

Working Group V

Working document 5

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

**Subject :**     **Option paper: Highlighting the Limits of EU Competence**  
                  -     **paper by Mr Henning Christophersen**

Members of Working Group V will find hereafter a paper by Mr Henning Christophersen, Chairman.

**Mr. Henning Christophersen:**  
**Option-paper: Highlighting the Limits of EU Competence**

**Introduction**

It is a fundamental principle of EU law that the EU can only act within the limits of the powers conferred upon it by the Treaties. Likewise the principle of subsidiarity is a fundamental Union principle. The desire for clarification of EU competence vis-à-vis Member States' competence in a way likely to be understood by the citizens may raise the question, whether the essence of these principles might be better understood if expressed also partly by way of referring to the rights and competences remaining with the Member States. Ultimately the success of a new Treaty depends a great deal on the ability of the citizens to understand its content. We should therefore be prepared to consider every possible avenue leading to texts understandable to the citizens.

However, such an approach should in no way lead to the erroneous conclusion that competences are granted to the Member States by the Treaties, nor should it lead to a lack of necessary Union flexibility.

**Possible avenues to be explored**

The models presented below are not necessarily to be seen as mutually exclusive. Solutions drawing on combinations of the various models can be made.

*(1) The Community Model*

An objectively correct and legally applicable model for negative delimitation of competence (and protecting Member States' rights) could be to make a clearer delimitation of EU competence by going through the Treaties paragraph by paragraph, sector policy by sector policy and specifying where needed the Member States' rights and powers to be protected.

The major parts of the present negative delimitation of competence are specifically connected with sector policies and to that extent the "Community Model" is a simple expansion of the current negative delimitations. This model will be legally impeccable, but can hardly be said to be simple or easily understandable to the citizens. Systematising the negative definitions of competence in a limited number of categories might to a certain extent alleviate this weakness.

Alternatively, the "Community Model" could be focused on certain important national competences' delimitation vis-à-vis Union competence.

*(2) The Union model*

The "Union model" takes as its points of departure art. 6, par. 3 of the Treaty on European Union according to which, the Union "shall respect the national identities of its Member States". One might consider expanding this paragraph by adding language to the effect that the national identity of the Member States includes the constitutional and political structure of the Member States, including regional and local subdivisions, administration and enforcement where not exceptionally otherwise provided in the Treaties, State/church relations, policy with regard to distribution of income and maintaining or improving social welfare benefits, the sole right to impose personal taxes, etc.

The model has the advantage of being at the same time:

- Already rooted in the Treaty and therefore well known
- Easy to expand to focus on the issues which are relevant to citizens
- Flexible.

### *(3) The Constitutional Model*

Another option could be to include new provisions on the protection of Member States' competences in the introductory part of the Treaty. This approach would include:

- I. An explicit formulation of the principle that competences not transferred to the Union remains with the Member States.
- II. Language that explains in a non-exhaustive manner the most relevant remaining areas of national competence, such as the constitutional and political structure of the Member States, including regional and local subdivisions, administration and enforcement where not exceptionally otherwise provided in the Treaties, State/church relations, policy with regard to distribution of income and maintaining or improving social welfare benefits, the sole right to impose personal taxes, etc.
- III. Possibly one or more clauses dealing with the delimitation of the Union's functional competence vis-à-vis the Member States' reserved areas.

As stated in the introduction it would be important to make sure that such examples of Member States' competence do not give the wrongful impression that Member States derive their competence from the EU.

### *(4) The political model*

One can imagine a political model in two different versions:

- I. The concept outlined under the "Constitutional Model" - but in a political language - could be adopted in the form of a political declaration, thus highlighting the citizens' sensitivities without amending the Treaties. This model has the advantage of being rather uncomplicated.
- II. An alternative version could be a Charter of Member States' Rights. A Charter of Member States' Rights would - like the Charter of Fundamental Rights - be a political document (a solemn declaration) but aimed at clarifying for the citizens the scope of national competence.

Like the Charter of Fundamental Rights, the Charter of Member States' Rights could be drafted in a clear and easy language followed by some general articles and explanatory comments providing the necessary precision. The two charters could be seen as complementing each other in representing the rights of the two components of the Union: The citizens and the Member States.