

Working Group V

Working document 20

Working group V « Complementary Competencies »

Subject : **Note by Mr Peter Altmaier**
"The Division of Competencies between the Union and the Member States"
(revised version)

Members of the Working Group V will find hereafter a paper by Mr Peter Altmaier, Alternate Member of the Convention.

THE DIVISION OF COMPETENCIES BETWEEN **THE UNION AND THE MEMBER STATES**

- INTRODUCTORY-NOTE - **(Revised version)**

By Peter Altmaier, Member of the German Bundestag, Alternate Member of the
Convention

As agreed upon in the previous meeting WP V, I submit a revised version of my document on the method of competence-division. It is based on the oral contributions in the meeting and the written proposals presented by several members of the group.

The present note consists of two parts:

- Part I explains the structure and the content of the proposed competence-order.
- Part II provides a revised – an still preliminary – draft for a new competence-title in the constitutional treaty.

The note aims to reflect the consensus in the meeting as well as personal views of the author.

Part I: Reflections on structure and content

1. The creation of a new title in the constitutional treaty

In the last meeting of WG V, the idea of creating, in the forthcoming constitutional treaty, a new and comprehensive chapter on competencies (i.e. their content and their exercise) has been largely welcomed. Such a chapter will have the advantage of systematizing, clarifying and simplifying the competence-order of the Union.

There are, however, different views on what kind of provisions should be dealt with by this chapter and with regard to the content of the provisions concerned. For example, Mr. Ponzano has suggested to deal with the instruments for action (regulation, directive etc.) in a different chapter of the treaty. A final decision will depend on the general structure of the constitutional treaty and the results of the work of the WG's concerned. For the time being, I would prefer to present to the Presidium a rather complete draft.

Given the fact that I drafted the note in English (which is not my mother-tongue), it deserves close examination and revision by linguistic experts. For example, Mr. Heathcoat-Armory would prefer to talk about „powers“ instead of „competencies“.

2. The political statement (chapter 1)

In order to give citizens a clear picture on „who is responsible for what“, the order of competencies must be short and should be described in a simple and easily understandable language. This excludes lengthy provisions on conditions, modalities, instruments, methods and intensity of action at this stage.

The first chapter of the competence-title should therefore be drafted as a political statement for the citizens, indicating in a nutshell what the competencies of the Union are. This chapter would replace the rather complicated and confusing Article 3 of the EC-Treaty.

Given its nature as a political statement, this chapter can in no way serve as a legal basis for EU action (neither does Article 3 EC-Treaty). This is clarified by Article 4 which explicitly refers to the relevant provisions of chapters 2 and 3.

The content of the proposed chapter is inspired by the Report Lamassoure and the different categories of competencies developed by this report. It is far from being a competence-catalogue (neither positive nor negative): Instead, the already existing policy-areas and matters (listed in Article 3 and the relevant provisions of the Treaties) are summarized and categorized. It follows from the principle of allocated powers that all areas and matters not explicitly mentioned shall lie with the Member States.

It would exceed the present mandate of WG V, to fill in the different competence-categories with concrete matters and policies. My proposal is therefore confined to some examples. However, we should try to fill in the chapter on „complementary competencies“ and then

ask the Presidium for further authorization to also deal with the chapters on „the competencies of the Union“ and „the shared competencies“.

3. The general principles on the exercise of competencies (chapter 2)

In chapter 2 of the proposed new title on competencies, I have tried to formulate general principles applying to all competencies of the Union (except if otherwise provided: see Article 17).

This will allow us, to draft chapter 3 of this title – which will provide the legal basis for EU-action in the different fields – in a much shorter way. Chapter 2 „explains“ the functioning of the competence-order and provides binding guidelines for the EU-legislator and the Court of Justice. For this purpose, I have listed principles already mentioned in the existing Treaties (sometimes modified) and added new ones, as discussed in WP V.

4. The principle of allocated powers (Art. 5)

There was a large consensus that all competencies of the Union are derived from the Member States. This is made clear in the headline of the competence-title itself as well as in Article 5 by use of the words „competencies conferred upon the Union“. The proposed wording of this article also implies that all other competencies remain with the Member States.

Inspired by a proposal made by Mr. Farnleitner, I have added an assumption for Member States competence in case of doubt (wording has to be considered); this could be a certain guideline for the ECJ when interpreting the scope of specific articles..

5. The definition of the competence-categories (Art. 6)

There are different views on whether a legal definition of the different competence-categories should (and could) be given or not. On the one hand, such definitions are difficult to be found, given the great diversity of the matters allocated to the categories concerned (esp. in the field of „shared competencies“). On the other hand, without such a definition, the attribution of competencies to different categories would be of a purely political nature and completely useless in legal terms.

I therefore suggest to define the competence-categories as follows:

- The competencies of the Union:

Following the Report Lamassoure, I have disregarded the notion of „exclusive competencies“ because of the very restricted number of matters concerned. In some cases, it is also heavily disputed whether a certain competence is of an exclusive nature (e.g. internal market). This and similar conflicts can be avoided by using the larger notion of „competencies of the Union“. The Report Lamassoure prefers „the Union’s own competencies“ but this could provoke the misunderstanding that these competences are genuine EU-competencies (not conferred upon it by the Treaty).

This category shall comprise all policy-areas and matters belonging completely or primarily to the responsibility of the Union. The Member States have no power to act except if explicitly authorized by the EU to do so.

As regards instruments and methods of EU-action, the whole scale of intervention shall be available, except if otherwise provided by the special provisions of chapter 3 (for example, in some cases, EU-action can be restricted to directives and minimum-harmonization).

It goes without saying, that the general principles (subsidiarity, proportionality etc.) listed in chapter 2 shall apply to all categories of competencies.

- The shared competencies of the Union and the Member States:

Following the debate in the last meeting, I decided to drop the notion of „common competencies“ (which I had suggested in my note) and to use the notion of „shared competencies“ instead. It is also used by the Report Lamassoure and has become a quite familiar notion for those involved in the Convention's debates.

This category shall comprise all policy-areas and matters where both the Union and the Member States enjoy substantive responsibilities (either in a horizontal or in a vertical division). In principle, both the EU and the Member States take action in these fields, according to the specific provisions laid down in chapter 3. According to the matter/policy concerned, EU-action can be confined to framework-directives, minimum-harmonization etc..

- The complementary competencies of the Union in areas of Member State's competence:

The third category should cover areas belonging primarily to the responsibility and competence of the Member State's. The Union's competence shall be restricted to purely complementary measures dealing with rather marginal aspects; as a rule, legal-harmonization would be explicitly excluded, the Union's action would be confined to promotion, coordination and exchange, except if otherwise provided by the special provisions of chapter 3.

It has been suggested to use the term „complementary measures“ instead of „complementary competencies“ to make clear that this category relates to areas of Member State's competence. This seems to be politically logic but legally problematic.

6. The principle of subsidiarity (Art. 7)

There is an overwhelming agreement that the principle of subsidiarity shall be the fundamental principle for EU-action. There are however different views on its concrete place, scope and wording.

At present, the principle of subsidiarity is dealt with by Article 5 EC-Treaty (Part I, Principles). Given the fact that it refers to the action of the Union, it should be moved to the Title on competencies and action.

So far, the various contributions of members of WG V have not yet dealt with the scope and wording of this principle. I therefore maintain the idea of making it to a general principle applying to all types of competencies and action of the EU with regard to both the Member States and the private sector.

7. The principle of proportionality (Art. 8)

In order to underline its importance, I suggest to provide a separate article for the principle of proportionality (so far listed in Article 5 par. 3). The principle deals with the question „how“ EU-action should be taken and implies that the lowest adequate scale of intervention (both with regard to methods and instruments) shall be chosen for all kinds of EU-action.

8. The relation between „functional“ and „sectorial“ competencies:

The „Competition-clause“ (Art. 9)

Mr. Ponzanos written contribution highlights the delicate relationship between the „functional“ competencies of the Union (e.g. internal market, fundamental freedoms, competition etc.) and the „sectorial“ competencies (e.g. environment).

On the one hand, there is widespread concern that an excessive use of functional competences for secondary legislation could overthrow the well-balanced competence-order in the field of sectorial policies. On the other hand, it must be avoided that functional competencies become „worthless“ by restricting their scope on matters outside the sectorial competencies. The proposed „Priority-clause“ is therefore no longer upheld.

A solution to the problem could perhaps be found by a two-folded approach:

- The scope of some „functional“ competencies should be revised, clarified and – if necessary – restricted. This applies esp. to the provisions on the internal market: They are of core-importance for the Union, but given the enormous achievements in this field in past, their future scope could be limited to action which is concerned „primarily and directly“ with the establishment, the completion or the functioning of the internal market. One could also require that a „distortion of the conditions of competition“ shall be a pre-condition for further action on grounds of Articles 94 and 95 of the EC-Treaty.
- A „Competition-clause“ could be inserted in Chapter 2 of the competence-title. This clause would stipulate that action on grounds of functional competencies can only be taken, if the „center of gravity“ of the proposed action clearly falls within the scope of the functional competence concerned (and not within the scope of specific sectorial competencies).

9. The hierarchy of instruments and norms (Art. 10)

Several proposals are aiming at establishing a hierarchy of instruments and norms for EU-action. This relates to the question what kind of instruments (regulations, directives, framework-directives, recommendations etc.) should be available for action in specific fields of competence. The answer to that question almost entirely depends on the outcome of the work of the new WG on „Simplification“. At this stage, it is however important to reserve – in chapter 2 of the competence-title - an article dealing with this question.

10. The principle of the primacy of Community-law (Art. 11)

This principal has been developped by the Court of Justice and is one of the core-principles of Community-law. There was a broad consensus that this principle should be explicitly mentioned in a forthcoming constitutional treaty, as suggested by the Commission's note.

Given the fact that the principle does not only apply with regard to „secondary legislation“ (as dealt with by the new Title on competencies) but also with regard to the relationship between EU-primary-law and national laws, it shouldt be given a prominet place in the introductory part of the forthcoming constitutional treaty. This would however exceed the mandate of WG V. For the time beeing, I therefore suggest to deal with this principle in Article 11 of the competence-title.

11. The hierarchy of methods and scale of intervention (Art. 12)

It is the merit of the Commission's proposal that it clearly explains the insuf-ficiency of a mere definition of competence-categories. A better delimitation of competencies can only be achieved if clear criteria will be established by the constitutional treaty on what methods and what scale of intervention are available for specific policy-fields and matters attributed to the different categories.

Inspired by the proposals of the Commission and the various oral and written contributions, I have tried to legally define the different methods in a short and comprehensive way in the proposed Article 12.

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12. Instruments and methods must be justified (Art. 13)

It follows from the principle of proportionality, that whenever EU-action is taken, the lowest possible adequate level of intervention should be chosen both with regard to instruments and matters. Compliance with this provision can be much better controlled (by the involved institutions, by the citizens and by the ECJ) when reasons are given for the concrete choice of methods and instruments for every single EU-act. It is eminent to insert this obligation into chapter 2 of the competence-title in order to underline it's political and legal importance.

13. The principle of national implementation and execution (Art. 14)

As a rule, the implementation and execution of EU-action (legislation, pro-gramms etc.) shall be a matter for the Member States if not otherwise provided by the constitutional treaty. Of course, the principle of homogenous application of EU-law requires monitoring-righths and capacities for the EU-Commision in some areas. These shouldt be dealt with in seperate articles.

14. The Flexibility-clause (Art. 15)

There have been proposals to delete Article 308 if a satisfactory delimitation of competencies can be found. So far, a majority in the convention wants to preserve that article in order to allow some degree of flexibility for the future.

In this case, the article should be reformed to make clear that it provides not a independent „competence-competence“ but only allows to deal with specific aspects with regard to existing competencies (expanded „effet utile“). This should be better reflected in it's wording and also by inserting it into the article on the exercise of competencies and not in the final provisions of the constitutional treaty.

The question whether Article 308 should also allow a retransfer of competencies (no longer needed) from the Union to the Member States deserves further examination with regard to some constitutional problems (Member States as Masters of the Treaties)¹.

There would be no constitutional problem to allow that legal acts adopted by unanimity could be removed by qualified majority.

18. The „Christopherson-clause“ (Art. 16)

The proposal from Mr. Christophersen, to expand art. 6 par. 3 EU-Treaty (the Union shall respect the national identities of its Member States; Union Model) would have as effect an additional safeguard for the Member States with regard to the side-effects, the exercise of „functional powers“ could have on their internal structures and national competencies.

Such a clause would not automatically mean that functional powers would have no effect at all in the listed areas, but could limit or even exclude some „negative“ effects of EU-action in these fields. The EU-legislator would have to take it into account when preparing and adopting legislation, the ECJ would consider if a contested measure (or its effects) would be in line with the requirements of the „Christopherson-clause“.

To this effect, it seems to be appropriate, to move Art. 6 par. 3 EU-Treaty to the new competence-title in order to clarify that it has not just political but also legal importance.

I suggest to restrict the content of the clause to national identities, constitutional and political structures (including regional and local self-government) and the legal status of churches and religious bodies (Declaration no 11 of the Amsterdam-IGC)

¹ See in particular p.9 of Mr. Farnleitner's document

20. The specific provisions on the exercise of competencies (Chapter 3)

As mentioned before, it is important that the competence-order of the EU be enshrined in the main-part of the forthcoming constitutional treaty (instead of moving it to the protocols or even to secondary legislation, as has been sometimes proposed).

Given the fact, that the forthcoming constitutional treaty must be short and understandable, it is unavoidable, to redraft the existing articles on functional and sectorial powers in order to delete superfluous and unconstitutional parts of it (see for example the provisions of Title XVII of the EV-Treaty). The extended number of general rules in chapter 2 will allow to confine the specific provisions to the absolutely necessary minimum. If – as suggested – complementary competencies are defined as areas where any kind of harmonisation is excluded, it will no longer be necessary to repeat this statement with regard to every single matter concerned. Only in exceptional cases, when the use of competencies should be more or less restrictive, this will be explicitly mentioned. WG V should try to demonstrate this in the field of complementary competences.

Subsequently, by art.3 the different policy-fields and matters indicated in article 1 will be complemented by special references to their scope (e.g. if it should be more restrictive), to the norms and instruments (which are allowed or forbidden) and the methods and the scale of intervention. This would also be the right place to act according to the „Community Model“ proposed by Mr. Christopherson (definition of protected interests of the Member States in the field of EU-competence).

Chapter 3 provides the legal basis for EU-action in the different fields of EU-competence. It will be structured according to the developed system of 3 different competence-categories.

Part II: Revised scheme of competence-rules

Title X²

The competencies conferred upon the Union

Chapter 1

The competencies

Article 1

The competencies of the Union

The competencies of the Union shall include:

- *The common foreign, security and defense policy*
- *International relations in fields of EU-competence*
- *The common trade policy*
- *The internal market*
- *The customs' Union*
- *Competition ...*

² The numbers of the following Titles and articles will depend on their position in the forthcoming constitutional treaty.

Article 2

The shared competencies

The shared competencies of the Union and the Member States shall include:

- *The protection of the environment*
- *Transport*
- *Social policy ...*

Article 3

The complementary competencies

The complementary competencies of the Union in areas of Member States' competence shall include:

- *Education*
- *Culture*
- *Research*
- *Industrial policy*
- *Labour market ...*

Article 4

The competences referred to by articles 1 to 3 shall be exercised solely on the grounds, within the limits and according to the modalities laid down in the provisions of Chapter 2 and 3.

Chapter 2

General principles on the exercise of competencies

Article 5

Principle of allocated powers

The Union shall have the competencies conferred upon it by this Treaty. Assumption is made that competencies not explicitly conferred upon the Union shall lie with the Member States.

Article 6

Categories of competencies

1. The competencies of the Union:
2. The shared competencies:
3. The complementary competencies:

Article 7

Principle of subsidiarity

The Union shall take action only if and insofar as the objectives of the proposed action cannot be sufficiently achieved otherwise and by reason of the scale or effects of the proposed action, be better achieved by the Union.

Article 8

Principle of proportionality

Any action by the Union shall not go beyond what is necessary to achieve the objectives of this Treaty.

Article 9

Competition clause

Article 10

Hierarchie of instruments and norms

(Art. 249 EC-Treaty. Wording depends on the outcome for the WG on simplification)

Article 11

Principle of primacy of EU-law

The laws of the Union shall prevail above the laws of the Member States.

Article 12

Hierarchy of methods and scale of intervention

In order to carry out the tasks and competencies conferred upon it by the provisions of this Title, the Union shall dispose of the following methods of intervention:

Regulation allows the Union to regulate matters directly and uniformly;
Harmonization allows the Union to establish common standards or minimum-standards of binding character; in the latter case, the Member States can issue or maintain more stringent standards in accordance with the provisions of this Treaty;

Mutual recognition obliges the Member States to mutually recognize other Member States legal standards or acts of administration;

Legal coordination allows the Union to legislate cross-border aspects in areas of Member States' competencies, respecting the autonomy of the national legislation concerned;

Joint action allows the Union ...³ ;

Promotion allows the Union to offer non-binding incentive measures including financial support programmes;

Coordination allows the Union to organize the exchange of information, experience and the evaluation of best practises (bench-marking) within the scope of ist competencies (also OCM?);

Execution allows the Union to execute ist own legislation by applying ist own administrative rules;

Monitoring allows the Union to evaluate, supervise and control the execution of EU-laws by the Member States', respecting the autonomy of the Member States' legal order.

Article 13

Obligation to give reasons

Any proposal for EU-action must indicate and motivate the legal basis, the need for action and the choice of methods and instruments.

³ Suggested by the Commission with regard to mission e.g. in the Balkans; has to be defined.

Article 14

Principle of national implementation and execution

If not otherwise provided by the provisions of this treaty, any action taken by the Union on grounds of the provisions of this Title shall be implemented, executed and applied by the Member States.

Article 15

Flexibility-clause

If action by the Community should prove necessary to attain, in the course of the operation of the internal market, one of the objectives of the Union and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

Article 16

Christopherson-clause

When exercising its competencies, the Union shall respect the national identities of the Member States, their constitutional and political structures including regional and local self-government and the legal status of churches and religious bodies.

Article 17

The above mentioned principles shall apply to every action of the Union, compulsory or non-compulsory, in conformity with the specific provisions laid down in Chapter 3.

Chapter 3

Special provisions on the exercise of competencies

At this place, the already existing Treaty-articles where competencies are attributed with regard to different policy-areas and –matters, will be re-examined and – if necessary - completed by the allocation of specific instruments and methods of intervention as referred to in the provisions of chapter 2.
