

Working Group V

Working document 14

Working group V « Complementary Competencies »

Subject: - Note by Mr David Heathcoat-Amory, member of the Convention
" Complementary Competences – The Way Forward"

Members of Working Group V will find hereafter a note by Mr David Heathcoat-Amory, representative of the UK Parliament, member of the Convention.

Complementary Competences – The Way Forward

Members of the Convention have frequently complained that the EU structure, operation and language is too complex for the ordinary member of the public to understand.

In our working group we can help remedy this. Our aim must be clarity and certainty. We should also use plain language. As a start, we should drop references to ‘competences’ and talk instead of ‘powers’.

Powers should fall into one of three categories. First, those which are *exclusive* to the EU. Second, *shared* powers. Third, *Member states’* powers, where the EU only acts (if at all) in a liaising role. This classification closely follows Peter Altmaier’s paper ¹.

His ‘principle of allocated powers’ is also wise in that the EU has no competence other than explicitly conferred upon it by treaty. This is similar to the 10th amendment to the US constitution. A key issue for the working group is the relation between ‘functional’ and ‘sectoral’ powers, referred to in paragraph 12 of Peter Altmaier’s paper. If we are to achieve a certain distribution of powers, legally certain and understandable by the public, then we must abandon the use of functional powers. Such powers are by their very nature open ended. Defining powers by reference to desirable objectives may be convenient to the legislator but it creates uncertainty and contributes to the widespread view that more and more powers are being accumulated at the centre despite apparent checks written into the treaties.

In this context the ‘ever closer union’ article (A of the TEU) is unhelpful in that it gives only a vague sense of direction and is legally significant without being at all certain in its application.

But the problems go much further than that. A number of treaty articles appear to give precise definition to policy areas in which the EU has only a supporting role (complementary competences). But these articles are then either not used at all, or are circumvented by the use of other treaty powers. Key instances of this include article 157, where Industrial Policy has been overridden for Single Market reasons; article 135, on Customs cooperation, which has never been used (95 has been instead, despite objections from Governments); and article 164, on research and development, which could in time as a Complementary Competence be diluted through Community participation under TEC 169.

¹ Working Document 9 of WG V

Another example is the ECJ decision in which the court granted health care rights by reference to a single market in services. This effectively overrode the carefully defined limits to EU health policy in article 152 and the political agreement reached by the Council as to availability of health care to citizens of EU member states.

A further case which stirred considerable controversy in the UK was the use by the Commission of article 118a (old numbering) covering health and safety, to enact the Working Time Directive. This ensured that Qualified Majority Voting applied, rather than the unanimity required if another treaty basis had been used.

Patently, such a conflict between articles needs to be resolved. This can best be achieved by establishing primacy of non-Single Market articles over Single Market articles, and primacy too over functional aims.

Perhaps the core problem is the widespread use of articles 94 and 95. Up to June 2002, 9 pieces of legislation had been enacted under article 94 and 73 items under article 95, not counting those enacted under article 308. Many of these legislative items are highly contentious and have certainly expanded EU activity into areas of great concern to national parliaments and the public. Here are some examples:

- Regulation (EC) 178/2002, laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety
- Regulation (EC) 2560/2001, on cross-border payments in Euro
- Directive 2001/101/EC, on the labelling, presentation and advertising of foodstuffs
- Directive 2001/97/EC, on prevention of the use of the financial system for the purpose of money laundering
- Directive 2001/95/EC, on general product safety
- Directive 2001/84/EC, on the resale right for the benefit of the author of an original work of art [“droit de suite”]

- Directive 2001/29/EC, on the harmonisation of certain aspects of copyright and related rights in the information society
- Directive 2001/18/EC, on the deliberate release of genetically-modified organisms and repealing Council Directive 90/220/EEC
- Council Decision 2001/87/EC, on the signing, on behalf of the European Community, of the United Nations Convention against transnational organised crime and its Protocols on combating trafficking in persons, especially women and children, and the smuggling of migrants by land, air and sea
- Directive 2000/84/EC, on summer-time arrangements
- Directive 2000/36/EC, relating to cocoa and chocolate products intended for human consumption [the “Milk Tray Directive”]
- Directive 2000/25/EC, on action to be taken against the emission of gaseous and particulate pollutants by engines intended to power agricultural or forestry tractors
- Directive 2000/14/EC, on the approximation of the laws of the Member States relating to the noise emission in the environment by equipment for use outdoors
- Directive 2000/13/EC, on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs
- Directive 1999/103/EC, on the approximation of the laws of the Member States relating to units of measurement
- Directive 1999/93/EC, on a Community framework for electronic signatures
- Council Regulation 332/2002, establishing a facility providing a medium-term financial assistance for Member States’ balances of payments
- Council Regulation 6/20002, on Community designs
- Council Regulation 2580/2001, on specific restrictive measures directed against certain persons and entities with a view to combating terrorism

- Council Regulation 2157/2001, on the Statute for a European Company (SE)
- Council regulation 1725/2001, concerning action against anti-personnel landmines in third countries other than developing countries
- Council regulation 1386/2001, amending Council Regulations (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community
- Council Regulation 1339/2001, amending the effects of Regulation (EC) No 1338/2001 laying down measures necessary for the protection of the Euro against counterfeiting to those Member States which have not adopted the Euro as their single currency
- Council Directive 2001/86/EC, supplementing the Statute for a European company with regard to the involvement of employees
- Council Decision 2001/924/EC, extending the effects of the Decision establishing an exchange, assistance and training programme for the protection of the Euro against counterfeiting (“Pericles” programme) to the Member States which have not adopted the Euro as their single currency
- Council Decision 2001/792/EC, establishing a Community mechanism to facilitate reinforced cooperation in civil protection assistance interventions
- Council Decision 2001/549/EC, providing macro-financial assistance to the Federal Republic of Yugoslavia
- Council Regulation (EC) No 2667/2000, on the European Agency for Reconstruction
- Council Regulation (EC) No 2220/2000, amending Regulation (EEC) No 302/93 on the establishment of a European Monitoring Centre for Drugs and Drug Addiction
- Council Regulation (EC) No 2040/2000, on budgetary discipline
- Council Decision 2000/460/EC, amending Decision 1999/311/EC adopting the third phase of the trans-European cooperation scheme for higher education (TEMPUS III) (2000-2006)

- Council Regulation (EC) No 1267/1999, establishing an Instrument for Structural Policies for Pre-accession
- Council Regulation (EC, Euratom) No 1149/1999, amending Regulation (EC, Euratom) No 2728/94 establishing a Guarantee Fund for external actions
- Council Decision 1999/847/EC, establishing a Community action programme in the field of civil protection
- Incorporation of elements of the Schengen acquis

Many of these EU actions and laws would not be anticipated by reading the treaties. The use of articles 94, 95 and 308 go far beyond the requirements of a single market. These articles are used to justify almost any action because so many goods, services or people can cross national frontiers and therefore in some sense are market related. But their widespread use undermines the confidence that people should have in the clarity, certainty and precision of the treaties as signed by governments and ratified by parliaments.

If the EU requires a flexibility clause to deal with an unexpected crisis or unforeseen development, this should be specific for the purpose. Under it the Council could agree unanimously to create powers for the passage of legislation to deal with such a crisis. The Canadian constitution has a 'Notwithstanding Clause' which allows provinces to legislate in similar circumstances and requires annual renewal. The EU clause could similarly require the legislation to lapse after one year unless exceptionally renewed.

In summary, this paper argues for the following:

1. We need a simple, jargon-free definition of EU and member states' powers. Prejudicial directives such as 'ever-closer union' should be removed.
2. These powers must be defined by action and not by objective.
3. The treaty must make clear that clauses defining the extent and limit of powers have supremacy over single market or other functional aims
4. Articles 94, 95 and 308 should be dropped and we must learn to rely on powers properly and fully defined. A flexibility clause for use in dealing with unexpected developments may be appropriate, with safeguards.