

Working Group V

Working document 4

Working group V «Complementary Competencies »

Subject : **Note from the European Commission on "Delimitation of powers : a matter of scale of intervention"**

DELIMITATION OF POWERS:

A MATTER OF SCALE OF INTERVENTION

Action taken by the European Union to carry out its tasks dovetails in various ways with steps taken nationally. Under the current Treaties this interaction between different levels of authority gives rise to a **complex legal framework** which is all the more difficult to understand as the respective approaches of the European Union and the Member States vary substantially as a function of the areas concerned and of the specific situations to be addressed.

This is the context in which are set **Declaration No 23, attached to the Final Act of the Treaty of Nice**, which calls for the **establishment and the monitoring of a more precise delimitation of powers** between the European Union and the Member States, and also the **Laeken Declaration**, which calls for **clarification of the current system**.

The point of this clarification is obvious both for reasons of **transparency** and of **effectiveness**, as it makes it possible to identify **who does what**. There is, however, no magic recipe for achieving simplification. Some **degree of complexity is inherent** in the system, which has to remain founded on the interaction of powers between the different levels of authority concerned. In other words, there can be no hard-and-fast delimitation, by blocks of subject areas, of the fields of intervention of the European Union and the Member States.

One of the reasons for this is that the European Union is a unique construction which, unlike individual States, was set up in order to attain **predetermined objectives**. Its powers to act are thus defined **essentially** as a function of these objectives and not *ratione materiae*. Whence the **dynamic nature** of the system as regards the gradual attainment of the objectives set.

This document expands on the observations made in the Commission communication 'A project for the European Union' of 22 May 2002 and seeks to rationalise and clarify the

exercise of the Union's powers by means of (a) a definition of the fundamental principles of the system; and (b) a classification of the different types of Union action according to their scale.

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The general principles of the system

There are limits to the action the European Union can take. The Union can take action only if and insofar as the treaties allow it to do so (**principle of allocation of power**). All the Union's actions are thus based on legal provisions — the legal bases — which as a rule give the Union the possibility to take action in specific areas and set out the specific objectives, the procedures to be followed and, where appropriate, the instruments to be used, the types of initiatives to be adopted and the limits of such action¹.

What this means is that any powers not allocated to the Union are reserved to the Member States, which will implement them in accordance with their internal legal systems. Some would like to see an enumeration of **powers which are exclusive to the Member States**. There is, however, a risk that this list would not be exhaustive (it would indeed be very difficult to draw up) and also of creating a “grey area” of fields which would not fall into any category.

¹ As already mentioned, the European Union is a unique construction, a distinctive feature of which is its system of “functional” legal bases, i.e. the provisions which confer upon the Union powers to act in order to achieve pre-set objectives irrespective of the area in which the measure is taken. The most familiar examples are Articles 94 and 95 of the EC Treaty for the completion of the internal market and Article 308 of the EC Treaty for the more general achievement of the objectives of this Treaty in the absence of specific powers of action.

The **principles of subsidiarity and proportionality** are the principles which regulate the exercise by the European Union of its powers. These principles are explicitly written into the EC Treaty and are the subject of an application protocol. They convert into legal terms the notion of **added value** which lies at the base of all action taken at European level. The Union can intervene only if and insofar as the objectives of the action envisaged cannot be achieved satisfactorily at national level and can therefore, on account of the scale or effects of the proposed action, be better achieved at the European level. At the same time, however, any action by the Community must not go beyond what is necessary to achieve these objectives.

The general framework is supplemented by the **principle of the primacy of Community law** — formally established by the Court of Justice — whereby measures and provisions taken by the Member States must respect and comply with Community law. This principle is valid for the binding legal provisions adopted by the European Union in the exercise of its powers, but also, and even more so, for the rules set out by the Treaties and which are directly binding upon the Member States and sometimes on citizens and companies (examples are the prohibition of discrimination on grounds of nationality, the prohibition of customs duties and similar taxes, the prohibition of measures which restrict the fundamental freedom of movement, the prohibition of state aid and measures and practices likely to restrict or distort competition).

It is therefore proposed that the following principles be included and defined in the Treaty:

- the **principle of allocation of powers** to the European Union
- the **principle of subsidiarity and proportionality** in the exercise of the Union's powers
- the **principle of the primacy** of Community law.

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The Union's powers: the inadequacy of the distinction between exclusive, shared and complementary powers

There is **no provision in the Treaties for homogeneous categories of European Union powers**. On the contrary, each legal base establishes a specific system of power, and these systems may vary enormously even when similar policies or actions are involved. Such divergences do not, however, depend on systematic criteria. A distinction is sometimes made between the Union's **exclusive** powers, the powers **shared** between the Union and the Member States, and the Union powers which are **complementary** to those of the Member States².

Under this categorisation, when the Union is given exclusive power in any area, the result is that the Member States can no longer intervene even if the Union has not taken action. Action by the Member States in these areas is possible only subject to empowerment or (re-)delegation by the Union. By contrast, when the Union has a power which is shared (or “concurrent” to use the German constitutional terminology) with the Member States, the latter can take action in this area provided the Union has taken no action, and the Member States are prevented from exercising this power only if the Union has taken action. Lastly, complementary power means the situation in which the rules of the Union and those of the Member States can coexist without Union action depriving the Member States of their capacity to act, particularly on the legislative front.

Although the provision in the Treaty concerning subsidiarity (Article 5 EC) uses the notion of “exclusive power”³, the Treaties do not specify the areas for which the Union has exclusive power. **There is no undisputed list of areas of power exclusive to the**

² See, for instance, Convention Secretariat note CONV 47/02 on the delimitation of powers between the European Union and the Member States.

³ To indicate the areas in which the principle of subsidiarity is not applicable, which is logical in that the Member States cannot take action in these areas.

Union. According to the case law of the European Court of Justice areas of exclusive power include external trade relations and the protection of marine biological resources⁴. Irrespective of this case law, it can be considered that the European Union has exclusive power also with regard to monetary policy within the euro zone and for regulating the customs union. There are, however, very few areas of exclusive power⁵.

Furthermore, the power is exclusive only with regard to adopting the basic legislation: the intervention of the national authorities remains necessary at least to ensure actual implementation of the instruments adopted (the customs administration services, for instance, are national).

For the two other categories - shared powers and complementary powers - this is a distinction which in practice is sometimes **neither very easy to make nor very useful** inasmuch as the wide range of situations involved cannot always be appropriately classified using these somewhat theoretical categories. Another point is that these categories are not always accepted and that there are other classifications⁶.

In actual fact, in the **vast majority of cases**, the European Union and the Member States **can and often must act together**, inasmuch as the effective implementation of any given policy requires input from all levels of authority, be it European, national, regional or local. However, this interaction varies considerably. Sometimes the scale of European

⁴ European Community action in other cases, e.g. international negotiations in areas in which the Community has established internal rules for implementing a common policy stipulated by the treaty or for complete harmonisation of national legislation, has also been qualified as exclusive by the Court of Justice. In such instances, this is not an exclusive original power but an example of national power being pre-empted by the Community's exercise of a shared power.

⁵ See note CONV 47/02 mentioned above.

⁶ The European Parliament resolution on the division of powers between the European Union and the Member States (Lamassoure report) also includes areas in which the Union intervenes only on a complementary basis in the shared powers category.

Union action is extremely large and leaves but little margin for national initiative (e.g. legislation which applies uniformly in all Member States); sometimes this scale is much smaller (e.g. action for non-compulsory coordination of national policies). Moreover, similar variability can also be seen within a given field, e.g. for the transport policy where the Community has adopted, as a function of requirements, uniform provisions (e.g. with regard to coastal shipping), provisions for minimum harmonisation of national legislation (e.g. on safety conditions and controls) or basic financial support (e.g. for innovation).

The main point of seeking clarification is to provide the general public in Europe with an answer to the leading question "**who does what ?**" and get every level of authority to be accountable for what it does. To place this or that policy in the category of shared powers or complementary powers does not answer in itself this question every time, as the action the Union takes as part of that policy may differ considerably from one case to another.

Reality thus shows that **clarification** cannot be achieved just on the basis of the **distinction between exclusive, shared and complementary powers**. In most areas both the Union and, in respect of the principle of the primacy of Community law, the Member States can take action and the nature and arrangements for interaction are extremely variable.

Clarification of powers on the basis of the scale of Union involvement

Another approach is therefore needed in order to better reflect the unique nature of the European Union and in particular its powers to act.

There are two specific aspects of the European Union's general system which nonetheless need to be noted as they do have some influence on the matter of the division of powers.

Provisions in the Treaties which have a direct effect — Firstly, there are the provisions written into the Treaties and which, without necessarily allocating specific

powers to act to the European Union, nevertheless circumscribe and limit the powers of the Member States, which are obliged to respect them in the exercise of their powers to act, even in areas which fall within their exclusive sphere of responsibility. These provisions - e.g. those mentioned above in connection with the prohibition of discrimination or the freedom of movement in the internal market - are similar to the **fundamental provisions included in a text having a constitutional value**; they are rules which confer very substantial rights on citizens and companies and constitute the very foundation of the European Union.

Monitoring — Secondly, it has to be borne in mind that on the one hand, the European Union has the powers needed to ensure respect of the principles and rules imposed by the Treaties and by the instruments of secondary legislation, through action by the Commission, as the guardian of the Treaties, and by the Court of Justice, the institution which guarantees the integrity of the Community legal order. On the other, more specific and incisive powers are allocated by primary or secondary legislation to the Commission in certain areas (particularly with regard to competition, anti-dumping action, customs matters).

It is accordingly proposed to establish a **classification of Union powers as a function of the scale of the action**. The scale of Union action is measured by reference to the limits this action sets on the feasibility of national action being taken in the same field.

A classification of this kind in the Treaty would make it possible, when deemed necessary, to **define for certain areas the scale of European Union involvement. This would not, however, mean that every action in these areas has to reach the maximum level**. Exercise of powers in the area in question can reflect needs and respect the principles of subsidiarity and proportionality through less “intensive” measures and even without Community measures. For each specific case, the Union's institutions must give reasons for the scale of involvement opted for. The scope for action by the national (regional and local) authorities should in each instance be inversely proportional to that of the Union.

Depending on their scale, the following types of European Union action can be defined:

A) Legislative action — This type of action stems from the fact that the European Union has the power to issue legislative provisions which govern relations between the Union and its Member States or its international partners, but also in some cases relations with and between private parties. This category breaks down into **four sub-categories**:

- *uniform regulation*, i.e. provisions which apply directly and uniformly in all the Member States (e.g. the common customs tariff; Community intellectual and industrial property rights; agricultural market organisation);
- *harmonisation*, i.e. provisions which establish the essential principles and rules at European level, which must be incorporated and specified in national legislation by the competent authorities (e.g. the completion of the internal market for many goods and services, telecommunications, company law); harmonisation is partial when it regulates only certain aspects of a given area; it is optional when the Member States are free to comply;
- *minimum harmonisation*, i.e. provisions which establish the minimum reference legal framework, which must also be transposed into the national legal systems; the Member States are free to issue or maintain more stringent provisions (e.g. health and safety at work; protection of the economic interests of consumers; protection of water and the air);
- *mutual recognition*⁷ and “*interconnection*” of the national legal systems, i.e. the provisions which,

⁷ It should be noted that mutual recognition is also one of the principles of the smooth operation of the internal market, whereby every Member state must, apart from certain exceptions which are justified, allow goods and services produced in another Member State to move freely on its territory, even in the absence of specific Community legislation.

without requiring amendments to national legislation, nevertheless put in place legal provisions which oblige the national authorities and systems to interact and take due account of situations regulated in conformity with the laws of the other Member States (e.g. mutual recognition of qualifications; social security of migrant workers).

In addition to the adoption of legislative measures, European Union action may also include, where necessary and provided it is covered by explicit legal provisions, the adoption of implementation measures in respect of legislative instruments.

B) Non-legislative action — This type of action stems from the fact that the European Union has the power to adopt measures to achieve convergence or consistency in, or at least support, the policies of the Member States in relation to common objectives, although such measures are not designed to govern legal relations with and between private parties. In principle, only the Member States have the legislative power for the matters in question when the Union uses this type of action, **except in cases where it is necessary to adopt legislative provisions at the Community level** (see point A above). This category also breaks down into **four sub-categories**:

- *joint action*, i.e. instruments of a policy or executive nature implemented directly by the institutions of the European Union (e.g. police missions in the Balkans);
- *compulsory coordination of national policies*, i.e. instruments which impose upon the Member States the obligation to take action to attain the objectives set or which call upon them to respect commitments (e.g. the broad economic policy guidelines);
- *financial support programmes*, i.e. instruments setting out the conditions and the procedures for granting Community funding, the categories of beneficiaries, the conditions and arrangements for monitoring expenditure and lastly the arrangements for administrative management of this funding (e.g. the Structural Funds, programmes relating to education or health);
- *non-binding coordination of national policies*, i.e. instruments, such as recommendations, which seek

merely to promote a joint effort by the Member States to attain common objectives through initiatives and campaigns which are not in any way compulsory (e.g. the fight against social exclusion).

Clarification of the exercise of powers between the Union and the Member States will accordingly be achieved by **incorporating into the Treaties definitions of the various scales for action**, the **possibility to specify the extent of European action desirable for certain areas**, and the **obligation to give the reasons in each case** for opting for a given course of action.

Clarifying the distribution of powers in this way can be used to mirror the current situation in the Treaties. It is a method which will also **make it possible to examine whether the Treaties make adequate provision for the action powers needed in respect of all policies**; this examination could make more intensive Union action possible in certain areas and in others reduce the scope for Union involvement.

Article 308 EC

It has in some quarters been asked that **Article 308 EC** be deleted. This is the article which currently allows the Community to take appropriate action when it appears necessary in order to achieve one of the Community's objectives even if the Treaty has made no provision for the powers required to do so.

It is worth pointing out in this connection that this provision cannot be used as a basis for creating new powers for the Union, but only to exercise implicit powers⁸. Furthermore, action adopted on the basis of this article has not to date given rise to contestation before the courts alleging breach of the division of powers between the Union and its Member

⁸ Opinion 2/94 of the Court of Justice of 28 March 1996 concerning accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms

States. On the contrary, in many instances, the use of this legal basis has received all-round approval as it has enabled the initiatives deemed to be necessary to be implemented⁹. Article 308 EC is therefore an instrument of flexibility which allows the system to function while still complying with the principle of the powers allocated to the Union. Its deletion would generate such major disadvantages in terms of inflexibility and the risk of no action being taken that Article 308 EC has to be maintained. This does not, however, rule out examination of the procedure for its implementation, particularly in order to incorporate codecision with the European Parliament when legislative measures have to be adopted.

In actual fact, Article 308 EC has been comparatively little used of late, and this trend could grow if the powers of action needed to attain certain general objectives written into the Treaties were made explicit in the new legal bases, particularly as regards policies and initiatives taken by the Union which, as in the case of energy, are currently based on Article 308 EC.

Lastly, it should be stressed that, while prior to the amendments brought by the Maastricht and Amsterdam Treaties, this provision was used as the legal basis for Union actions in areas where the latter went no further than to supplement or support Member States' initiatives (areas of **complementary** powers), **this is no longer the case today**. Henceforth powers of action are explicitly allocated to the Union in respect of these areas through specific legal bases. Moreover, these powers of action are often accompanied by further restrictions : e.g. specific Treaty provisions are frequently do not permit measures to harmonise national legislation. On the other hand, the Union institutions currently use Article 308 EC to take action in areas which have a bearing on the organisation of the

⁹ Before the Single European Act came into force, for instance, environmental protection initiatives, and, more recently, programmes of financial support for the countries of central and eastern Europe, and energy-related actions.

common market, i.e. in areas which lie at the heart of Union action and which are normally covered by the powers shared with the Member States¹⁰

It is proposed that:

- the scope of the **provisions of the treaties which have direct effect** and of the Union's **monitoring action be specified**;
- **a typology of the scales for action** the Union can undertake be **defined** in the Treaties;
- this typology be **based on the distinction between legislative action, non-legislative action** and the arrangements they involve;
- **this typology** be applied when necessary to **mirror the current situation in the treaties or to make changes to the current situation**;
- it be made compulsory to **give reasons in every specific case** for the course of action chosen;
- **Article 308 EC be maintained, but its use decreased** by setting out explicitly in the new legal bases the powers of action and the arrangements necessary to implement the initiatives the Union currently pursues via this provision.

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Monitoring the exercise of powers - compliance with the principles of subsidiarity and proportionality

¹⁰ A note drafted by the Portuguese Presidency at the IGC of 2000 (the conference which paved the way for the Nice Treaty) explains that this provision is the essential basis for initiatives relating to the creation of agencies; to economic, financial and technical cooperation with third countries; and to the energy sector (note CONFER 4711/00).

When a course of action can be pursued more efficiently at the national level or goes beyond what is needed to attain the common objectives, it must not be undertaken at the Community level. Since it is not possible to arrive at a hard-and-fast division of powers between the European level and the national level, **specific monitoring procedures must be introduced in order to ensure compliance with the principles of subsidiarity and proportionality** in the exercise of these powers.

The decision on the need for and the scale of action by the European Union is subordinated to appreciation of an essentially political nature. There are no precise parameters allowing a hard-and-fast framework for such a decision. The dividing line for the exercise of powers between the Union and the Member States cannot be determined in an abstract and rigid way, but requires **appreciation on a case-by-case basis**, applying the principles of subsidiarity and proportionality. The Protocol on the application of these principles, attached to the Treaty of Amsterdam, recognises this expressly and stresses the **dynamic nature of the concept of subsidiarity**.

If, as is proposed in this document, it is opted not to go for a rigid distribution of the powers between the Union and the Member States, but to safeguard the momentum of European integration by referring to the scale of Union involvement, then the **arrangements concerning respect of the distribution of powers, and particularly respect of the principles of subsidiarity and proportionality, need to be strengthened**.

This matter is not covered in this note, but will be addressed by the Working Group on “Subsidiarity” and the Working Group on “National Parliaments”.