

Brussels, 29 October 2002

CONV 377/02**CONTRIB 130**

from	Secretariat
to	The Convention
Subject :	Contribution by Ms. Lena Hjelm-Wallen, member and Lord Tomlinson, alternate member of the Convention: - "Competences"

The Secretary-General of the Convention has received the contribution annexed hereto from Ms. Lena Hjelm-Wallen, member and Lord Tomlinson, alternate member of the Convention.

CONV 377/02

COMPETENCES:

JOINT PAPER BY JOHN TOMLINSON AND LENA HJELM-WALLEN

Introduction

1. We strongly welcome the excellent work that Henning Christophersen has done on this subject and the contributions from others in particular Peter Altmaier and the Commission. This paper represents our comments on the group's draft report.
2. A key objective of the Convention is to explain to our citizens more clearly the nature of the European Union. Many are unclear about the division of competences between the Union and the Member States. This gives rise to unjustified fears of a drift of power to the centre with no adequate democratic oversight.
3. In truth, the Treaties do contain provisions which set out where the Union has competences. But they are unsystematic and scattered throughout the Treaties. And the different levels of competence that the Union can exercise – exclusive, shared, limited to supporting national action – are nowhere clearly explained: they emerge from the wording of individual policy chapters and the case law of the Court of Justice.
4. This is unsatisfactory. A new constitutional Treaty should set out clearly the principles underlying the division of competences, the scope of the Union's competences, and explain the different ways in which the Union can exercise these competences.
5. But, in doing so, we should not lose the flexibility which has enabled the Union to respond swiftly to changing needs and circumstances; nor should we constrain the operation of the horizontal principles in the Treaty in particular those which underpin the development of the single market.

Principles

6. It is important that citizens understand the constitutional basis on which the Union exercises its powers. The constitutional Treaty should therefore contain the following principles:

the principle of conferred powers: that the Union shall have only those powers which are given to it in the Treaty. Otherwise powers remain with Member States;

the principle of subsidiarity: as in the current Treaty, but strengthened, to make clear that the Union needs to be able to demonstrate that the objective of any proposed action cannot be sufficiently achieved by the Member States acting separately;

the principle of proportionality: that the Union shall exercise its powers to encroach as little as possible on the powers of Member States consistent with achieving the objective of the action, and shall not go beyond what is necessary to achieve the objectives of this Treaty.

the principle of diversity: the Christophersen clause requesting the Union to respect the national identities of the Member States. This might also refer to cultural and linguistic diversity and national traditions, but we do not think it should be complicated by other issues eg constitutional and political structures, legal status of Churches.

7. We agree that there should be a “statement of reasons” attached to Commission proposals to confirm conformity with these principles.

Scope

8. We believe that the range of policy areas in which the Union is currently empowered to act is about right. In some areas we would like to see the Union’s capacity to act strengthened (eg CFSP and Justice and Home Affairs); in others, it will make sense to clarify that there are limits on the nature of Union action (see complementary competences below).

9. The range of policy areas in which the Union can act should be set out in the constitutional Treaty. This should be based on the existing Article 3 TEC, incorporating JHA and CFSP. But it should be re-ordered in accordance with the level of competence exercised by the Union. The description of the Union’s action in each area should be clarified. In particular, the description relating to areas of complementary competence should be standardised as “a contribution to”

Different levels of competence

10. It is important that citizens understand that a list of this kind does not mean there is a monolithic approach to Union action. The Union can and does act in different ways in different areas depending on the powers it is given in the Treaty, and the need for action.

Complementary competence/Assisting measures

11. We agree that it makes sense to clarify that – in certain existing Treaty areas – the Union can only act to support national action. The Treaty should explicitly establish a category to cover these and list the relevant policy areas. The treaty should make clear that in this area:

- (a) action by the Union should be limited to supporting, encouraging and co-ordinating action taken by the Member States;
- (b) the Union may not act to harmonise or approximate the laws of Member States;
- (c) the Member States therefore retain full freedom of action.

12. We do not believe that only non-binding instruments should be available in these areas. There will be occasions, for example, when a legal decision providing a budget support programme will be useful. But we agree with the draft report that it would make sense to exclude the use of those legal instruments essentially designed to harmonise or approximate, ie regulations and directives, except where explicitly authorised in the relevant policy chapter.

13. We believe complementary competence should include the following areas in accordance with the relevant chapters in the existing Treaty: economic policy (current Articles 98/104: certain aspects), employment (Articles 125-30), education, vocational training and youth (Articles 149-50), culture (Article 151), public health (Article 152: with some specific exceptions), trans-European networks ((Articles 154-6: with some specific exceptions), development policy (Articles 177-181), industry (Article 157), and research and technological development (Articles 163-173).

14. We agree with the draft report that the term “complementary competence” does not explain clearly to people what is envisaged here, and that “assisting measures” would be better.

Exclusive competence

15. It would equally be helpful to define and list the areas where the Union exercises exclusive competence. The Treaty should make clear that in these areas the Member States may only act if authorised to do so by a Union measure. The list should cover: monetary policy (for those Member States who have joined the single currency), the common commercial policy and fisheries conservation. The Union should be able to use any of the instruments set out in the Treaty.

Shared competence

16. We do not see a need to list the areas of shared competence since they are, by definition, all those Treaty areas which are neither exclusive nor complementary/assisting.

17. However it would be helpful to explain what shared competence means as follows:

- (a) the Union may act in these areas, within the limits set out in the relevant policy chapter;
- (b) Member States must respect the obligations imposed on them by any Union measures, but can otherwise act freely;
- (c) the Union should be able to use any of the instruments set out in the Treaty, consistent with the objective of the proposed measure and with the principle of proportionality.

Flexibility

18. There are a number of general Articles which enable the Union to act more widely than set out in specific policy chapters to support the broad objectives of the Treaty. We support the flexibility these Articles provide, but agree that we need to restrict access to genuinely deserving situations. We have the following proposals.

“Centre of Gravity”

19. Other articles in the Treaty must not be used to avoid the limits set on action in the complementary/assisting areas, except in clearly understood and justified circumstances. So, for instance, the Union should only act beyond the limits set in the complementary/assisting areas by using a single market legal base if the measure genuinely has as its objective the improvement of the conditions for the establishment and functioning of the internal market and in fact pursues those objectives.

20. We are also interested in Giuliano Amato’s ideas that the Treaty should better reflect the fact that future single market measures should focus on where there are demonstrable distortions of the market rather than harmonisation for its own sake. We would be interested to see further work on this.

Article 308

21. The rule for Article 308 must remain unanimity. Any mechanism to monitor subsidiarity, agreed elsewhere in the Convention, might be given a special role. We should make clearer (to reflect existing practice) that Article 308 can be linked to any objective or policy explicitly set out in the introductory part of the Treaty, not simply the common market.

Conclusion

22. The above proposals are not designed radically to alter the scope or exercise of the Union’s competences. The current arrangements work well for the most part, but they are not transparent. Improving their transparency should be the key objective of the Convention in this area.
