

Working Group V

Working document 7

Working group V «Complementary Competencies »

Subject : **Note from the European Commission on "The European Union's complementary powers: scope and limits"**



EUROPEAN COMMISSION

Brussels, 5 July 2002

V - 2

THE EUROPEAN UNION'S COMPLEMENTARY POWERS:

SCOPE AND LIMITS

The notes drafted by the Convention Secretariat (CONV 47/02 and CONV 75/02) stress that when the European Union is given complementary powers, there are clear limits to the action it can take. Indeed, in such cases the European Union intervenes only to complement, support and coordinate action by the Member States and the latter retain primary responsibility for adopting and implementing the relevant policies and legislation.

The Commission wholeheartedly shares this description of complementary powers. Nevertheless, in the debates in the Convention and particularly outside that framework, there has been criticism of the exercise of these powers by the Union. Specifically, the point has been made that in certain cases the Union allegedly adopts measures going beyond the powers allocated to it and that consequently the powers of the Member States are surreptitiously being eroded. This has prompted a call to further limit these powers and in some instances to “return” them to the Member States.

Most of this criticism stems from misunderstandings and even from poor understanding of the way in which the Union actually exercises its powers and the way in which this affects Member States' capacity for action.

The point of this note is to give a few tangible examples and clarify this matter.

* *

The exercise of complementary powers: the example of education

With regard to complementary powers, the treaties explicitly allocate to the Union powers of action through provisions which constitute the legal bases for its action. These provisions set out accurately the areas and objectives of Community intervention, the procedures to be followed, the conditions and the restrictions for exercising these powers. Frequently, moreover, these same provisions oblige the Union's institutions to take account of requirements peculiar to the areas in question when they implement powers they hold by virtue of other provisions in the treaties, in order to avoid jeopardising these requirements through their action in other areas of intervention¹.

In practice, the implementation of the Union's complementary powers essentially gives rise to initiatives of financial support and/or non-binding coordination to consolidate and complement national policies.

For instance, Article 149 EC, introduced by the Maastricht Treaty, gives the Union powers in the area of **education**. This article stipulates that the Community must fully respect the responsibility of the Member States for the content of education and the organisation of their education systems as well as their cultural and linguistic diversity. The Community's action goes no further than to encourage cooperation between Member States and, where necessary, to support and complement the action they take.

Accordingly, the Union can adopt recommendations and undertake actions of encouragement, **but harmonisation of the legislative or regulatory provisions of the Member States is ruled out completely.**

Since this provision came into force, the Union has adopted several initiatives on education. Essentially there are three types of activity:

¹ An example is Article 151(4) EC which stipulates that "*The Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and promote the diversity of its cultures*", and Article 152(1) EC which states that "*A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities*". See also the considerations made on the subject of Union action in the area of culture in report No 249 –2001/2002- of the French Senate of 19 February 2002.

- conclusions of the Council and recommendations of the European Parliament and the Council, i.e. acts which have no binding effect and simply encourage the competent national authorities to coordinate the action they undertake²
- financial support programmes in respect of student mobility initiatives or initiatives to promote language study³
- agreements with third countries to involve them in the financial support programmes mentioned above or to organise cooperation in the area in question⁴.

Thus, at the institutional level, Article 149 EC provides a considered framework for Community action. This action is designed to achieve the added value which only the Union can bring particularly with regard to student and vocational mobility, cooperation between education and training establishments and the fostering of exchanges.

² See, for instance, the Council conclusions of 20 December 1996 on the effectiveness of schooling: principles and strategies for promoting success at school. Conclusions of the Council of 20 December 1996 on a strategy for lifelong learning. Conclusions of the Council of 16 December 1997 on the evaluation of the quality of school education. Recommendation of the European Parliament and the Council of 12 February 2001 on European cooperation on the evaluation of the quality of school education. Recommendation of the European Parliament and the Council of 10 July 2001 on mobility within the Community of students, persons in training, volunteers, teachers and trainers.

³ See, for example, Decisions 819/95/EC of 14 March 1995, 576/98/EC of 23 February 1998 and 253/2000/EC of 24 January 2000, of the European Parliament and of the Council, on the Community programme Socrates; Decisions 818/95/EC of 14 March 1995 and 1031/2000/EC of 13 April 2000, of the European Parliament and of the Council, on action programmes in the field of youth; Decision 1934/2000/EC of 17 July 2000, of the European Parliament and the Council establishing the European year of languages 2001.

⁴ See, for example, the agreements with all the candidate countries to enable them to participate in the Community programmes in the area of education; the agreements with Canada and the USA on a programme of cooperation in the area of higher education.

In practice, this action has complied with the requirements of subsidiarity and proportionality while making a contribution which is very much appreciated by the beneficiaries and by public opinion in general.

The Erasmus programme of university student mobility is a good illustration of this.

Indeed, it is under this programme that the academic year 2002-2003 will see the **one millionth student benefit from mobility as part of his/her university studies**. The

Union will thus have made an active contribution, in a way it alone can do, to the training of a young generation of university students endowed with a level of European knowledge and experience which was hitherto uncommon. Initiatives like this will be all the more precious in an enlarged Europe. Could the European Convention, which in July 2002 welcome the Youth Convention, endorse a position which would result in such eminently citizen-focused initiatives being abandoned?

Another example comes in the form of the initiatives taken in the wake of the conclusions of the Lisbon European Council in March 2000 and which set the strategic objective of making Europe the world's most competitive knowledge-based economy by 2010. It was with this in mind that the new open method of coordination was drawn up. It is a method which is particularly well suited to an area such as education in which proceeding by legislative means would have been inappropriate.

European Union action in the area of education on the basis of Article 149 EC shows that even in areas subject to a high level of subsidiarity European value added can be generated, particularly in order to support and complement national policies by initiatives of coordination and financial support.

Summing up, **European Union action in education is both necessary and proportionate**, and the means at its disposal are appropriate. **This action does not impinge upon the fundamental powers in this area which continue to remain with the Member States.**

* *

**The alleged erosion of Member States' powers through the exercise of other powers:
the example of the internal market**

European Union action in the area of the internal market

The establishment of the internal market is a fundamental task of the Community or, more precisely, a mission within the meaning of Article 2 EC.

In order to achieve this, it must:

- either give preference to the **direct application of the EC Treaty** for the respect of the fundamental freedoms of the internal market (e.g. freedom of circulation of goods, Article 28 EC; freedom to provide services, Article 49 EC). In this event, the principle of mutual recognition of equivalent national legislation is normally used (this principle leaves the specific nature of national legislation intact);
- or **harmonise national legislation** (e.g. by adopting legislative instruments based on Article 95 EC) when this equivalence is non-existent or insufficient and thus throws up major and intolerable obstacles to the freedom of circulation of goods, services, capital or people.

With regard to harmonisation, **the scale of legislative action** in application of the principle of proportionality **varies according to the nature of the obstacles**. More often than not it involves:

- either **vertical harmonisation** of the rules applicable to the marketing of specific goods or services (e.g. the directives on financial services). This option leaves less margin for specific national features;
- or **horizontal harmonisation** limited to common problems in a given sector (e.g. the directives on the labelling of foodstuffs, on the general system of recognition of qualifications, on e-commerce). In this instance, the Member States retain the possibility of regulating, while respecting the general principles of the Treaty, the other areas not specifically covered by the harmonisation directives (e.g. composition of products).

The impact of internal market rules in areas covered by complementary powers

The sources of obstacles to the fundamental freedoms of the internal market vary and do not stem only from **national legislation designed principally to regulate trade**.

By way of example, such obstacles can originate in the inability to gain access to a regulated profession (e.g. doctor, nurse) in a given Member State because the regulations of this State make no provision for the recognition of equivalent qualifications issued by other Member States. Another example is the inability to market in a given Member State foodstuffs produced in another Member State because the destination country, possibly out of a legitimate concern to protect public health, unilaterally establishes the list of the additives which it is permissible to use.

In such situations, the European Union has to intervene from the point of view of the internal market in sectors which, in the Member States, are covered by “**non-commercial**” areas of power (e.g. the powers of the ministry of education or public health). Without such intervention, the fundamental freedoms of the internal market would be **devoid of their substance**. In other words, the Community action in question has a transversal nature and may have an impact in the most diverse areas — and even areas for which the Union has been allocated only complementary powers — provided that obstacles inhibiting the internal market freedoms are identified. Moreover, some of these actions are *per se* multidisciplinary as is clearly shown by the example of the directive on e-commerce which covers simultaneously trade relations and contract law, as well as the areas of culture, education, health and any other topic liable to feature on the Internet⁵.

It should be stressed that while it does interfere with the Member States’ capacity to act in areas covered by the Union’s complementary powers, the Community action in question has nothing to do with the exercise of its complementary powers. The main and dominating purpose of such action — its “centre of gravity”, to use an expression common in the case law of the Court of Justice with regard to compliance with the legal

⁵ On this subject, see the very interesting contribution to the Convention from Mrs de Palacio, note CONV 56/02.

bases of the Treaty⁶ — concerns the establishment of the internal market and not education or public health policies.

To return to the examples of obstacles mentioned above, the directives on the recognition of qualifications are certainly not designed to harmonise national policies on education and study programmes, but to remove obstacles to the freedom of movement within the European market for the holders of these qualifications. Similarly, the directives on food products or the application of the treaty rules designed to allow mutual recognition of national legislation are not designed to harmonise the public health policies of the Member States — which remain free to define them as they think appropriate — but purely to remove obstacles to the achievement of a genuine internal market for these products. The reasoning is the same for any other Community action undertaken for the purposes of the operation of the internal market which may have an impact in areas covered by complementary powers: for instance, the so-called Television Without Frontiers directive essentially goes no further than to provide for rules to identify national supervisory authorities and on certain restrictions and conditions governing services in order to guarantee a genuine internal market for television broadcasting services, and does not directly affect national media policies.

The safeguards provided by the Treaty

The EC Treaty does not give a blank cheque for Union intervention when it comes to ensuring the fundamental freedoms within the single market. It provides for several **safeguards**.

- *The exceptions provided for in the Treaty* - In the first instance, in the non-harmonised context, certain exceptions are provided for directly by the Treaty (e.g. Article 30 EC, with regard to the movement of goods, and Article 46 EC with regard to the freedom of establishment and to provide services). These provisions

⁶ See the Titanium dioxide judgment of 11 June 1991, Case C-300/89, and the judgment on the Programme to promote linguistic diversity, of 23 February 1999, Case C-42/97.

stipulate that Member States retain the possibility of maintaining restrictions to trade for reasons of public order, public safety, health protection or other imperative reasons of a general interest. Thus, with regard to the protection of public health, the case law of the Court of Justice enables the Member States to demand a **higher level of protection** and thus prevent access into their territory of products or services which fail to meet this level. The Member States also remain in control of the organisation of their **national health and social security systems** in full respect of the Treaty⁷.

- *The general principles inherent in the system of Union powers* - These are principles of allocation of powers, subsidiarity and proportionality, enshrined in Article 5 EC and subsequently made explicit in a Protocol to the Amsterdam Treaty, providing a framework for all Community action and restricting it to what is necessary to attain the objectives set in the Treaties.
- *The specific conditions for the implementation of Article 95 EC* – Community action to establish the single market under Article 95 EC is subject to **specific conditions**: the legislative instrument must **effectively** be designed to improve the conditions of establishment and functioning of the single market, and the competitive distortions the legislative instrument seeks to eliminate must be **significant**. These conditions were clarified by the judgment relating to "tobacco advertising"⁸ which annulled a directive on the banning of tobacco advertising precisely because these conditions were not satisfactorily fulfilled. This judgment proves that the safeguards against any disproportionate Community action not only exist but are effective.
- *The ban on harmonisation in certain areas* – The EC Treaty contains certain provisions (e.g. Article 149 on education, Article 150 on vocational training, Article 151 on culture, Article 152 on human health protection) which prohibit any Community initiative to harmonise national legislation. This prohibition naturally

⁷ See Article 152 EC and the Kohll and Decker judgments of the Court of Justice, of 28 April 1998, i.e. cases C-158/96 and C-120/95 respectively.

⁸ Judgment of 5 October 2000, case C-379/98.

targets actions whose main and dominating purpose (the "centre of gravity") relates to the areas in question.

- *The consideration of other policies in the internal market rules:* Article 95(3) EC places an obligation upon the Commission and encourages the European Parliament and the Council to use as a basis **a high level of protection** with regard to health, safety, the environment and consumers, thus preventing **Community steps being taken which might lower the standards provided for in national legislation**. Moreover, as has already been stated, certain provisions in the Treaty place an obligation on the Union's institutions to take into account the requirements peculiar to these specific areas in the exercise of any other power (e.g. Article 151 EC on culture and Article 152 EC on public health).

Conclusion

In view of the foregoing, it may be concluded that:

- Community action may in certain cases produce an impact on the legislative powers of the Member States in areas which are covered by complementary powers;
- this impact is in particular the result of Community action to establish and preserve the fundamental freedoms of the single market, which is one of the Union's core tasks;
- consequently, the existence of this impact does not justify the request to further limit the Union's complementary powers in as much as the exercise of these powers has no direct bearing on this impact;
- be that as it may, this impact is indirect on national legislative powers and does not directly affect the power of Member States to organise their own policies in the areas in question and implement relevant legislation, since the purpose and effect of Community action is merely to eliminate obstacles to the full exercise of the fundamental freedoms of the single market;
- it is not therefore accurate to state that Community action erodes national legislative power. Rather, the Member States must exercise these latter powers in accordance with the objectives of the single market which they have joined;
- any limit on Community action for the purposes of the single market and in particular any obstacle to the flexibility of intervention conferred by Article 95 EC would call into question one of the Union's core tasks;

- the powers of action the Union has in this area must therefore be protected particularly as the powers involved are not unlimited given that appropriate and effective safeguards already exist (once again the "tobacco advertising" judgment is given as an example);
- in future, the implementation of the package of measures adopted by the Commission to improve the quality of legislation⁹ will make it possible to further reduce the impact in question. This package envisages on the one hand more systematic external consultation prior to the submission of Commission proposals, and on the other the in-depth analysis of the impact of these proposals and therefore of the justification for any action taken at the Community level. These are clearly measures which give more guarantees of better consideration of the requirements of subsidiarity and proportionality in the future. In particular, the prior impact analysis will make it possible to better appreciate whether there is a case for putting forward an initiative at the Community level and, if so, on what scale.

⁹ See the four communications published on 5 June 2002 (COM (2002) 275-278).