

- *Basic public policy choices and social values of a Member State* e.g. (a) policy for distribution of income; (b) imposition and collection of personal taxes; (c) system of social welfare benefits; (d) educational system; (e) public health care system; (f) cultural preservation and development; (g) compulsory military or community service.

By exemplifying in TEU Article 6(3) what constitutes the national identity of a Member State, it seems possible to meet the main concerns expressed in the Working Group and elsewhere of safeguarding the role and importance of the Member States in the Treaty while at the same time allowing the necessary margin of flexibility. In the latter respect it was noted that the provision was not a derogation clause. The Member States will remain under a duty to respect the provisions of the Treaties. The article would therefore not constitute a definition of Member State competence, thereby wrongly conveying the message that it is the Union that grants competences to the Member States.

The purpose would be to render more visible and more operational the existing principle that the Union, in the exercise of its competence, is under an obligation to respect the national identities of the Members States. The clause would send an important message to the citizens as well as provide useful guidance for the Union institutions in the fulfilment of its tasks. Were the Court of Justice to be given power with respect to such article in a future “basic treaty of constitutional significance”, the Court could be the ultimate interpreter of the provision if the political institutions went beyond a reasonable margin of interpretation.

Recommendation

- *The provisions contained in TEU Article 6(3) that the Union respects the national identity of the Member States should be made more transparent by exemplifying in two categories the essential elements of the national identity:*
- *The first category should include fundamental structures and essential functions of the Member States notably their political and constitutional structure, including regional and local self-government; national citizenship; territory; constitutional status of churches and religious societies; national defence and the organisation of armed forces; structure for application and enforcement of law including the use of coercive measures and languages.*
- *The second category should include basic public policy choices and social values of Member States, notably their policy for distribution of income; systems for imposition and*

collection of personal taxes; systems of social welfare benefits; educational systems; public health care systems; cultural preservation and development; compulsory military or community services.

Special principles governing the relation between internal market competence and assisting measures

The working group discussed the relationship between Articles 94 and 95 on the internal market and the policy areas where assisting measures may be adopted. The views expressed ranged from suggestions to abolish Article 94 and 95 to maintaining status quo. On the basis of the discussion it was possible to conclude that a measure should be based on the article where the measure had its “centre of gravity”. In order to express this in a way that can be understood by the citizens the following rule should apply: In policy areas where assisting measures may be adopted, nothing prevents the application of measures adopted under another article of the Treaty provided that the principle objectives and effects of such measures relate to such other Treaty article.

Several members expressed the opinion, that the internal market should not always have priority over other objectives and common values connected with national systems of public health care and public education. In this respect it was noted that to protect these objectives and values, the current Treaties do not contain safeguard clauses comparable to a number of safeguard clauses allowing individual Member States to derogate from the Treaty, such as TEC Article 30. Consequently, there might be exceptional situations where a legitimate protection of values connected with public functions in the sectors of public health and education might call for strictly limited derogation from the basic principles and rules of the internal market. While there was general reluctance to grant such right of derogation to individual Member States, support was given to a Treaty Article allowing the Council in exceptional cases upon proposal from the Commission and with the concurrence of the European Parliament to make strictly limited derogation from the principles and rules of the internal market if other important objectives or social values of the Union might otherwise be seriously affected.

Recommendation:

- *A clause should be inserted into a new Treaty to manifest the following principle: In policy areas where assisting measures may be adopted, nothing shall prevent the application of measures adopted under another article of the Treaty provided that the principle objectives and effects of such measures relate to such other Treaty article.*

- *A Treaty article allowing the Council in exceptional cases upon proposal from the Commission and with the concurrence of the European Parliament to make strictly limited derogation from the principles and rules of the internal market if important objectives and social values of the Union might otherwise be seriously affected.*

Scheme of intensity of Union action

In addition to the principles referred to above the working group discussed a scheme provided by the Commission representative and setting out the following types of Community interventions according to intensity of the Community action:

Legislative action::

- Uniform regulation (e.g. common customs tariff)
- Harmonisation (e.g. company law)
- Minimum harmonisation (e.g. consumer protection)
- Mutual recognition and “interconnection” of the national legal systems (e.g. mutual recognition of qualifications; social security of migrant workers)

Non-legislative action (where Member States in principle has the legislative competence):

- joint action (e.g. police missions in the Balkans)
- compulsory coordination of national policies (e.g. broad economic policy guidelines)
- financial support programmes (e.g. programmes in relation to education and health)
- non-binding coordination of national policies (e.g. the fight against social exclusion)

Some members of the working group felt that such hierarchy of intensity should be inserted into the Treaty as a separate legal principle along with the principles of subsidiarity and proportionality.

Others felt that this “scale of intervention” would be a useful element in a further elaboration of the principles of subsidiarity and proportionality.

Other general principles governing the exercise of competence

The working group agreed that the following principles should also be included in a competence title in a new constitutional Treaty

- The principle of subsidiarity
- The principle of proportionality
- The principle of primacy of Community law
- The principle of national implementation and execution (except Commission implementation)

and execution where provided for in the Treaties)

- Statement of reasons for the adoption of an act including information necessary to review compliance with requirements of all the general principles governing the exercise of competence

Recommendation

- *A title on competence in a “constitutional” treaty should contain a chapter on conditions for the exercise of competence with separate articles covering:*
 - *The principle of subsidiarity*
 - *The principle of proportionality*
 - *The principle of primacy of Community law*
- *The principle of national implementation and execution (except Commission implementation and execution where provided for in the Treaties)*
 -
 - *Statement of reasons for the adoption of an act including information necessary to review compliance with requirements of the principles governing the exercise of competence.*

8. TEC Article 308¹

The large majority of the Group agreed that it was necessary to preserve a certain measure of flexibility in the Treaty system of competence so as to allow the Union to deal with unexpected developments and challenges. TEC Article 308 should therefore be maintained.

It was common ground that flexibility should not be founded on a lack of transparency or clarity regarding the allocation of competence to the Union. It was also common ground that a flexibility clause must never give the impression that the Union defines its own competence. The provision has been the cause of concern and controversy in several Member States, especially out of fear that it might undermine the principle of allocated powers. Most members therefore agreed on the necessity of clarifying and possibly tightening the conditions for its use.

¹ The Working group did not discuss the consequences for Article 308 of a possible merger of the TEU and TEC or of the pillar structure of the Union. This discussion would prejudge the outcome of the work in other fora of the Convention. However, the group noted that issues of major importance could arise with respect to TEC art 308, particularly in the event of a merger of pillar 1 and 2.

To avoid the current repeated recourse to Article 308 in certain areas, e.g. balance-of-payment aid to third countries, intellectual property rights, energy, and civil protection the working group agreed on the need to recommend new specific legal bases in the Treaty for such policy areas if the Union wished to pursue policies in this field. As regards tourism, which is mentioned in TEC Article 3 (u) along with energy and civil protection, there was wide agreement in the group, that no separate Treaty article was desirable. The group felt that it was an anomaly to have subject matters mentioned in TEC Article 3 without having any corresponding Treaty article setting out the policy objectives and the competence. The working group consequently found that TEC art.3 (u) should be deleted.

The working group looked at two different ways to improve Article 308::

Better criteria

General agreement prevailed that it should be specified that Article 308 cannot serve

- “ as the basis for widening the scope of [Union] powers beyond the general [Treaty] framework” or “be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty”¹, or
- as the basis for harmonisation measures in policy areas where the Union may only adopt (assisting measures)².

It was suggested that only measures aiming at “the establishment and functioning of the internal market” should fall under Article 308. Several members of the working group felt that such limitation would be too narrow since most acts adopted under Article 308 have covered other subject matters. Furthermore matters related to the internal market were already covered under TEC Article 95.

Others suggested modernising the existing condition in Article 308 that a measure shall be “within the framework of the common market”. To make that condition more operational, and thereby facilitating an effective control, they suggested that a measure adopted under Article 308 should be

¹ See Opinion 2/94);

² (See conclusions from European Council Edinburgh 1992)]

“within the operation of the common market, the Economic and Monetary Union, or the implementation of common policies or activities referred to in Articles 3 and 4”¹.

Some members of the group proposed to clarify that only measures to deal with “unforeseen” events could be adopted under that article. However, as time passes it becomes increasingly more difficult to establish what might have been foreseen at the time of the adoption of the Treaty. Instead the majority favoured that Article 308 should be applicable only in exceptional circumstances

New procedural requirements

Wide agreement existed in the group that unanimity in the Council should continue to be required under Article 308. Considered in the light of the enlargement it was pointed out that unanimity requirement in a Union of e.g. 25 Member States might by itself entail a decreased use of Article 308. Assent or other substantial involvement of European Parliament should be required.

Possible ex ante judicial control drawing inspiration from TEC Article 300(6) on the conclusion of international agreements or ECSC Article 95(3-4) was discussed in the group. The majority view was that given the requirement of unanimity under Article 308 it might in fact be useful to open up the possibility for any Member State and the Commission to request an ex ante opinion from the Court of Justice. Such possibility would at the same time provide an essential guarantee to all Member States and allow a solution in cases where the Council might otherwise be deadlocked in disagreement over the applicability of Article 308.

Several suggestions were made to allow for the adoption of legal acts under art. 308 to “take back competence transferred to the Union” through the use of that article. The majority of the working group agreed that such a clause could give the erroneous impression that Article 308 was in fact a “competence-to-competence” provision, Furthermore all that is necessary to restore freedom of action to the Member States in a matter regulated under Article 308 is the repeal of such legal act. The majority therefore favoured a specific provision enabling a qualified majority to repeal acts adopted under Article 308. As qualified majority would presumably be the general rule for adoption of legal acts under other provisions of a new Treaty such clause would in fact add to the Union flexibility with respect to acts adopted jointly under Article 308 and other Treaty basis.

¹ Thus limiting the use of TEC article 308 to the general sphere of applicability of the TEC as described in TEC article 2.

It was the general feeling of the Working Group that Article 308 is an important provision of constitutional significance, which, depending on its final shape and scope, might be best placed in a general title on competence in a new Treaty.

Recommendation

- *TEC Article 308 should be maintained to provide a necessary flexibility;*
- *Unanimity should continue to be required for adoptions under Article 308, and the assent or other substantial involvement by The European Parliament should be required;*
- *New specific legal bases in the Treaty should be adopted for subject matters that have been regulated primarily on the basis of Article 308 e.g. intellectual property rights, energy policy and civil protection if the Union wishes to pursue policies in these fields.*
- *TEC Article 3 (u) should be deleted.*
- *To allow for a better control with the application of Article 308, the material and procedural conditions for the application of the Article should be modernised and strengthened in the following ways:*
 - *Article 308 should apply only in exceptional circumstances;*
 - *Article 308 cannot serve “ as the basis for widening the scope of Union powers beyond the general Treaty framework” or “be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty”, or “as the basis for harmonisation measures in policy areas where the Union may only adopt assisting measures”.*
 - *A measure to be adopted under Article 308 shall be within the framework of the common market, the Economic and Monetary Union, or the implementation of common policies or activities referred to in [TEC Article 3 or 4]”*
 - *Ex ante judicial control comparable to the provisions of TEC Article 300(6) should be available under Article 308.*
- *Article 308 should allow acts adopted under that article to be repealed by qualified majority.*

*