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## **Working group V «Complementary Competencies »**

**Subject: Note by Mr. Antti Peltomäki on " Distribution of competence  
between the European Union and the Member States "**

## **Distribution of competence between the European Union and the Member States**

### 1 Purpose of the contribution

1. The purpose of this contribution is to propose a model for how competence could more clearly and comprehensively be distributed between the European Union and its Member States, in line with the European Council conclusions of Nice and Laeken.
2. In doing so, we intend to build on the work carried out by the Convention and the working group on complementary competence so far, in particular, the Lamassoure Report on the division of competences between the European Union and the Member States as well as the European Commission's proposal "*La délimitation des compétences: une question d'intensité de l'intervention*".

### 2 The scope, nature and exercise of the Union's competence: a model for reform

#### *2.1 Basic principles*

3. There is a consensus that we should preserve the principle of conferred competence as an overriding principle of the legal and political system of the Union. The Union has only those powers conferred upon it by the Member States, while in all other respects Member States retain full competence. For all Union action, there has to be a specific legal basis in the Treaty.
4. On the other hand, the Union system is inherently dynamic and evolving, and will have to be constantly adapted to present and future challenges.
5. Hence, in specifying the division of competence between the European Union and the Member States, it is essential to find a balance between clarity and flexibility, the principle of conferred competence and the dynamic nature of the Union system.
6. It should also be borne in mind that, in reality, the Union and the Member States can and often must act together in the field of the Union's competence, inasmuch as the effective implementation of any given policy requires input from all levels of authority.<sup>1</sup>
7. On this basis, we propose the following model for the new Treaty provisions on the scope, nature and exercise of the Union's competence.

#### *2.2 General Provisions*

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<sup>1</sup> Cf., Commission's proposal "*La délimitation ...*", p. 5.

8. The new Treaty should include a chapter "General Provisions on the Scope, Nature and the Exercise of the Union's Competence", containing:

a) an introductory provision, e.g., as follows: *"Having regard to the intensity of the Union action in relation to the action by the Member States, the categories of the Union's competence, the instruments and procedures for its exercise by the institutions and the principles to be followed thereby are defined in this chapter."*;

b) an enumeration of the categories of Union competence, e.g. as follows:

1) exclusive Union competence, including sectors where Member States could only exercise competence on specific authorization from the Union (e.g., conservation of the biological resources of the sea);

2) shared competence, including sectors where the Member States retain their right to use their competence independently within the bounds set forth by the Treaties and secondary legislation, in accordance with the principle of pre-emption laid down by the Court of Justice in the ERTA case<sup>2</sup>. Shared competence would include all other sectors falling under Union competence except those where the Union has exclusive or complementary competence. This group would also include issues where the Union would have functional competence for taking action to establish the internal market pursuant to the current Article 95 EC;

3) complementary Union competence, including sectors where Union competence would complement the policy of the Member States and could not involve more extensive transfer of competence from the Member States to the Union. Complementary Union competence would be divided into three sub-categories according to the policy sector:

i) Union competence including measures leading to a degree of harmonization of the acts and regulations of the Member States (e.g., development cooperation under the current Title XX EC);

ii) Union competence would exclude measures leading to harmonization of the acts and regulations of the Member States (e.g., public health under the current Art. 152 EC);

iii) Union competence would consist only of measures coordinating the policies of the Member States (e.g., employment under the current Title VIII);

Another question is should the new Treaty include separate provisions on the so-called open method of coordination which organises cooperation among the Member States within the framework of the Union without however involving the exercise of Union competence.

c) a definition of the instruments available for the exercise of Union competence, listed in a manner and order reflecting their legal effect (intensity), reinforcing the logic of the current Article 249 of the TEC;

d) a definition of the procedures for the exercise of Union competence;

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<sup>2</sup> Case 22/70 *Commission v. Council* ECR [1971] 263.

- e) a statement of the principles governing the case-by-case exercise of competence by the Union, in particular, the principles of subsidiarity and proportionality.

### 2.3 Specific Power-conferring Provisions (Legal Bases)

- 9. The chapters on individual policy areas should include the specific power-conferring provisions authorising Union action (legal bases). They should contain:
  - a) the specific objectives pursued by means of Union action in the subject area concerned;<sup>3</sup>
  - b) the means employed by Union action, reflecting the category of competence concerned and the relationship of the Union action to the action by the Member States and, by implication, the instruments available for the exercise of Union competence;
  - c) if appropriate and in exceptional cases only, the instruments available for the exercise of Union competence by means of a reference to the general provisions on the scope, nature and the exercise of the union's competence (above);
  - d) the procedure for the exercise of Union competence by means of a reference to the general provisions;

### 3. Obligations imposed by the Treaty on the Union institutions and the Member States

- 10. In addition to the provisions on the scope, nature and the exercise of the Union's competence, it should be recognised more clearly in the new Treaty that Union law also requires the Union institutions and/or the Member States to take account of certain substantive principles in the exercise of their respective powers, in accordance with the fundamental principle of loyalty. In particular, when exercising their own competence the Member States are bound by certain obligations of Union law, which may not imply any correlative powers for the Union.<sup>4</sup> The Treaty's scope of application does not therefore coincide with, but reaches further than, the scope of the Union's competence.
- 11. Such principles could be divided into:
  - a) the principles the Member States must comply with when exercising their national competence (e.g., prohibition of discrimination on grounds of nationality);
  - b) the principles the Union institutions in all their actions and the Member States – when they act in the context of Union law only – must comply with (i.e., the general principles of Union law, notably fundamental rights in accordance with the Court's case law; and the so-called horizontal principles that must be integrated into the definition and implementation of all Union policies, e.g., environmental protection).

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<sup>3</sup> Cf., the Lamassoure Report, para. 9.

<sup>4</sup> Cf., Commission's proposal "*La délimitation ...*", p. 3.

#### 4 Summary

12. The proposed scheme outlines the respective powers of the Union and the Member States through what might be described as a *funnel model*, where the intensity of Union action in a given policy area is determined by the scope and nature of the Union's competence on the one hand and by the selection of instruments available to the Union's institutions for the exercise that competence on the other hand:

