

CONV 375/1/02

REV 1

WG V 14

**REPORT**

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From	Chairman of Working Group V "Complementary Competencies"
To	Members of the Convention
Subject:	Final report of Working Group V

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**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 focusing on the issues of complementary competence and related areas the working group therefore had to devote considerable time to certain basic issues of competence. The recommendations reflect the general view of the group with respect to matters where many individual opinions were expressed. A small minority of the group is only to a limited extent supporting the recommendations.

**2. Complementary competence should be renamed “supporting 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 a term like “supporting measures” appropriate<sup>1</sup>. This term is consequently used in the report.

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<sup>1</sup> Care should be taken to ensure satisfactory translations into other languages.

Recommendation:

- *The term “complementary competence” should be substituted by a term like “supporting 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 future 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 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.

On the assumption that the Convention will draft a Treaty signalling a constitutional consolidation of a Union with wide areas of competence, it was felt that the reference to “an ever closer Union” in TEU Article 1 should be rephrased or clarified to avoid giving the impression that further transfer of competence to the Union is in itself an aim and objective of the Union.

Recommendation:

- *A future Treaty should comprise a separate title devoted to all issues of competence.*
- *Assuming that the Convention presents a draft Treaty signalling constitutional consolidation and covering wide areas of Union competence it is suggested for further consideration in appropriate Convention bodies that the reference to “an ever closer Union” in TEU Article 1 should be rephrased or clarified in order to avoid the impression that future transfer of competence to the Union remains in itself an aim and objective of the Union.*

### **4. Basic delimitation of competence in a future Treaty**

To meet the requirements of transparency and clarity a future 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 transparency<sup>2</sup>. However, that difficulty would be considerably reduced if only the *basic delimitation* of competence in each policy area is described, while leaving the precise and detailed definition of competence in the existing Treaties. A separate Article would make clear that the competence in each policy area should be exercised in accordance with the provisions of the relevant Treaty Articles for each policy area.

The overriding interest of providing the citizens with a short and clear picture of the distribution of competence as well as fundamental constitutional considerations made the working group recommend to the Convention to opt for such basic delimitation of competence to be part of a future Treaty.

While recognising that procedures for amending the future Treaty fall outside the scope of the working group several members stressed that Treaty amendments transferring new powers to the Union were unthinkable without ratification all Member States.

Recommendation:

*- A basic delimitation of Union competence in each policy area should be part of a future Treaty. A separate Article should make clear that competence should be exercised in accordance with the provisions of the relevant Treaty Articles for each policy area.*

## **5. Defining and classifying categories of competence<sup>3</sup>**

### Supporting measures

Broad agreement existed in the working group that:

- Supporting 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 the Member States, and where Member States have not transferred their legislative competence to the Union;
- Supporting measures enable the Union to assist and supplement the national policies where there is a common Union and Member States interest to do so;

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<sup>2</sup> Reference is made to a similar position in CONV 250/02 from the Convention Secretariat

<sup>3</sup> 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.

- Supporting measures may take the form of financial support, administrative cooperation, pilot projects, guidelines and many other forms, including the Open Method of Coordination.

A review of the acts adopted in the fields generally described as falling under supporting measures<sup>4</sup> shows that the overwhelming number of acts are resolutions, recommendations, action programmes, and other “soft” instruments. However, legally binding decisions are also occasionally used. The most characteristic Treaty articles dealing with supporting 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 legally binding decisions may be adopted as supporting measures, whereas Union legislation (regulations and directives) to substitute or harmonise national law cannot be adopted as supporting measures.

However, before such conclusion can be reached it is necessary to consider whether the budgetary law of the Union might necessitate the adoption of regulations in certain instances. The Court of Justice<sup>5</sup> 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 supporting 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 a basic act to have the form of a regulation. In the case before the Court the basic act authorising expenditure had the form of a decision *sui generis*<sup>6</sup>.

On this background the working group found that the requirements of clarity justified that a definition of supporting measures contained an element, that such measures may consist of legally binding decisions, but that Union legislation (regulations and directives) may not be used<sup>7</sup>.

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<sup>4</sup> See WD 1 of working group V

<sup>5</sup> Case C-106/96 (Judgement of 12. May 1998)

<sup>6</sup> 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 future Treaty, be based on the Treaty provisions relating to budgetary competence.

<sup>7</sup> The conclusion is based on the present legal instruments of the Union.

To ensure legal precision each Article related to supporting measures should expressly ensure that only supporting measures could be adopted<sup>8</sup>.

The Treaty provisions on public health and trans-European networks allow as a general rule only the adoption of supporting measures. However, in both areas the Council may in very restricted, clearly defined fields adopt legislation (regulations or directives). The working group discussed if this required a modification of the definition of supporting measures to allow trans-European networks and public health (and other future similar cases) to be classified *in toto* as areas of supporting measures. The group felt that such a modification would be useful.

The determination of areas where supporting measures may be adopted in accordance with the definition proposed follows below under point 6.

Recommendation:

- *Supporting measures should be defined in the future Treaty on the basis of the following elements:*
- *Supporting measures apply to policy areas where the Member States have not transferred legislative competence to the Union, unless exceptionally and clearly specified in the relevant Treaty Article;*
- *Supporting measures allow the Union to assist and supplement national policies where this is in the common interest of the Union and the Member States;*
- *Supporting measures authorise the Union to adopt recommendations, resolutions, guidelines, programmes, and other legally non-binding acts as well as legally binding decisions, to the extent specified in the relevant Articles of the “secondary Treaties”. Union legislation (regulations and directives) may not be adopted as supporting measures, unless exceptionally and clearly specified in the relevant Treaty Article;*
- *Credits from the Union budget may be allocated under supporting measures.*

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<sup>8</sup> For illustration the following example of the required technical adaptation is given relating to culture, TEC Article 151(5):

“In order to contribute to the achievement of the objectives referred to in this Article, the Council:

- Acting in accordance with the procedure referred to in Article 251 and after consulting the Committee on the Regions, shall adopt *supporting measures*, excluding harmonisation of the laws and regulations of the Member States. The Council shall act unanimously throughout the procedure referred to in Article 251;
- Acting unanimously on a proposal from the Commission shall, as *supporting measures*, adopt recommendations.”

### Exclusive competence/shared competence

Having considered the definition of supporting measures, exclusive competence must be defined. Shared competence will comprise matters being neither supporting 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 by themselves, 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 Treaty 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 not 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 may be met by a rewriting of the tasks and responsibilities of the Union currently described in TEC Articles 3 and 4. 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 the tasks and responsibilities of the Union (currently described in TEC Articles 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 future Treaty in accordance with existing jurisprudence of the Court of Justice, and areas of exclusive and shared competence respectively determined in accordance with the criteria developed by the Court.*

The Open Method of Coordination

Some members of the working group requested that the Open Method of Coordination be codified in the Treaty as an additional instrument for the Union. They defined the method as “a mutual feedback process of planning, examination, comparison and adjustment of the (social) policies of (EU) Member States, all of this on the basis of common objectives”. The working group noted that the Open Method of Coordination, as instituted by the European Council in Lisbon, March 2000, applies to areas of Union competence, of supporting measures as well as areas of Member States’ competence. Broad agreement was found in the group to ask the working group on simplification (WG IX) to include the instrument of Open Method of Coordination in its work as a “soft” instrument or method.

Recommendation:

- *The Open Method of Coordination should be considered in the working group on simplification as a “soft” instrument or method.*

## 6. Areas of supporting measures

Based on its working document 29 the working group discussed the Treaty provisions related to the following areas<sup>9</sup>:

- Employment (TEC Articles 125-130)
- Education and vocational training (TEC Articles 149 and 150)
- Culture (TEC Article 151)
- Industry (TEC Article 157)
- Research and development (TEC Articles 163-173)<sup>10</sup>
- Public health (TEC Article 152)
- Trans-European networks (TEC Articles 154-156)
- Customs cooperation (TEC Article 135)
- Consumer protection (TEC Article 153)
- Development cooperation (TEC Articles 177-181)

The working group's primary objective was to ensure that the definition and classification of "supporting measures" would provide the maximum clarity *without changing the legal competence of the Union in the areas concerned*. In this context it was stressed by many members of the group that the classification of a subject matter as supporting measures could not and should not be equalled with an evaluation of the field of Union activity as being less important. The fundamental importance f. i. of the "Erasmus programme" and the Union programmes on research and development, public health and trans-European networks was often referred to in this context.

Research and development was specifically discussed, due to its importance for the Union and its weight on the Union budget. It was noted that regulation of patents and other research-related intellectual property rights is covered elsewhere in the Treaty. A special recommendation in point 8 of the report recommends a separate legal basis for intellectual property rights. It was also noted that research and development of the Union is not limited to activities of direct interest for the economic life of the Union, but may have a wider scope. The group concluded that under the definition chosen research and development was an area of supporting measures.

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<sup>9</sup> Economic coordination as a part of the Economic and Monetary Union was not considered as this subject-matter falls under another working group. TEC Article 137 as amended by the Nice-Treaty was not considered by the group.

<sup>10</sup> The group did not consider the competence of the Union under the EURATOM Treaty, which is presumably shared competence.

The working group noted that legislation in the form of regulations and/or directives is clearly authorised with respect to consumer protection and development cooperation and probably also with respect to customs cooperation, not as a clearly defined exception, but as a main rule. These fields would therefore under the definitions chosen fall under shared competence. The group discussed if any inconveniences would arise out of this categorisation. It was observed that development cooperation has special features because Union activities in this field would never pre-empt the competence of the Member States to maintain their own national development policy. With respect to consumer protection the group noted that most legal acts adopted are in fact based on other Treaty provisions than Article 153. However, the fact that (minimum) directives could be adopted under Article 153 made it logical that consumer protection should be classified as shared competence.

The group also had a general discussion on the substance of the individual Articles dealing with supporting measures including some proposals for substantive amendments either enlarging or limiting the scope of some of the provisions. However, the group decided to concentrate on the abstract issue concerning supporting measures and did not wish to take any decision on detailed and substantive amendments to the present Treaty in this respect.

A proposal to establish the fight against narcotics as an area where supporting measures could be adopted was partly held to be already covered by TEC Article 152 (drugs-related health damage) and partly to belong to the working group on Freedom Security and Justice (WG X). A proposal providing for the adoption of supporting measures with respect to international sports was not broadly supported.

*Recommendation:*

*The following subject matters should be considered matters of supporting measures:*

- *Employment (TEC Articles 125-130)*
- *Education and vocational training (TEC Articles 149 and 150)*
- *Culture (TEC Article 151)*
- *Public health (TEC Article 152)*
- *Trans-European networks (TEC Articles 154-156)*
- *Industry (TEC Article 157)*

- *Research and development (TEC Articles 163-173)*<sup>11</sup>

## **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. The point of departure for the working group was the general principles of *the common interest and of solidarity*. In addition to these more abstract yet fundamental principles a number of legal principles were considered. 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 remain with the Member States. In the opinion of the working group the latter aspect of the principle of allocated powers ought to be expressly stated in the Treaty. Such an amendment would in itself establish an assumption in favour of national competence.

### Recommendation:

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

### Respecting the national identity of the 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 of what constitutes essential elements of national identity, which the EU must respect in the exercise of its competence.

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<sup>11</sup> The group did not consider the competence of the Union under the EURATOM Treaty, which is presumably shared competence.

The discussion of the group related to two areas of core national responsibilities:

- *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 legal status of churches and religious societies; (e) national defence and the organisation of armed forces; (g) choice of languages.
- *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 clarifying 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 competence to the Member States, or that Union action may never impact on these fields.

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 Member 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 appreciation.

Taking into account the clear and precise recommendations of the working group on the definition of supporting measures, and on the use of TEC Articles 94/95 and 308 in fields covered by supporting measures, broad agreement was found that no specific mentioning of basic policy choices of the Member States in the identity clause would be required.

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 clarifying that the essential elements of the national identity include, among others, fundamental structures and essential functions of the Member States notably their political and constitutional structure, including regional and local self-government; their choices regarding language; national citizenship; territory; legal status of churches and religious societies; national defence and the organisation of armed forces.*

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

The working group discussed the relationship between Articles 94 and 95 on the internal market and the policy areas where supporting 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”. However, the term “centre of gravity” was considered too technical and difficult to understand for ordinary citizens. In order to clarify the legal situation it should be specified in the Treaty that measures to harmonise legislation based on Treaty provisions on the internal market may apply only with respect to areas of supporting measures if the principal objectives, contents and intended effects of such measures relate to Treaty Articles on the internal market.

Recommendation:

- *It should be specified in the Treaty that measures to harmonise legislation based on Treaty provisions on the internal market may apply only to areas of supporting measures if the principal objectives, content and intended effects of such measures relate to Treaty Articles on the internal market.*

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 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 have 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

In addition to the above principles the working group agreed without any detailed discussion that the following principles should also be included in a competence title in a future 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
- The principles of common interest and of solidarity.

Recommendation:

- *A chapter on conditions for the exercise of competence in a general title on competence in a future Treaty should, in addition to the three recommendations given above, contain separate clauses 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*
  - *The principles of common interest and of solidarity.*

**8. TEC Article 308<sup>12</sup>**

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. Some members felt that Article 308 was inherently open to misuse and should therefore be deleted.

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.

The group noted that Article 308 may only be used if Community action is necessary, i.e. if a satisfactory result may not be achieved through national action. However, nothing in the Treaty excludes the application of the principle of subsidiarity in relation to acts adopted under Article 308.

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<sup>12</sup> 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 Article 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, civil protection and the establishment of agencies, 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 these fields. 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 Article 3 (u) should be adapted.

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 can not 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”<sup>13</sup>, or
- as the basis for harmonisation measures in policy areas where the Union rules out harmonisation<sup>14</sup>.

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 related to 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 “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”<sup>15</sup>.

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<sup>13</sup> See Opinion 2/94.

<sup>14</sup> See the conclusions from the European Council in Edinburgh in 1992.

<sup>15</sup> Thus limiting the use of TEC Article 308 to the general sphere of applicability of the TEC as described in TEC Article 2.

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.

#### *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 in itself entail a decreased use of Article 308. Assent or other substantial involvement of the 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 might avoid deadlocks in the Council on the applicability of Article 308.

Several suggestions were made to allow for the adoption of legal acts under Article 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 future Treaty such clause would in fact also simplify repeals of acts adopted jointly under Article 308 and other Treaty Articles.

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 best be placed in a general title on competence in a future 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;*
- *TEC Article 3(u) should be adapted. 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. balance-of-payments loans to third countries, intellectual property rights, energy policy civil protection and the establishment of agencies, if the Union wishes to pursue policies in these fields.*
- *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:*
  - o *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 rules out harmonisation.*
  - o *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.*
  - o *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.*

## **9. Administration**

The working group was specifically asked by the Presidium to consider a paper submitted to the Convention on good administration, efficiency and openness<sup>16</sup>. The paper suggests the insertion of a specific legal base to adopt EU rules on good administration, efficiency and openness for *the EU institutions* by:

- Safeguarding good administrative culture in the EU administration to increase efficiency and legitimacy.
- Highlighting basic principles for good administration of the work of the EU-institutions, e.g. service obligations, objectivity and impartiality, increased openness, consultations, and improved anticorruption measures.

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<sup>16</sup> WG V, working document 13.

The suggestions met with general approval. It was noted that a detailed analysis of the suggestions would involve a full analysis of the actual legal situation with respect to general principles of law concerning good administration as interpreted by the Court of Justice, as well as of the existing Community legislative instruments and the impact of the article on good governance contained in the declaration on fundamental rights (and possible consequences of inserting the declaration into a future Treaty)<sup>17</sup>. The proposals of the EU Ombudsman having similar objectives would also be relevant.

In the context of good administration, another paper<sup>18</sup> aimed at making the quality of *national administration* of EU legislation a matter of common interest, and authorising the EU to adopt supporting measures in this respect, was discussed. It is a basic principle of the Union (referred to under point 7 above) that implementation and execution of Union laws fall to the Member States (except where otherwise provided in the Treaty), and there is of course a corresponding duty of the Member States to ensure that the administration and execution is done effectively and legally correct. The working group found that on this background and in the perspective of a future Treaty for a Union of 25 member States or more, it would be wise to authorise the Union to assist Member States by facilitating exchange of information and persons related to administration of EU law and to support common training and development programmes. Such provision would in fact constitute an additional area of supporting measures that should be added to those listed under point 6 above.

Recommendation:

- *A clause should be introduced in a future Treaty providing power for the Union to adopt rules on good administration within the EU institutions.*
- *A clause should be introduced in a future Treaty underlining the common interest in the efficiency of national implementation of EU legislation and giving the Union powers to adopt supporting measures to facilitate exchange of information and persons related to national administration of Union law and to provide Union support for training and development programmes.*

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<sup>17</sup> Reference is also made to the Commission white book on good governance, doc. COM (2001) 428.

<sup>18</sup> WG V, working document 21.