Organizing a Federal Structure for Europe

VAKAT

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An EU Catalogue of Competencies

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I Introduction

The persistent political practice of simply continuing to pursue the familiar logic of integration, with deepening integration on the one hand and enlarging the Union on the other, has reached its functional limits. The ongoing expansion of supranational regulatory powers to cover more and more policy areas and the classical responsibilities of sovereign nation-states has made a decisive contribution to the growing heterogeneity of interests in the European multilevel system. As a reaction to this process of ongoing centralization and beyond the formal inclusion of the representatives of Member State governments, a growing number of political and social actors have expressed a desire to participate actively in the European decision-making system. This tendency manifests itself in slogans such as 'Europe of the Regions' or 'Europe of the Citizens'. Parallel to this process of the ongoing vertical differentiation and increasing complexity of European policymaking in material and institutional terms resulting from deepening integration, the European Union is confronted with the challenges of enlargement towards Eastern Europe. This will probably come about by the middle of the next decade. On the basis of the Presidency Conclusions of the Luxemburg summit (12–13 December 1997), six months after the end of the Intergovernmental Conference concerning the amendment of the Maastricht Treaty in Amsterdam (16–17 June 1997), and of the European Council in Helsinki (10–11 December 1999), concrete negotiations commenced with ten Central and Eastern European accession candidates, and with Cyprus and Malta. Furthermore, Turkey officially received the status of an EU accession candidate. In horizontal terms this not only makes it seem likely that there will be a significant increase in the number of Member States to 28 or more. It also seems likely that as a result of the accession of the Central and Eastern European Countries (CEEC) with their transforming political systems and economies there will be far greater conflicts and clashes of inter-

est between old and new Member States. These developments call for fundamental institutional and structural reform in order to ensure the European Union's ability to function and gain public approval. Only thus can the integration process survive its most severe challenge to date at the beginning of the 21st century.

However, it will not be sufficient to continue with the old model of amending the Treaties in a stepwise manner by convening a succession of intergovernmental conferences. Since Maastricht the current amendment procedure has had to be used at ever shorter intervals because the negotiations between the governments of the Member States have on each occasion produced results only in areas in which the pressure of the decision-making backlog no longer made it possible to procrastinate. The limitations of this kind of procedure are especially obvious in the case of the current Intergovernmental Conference (IGC) 2000. By the end of the year it is supposed to catch up with institutional reforms which, as absolutely essential prerequisites for the Union's ability to cope with enlargement, had originally been on the agenda of the negotiations for the Amsterdam Treaty. Since the fifteen Member States failed to reach agreement at this stage, the so-called institutional "leftovers" of Amsterdam now have to be dealt with separately in the current IGC. Preserving the capacity to act and make decisions is certainly, in an enlarged EU, to a large extent dependent on whether the negotiations on these "leftovers", that is, the new regulations on the composition of the Commission, the reweighting of the votes and the extension of the use of qualified majority voting in the Council, can come to a successful conclusion in Nice towards the end of the year. But even if one disregards the progress made so far within the framework of the current Treaty negotiations, which is not particularly encouraging, it is becoming increasingly evident that the restricted agenda of the Intergovernmental Conference is no longer in a position to do justice to the cluster of problems currently facing the European Union.

Like all previous Treaty amendments, the conclusions of the Intergovernmental Conference finally approved by the European Council in Nice in December 2000 will be an expression of the ongoing quest for a balance between the requisite degree of European unity and supranational capacity to take action on the one hand, and securing the largest possible degree of national (and regional) diversity on the other. In fact this permanent search for balance based on the principle of subsidiarity constitutes the quintessential aspect of the federal idea. After the Maastricht ratification crisis and as a result of the fact that the challenge of enlargement assumed concrete shape (this already had a very significant effect on the negotiations for the Amsterdam Treaty), the project of a European federal state, synonymous with the "United States of Europe", has been abandoned, at least for the time being. Until very recently, this was also true for any use of the term "federalism" as a structural guideline for building the future European Union on the basis of the principle of subsidiarity. However, in May 2000 German Foreign Minister Joschka

Fischer explicitly returned to this more general idea of federalism in his speech at Berlin's Humboldt University, in which he mapped out his personal vision of the future of Europe. Fischer rightly pointed out that the public debate on the long-term development of an enlarged European Union after the current Intergovernmental Conference should no longer exclude the question of the final shape of European unification, which he believes will be a "European Federation" based on a "Constituent Treaty". His view of federalism is not at odds with "the self-confident nation-state with its cultural and democratic traditions". Rather, it envisages a "division of sovereignty" between federation and nation-states "with matters which absolutely have to be regulated at European level being the domain of the Federation, whereas everything else would remain the responsibility of the nation-states".

Over and above its specific contents, the fundamental significance of the German Foreign Minister's speech lies in the fact that it takes its bearings from that aspect of the debate about integration policy which, ever since the public approval crisis during the Maastricht ratification debate, has increasingly tended to be overlooked. Whereas the debate at the time of the ratification of the Maastricht Treaty was still largely based on anxiety about excessive centralization and the insufficient democratic legitimation of policymaking on the EU level, the work of the Reflection Group ("Westendorp Group") and the Intergovernmental Conference 1996/97, which laid the groundwork for the Amsterdam Treaty, was primarily determined by the loss of the capacity to act and make decisions – a threat with which European institutions are confronted as a result of the forthcoming enlargement. In accordance with this change in the perception of top priority reforms, the ensuing critical appraisal of the results of the Amsterdam negotiations should also concentrate on the progress that has been made and the deficits in institutional and procedural reform. Thus it is only logical that, in the current Intergovernmental Conference which is preparing the Treaty of Nice, the need to make decision-making more effective on the European level, which is dictated by enlargement, should be in the forefront of the negotiations. This restriction to the institutional dimension almost exclusively underlines the *dynamic quality of the federal principle* in the European Union's multilevel system.

In contrast to this, the German Foreign Minister, with his proposal for a European constitution, has again returned to those reform components which, by means of primary law reorganization, are intended to promote *federalism as a treaty-based structural principle*. The present paper also takes its bearings from this kind of a structural understanding of federalism, and addresses itself to the pressing need for a clearly comprehensible and succinct Constitutional Treaty. The latter should be centred on a transparent set of competencies which will enable EU citizens to assign political responsibility clearly. At the same time it should make the assignment of powers to the subnational, national or

supranational levels dependent primarily on the question of higher-level political problemsolving capacities, instead of, as hitherto, according absolute priority to the compensation of interests in the bargaining processes between the Member States.

Against the background of the growing tension between deeper integration and enlargement, it has become increasingly apparent that the European Union's capacity to meet the challenges of the future can no longer be assured by means of a practice of making incremental Treaty amendments which in fact are merely indecisive reactions to the increasing weight of the problems. On the other hand, the need for action with which the European Union is confronted as a result of the impending enlargement to Central and Eastern Europe may offer one of the last opportunities to carry out a fundamental restructuring of the treaty-based "constitution" of the European multilevel system which does justice to the classical ideal of a federal balance between unity and diversity. For this reason even the current negotiations on the Nice Treaty amendments should not be completely restricted to unresolved institutional and procedural reforms. Federal organizational reform must begin with the European Treaty structures, and provide EU citizens with a European "constitutional document" which they can understand. This proposal centres on simplifying and improving the intelligibility of the European Treaty texts by grouping together central constitutional rules and regulations in a European "Basic Treaty",[1] as well as the incorporation of a Charter of Fundamental Rights in such a future European constitution. In fact important suggestions have been introduced into the negotiations with regard to both of these points. On the one hand a group of experts appointed by the President of the Commission, Prodi, which consisted of Richard von Weizsäcker, Jean-Luc Dehaene, and David Simon, examined the institutional ramifications of enlargement, and, in its report submitted in October 1999, proposed that the Treaties should be divided into two, with a Basic Treaty, and another separate treaty text containing other regulations. In the intervening period, this proposal has led to the compilation of a number of draft Treaties. On the other hand, the European Fundamental Rights Convention, which was established by the European Council in Cologne, presented its proposal for the Charter of Fundamental Rights at the beginning of October 2000. This final draft was adopted at the close of the European Council in Biarritz, and the Charter will be declared in Nice, though it will not initially be incorporated into the EU Treaty.

1 A draft version of such a Basic Treaty has been presented by a working group of the Bertelsmann Group for Policy Research at the Center for Applied Policy Research. It is available in English and German under www.cap.uni-muenchen.de/pub/download.html: Bertelsmann Group for Policy Research, A Fundamental Treaty for the European Union. A Proposal for "Dividing the Treaties Into Two Parts", Munich, 2000. See also Bertelsmann Europe Commission, ed., Paving the Way for EU Completion. What the IGC 2000 needs to do, Gütersloh, 2000.

However, the third and most important requirement of a federal organizational reform of the European Union designed to lead to a European Constitutional Treaty is the introduction of a primary law delimitation of competencies which will (1) facilitate the clear-cut assignment of political responsibilities (transparency and democratic legitimation), (2) take into account in an appropriate manner the capacity to deal with tasks in a satisfactory way on the various systemic levels of the European Union (efficiency and effectiveness), and thus (3) meet with the broad approval of the populations of the Member States (legitimacy). The present study concentrates on developing a model for the treaty-based reorganization of the division of competencies between the European Union and its Member States. With its proposals for restructuring the basic order of the European Treaties, it complements the reform proposals for a federalization of the European multilevel system on a level below that of a federal state, which were developed by the Bertelsmann Group for Policy Research at the Center for Applied Policy Research at the University of Munich acting in conjunction with the Bertelsmann Foundation.[2]

2 See, for example, the reform programme of the "Commission on European Structures" in Werner Weidenfeld (ed.), Europe '96. Reforming the European Union, Gütersloh, 1994; Werner Weidenfeld (ed.), Europa öffnen. Anforderungen an die Erweiterung, Gütersloh, 1997; Claus Giering, "Institutionelle Reformchancen" in Bertelsmann Stiftung and Forschungsgruppe Europa, eds., Kosten, Nutzen und Chancen der Osterweiterung für die Europäische Union, Gütersloh, 1998, pp. 55–68; Josef Janning and Claus Giering, "Strategien gegen die institutionelle Erosion" in Claus Giering, Josef Janning, Wolfgang Merkel, Michael Stabenow, Demokratie und Interessenausgleich in der Europäischen Union, Gütersloh, 1998, pp. 39–79; Bertelsmann Europe Commission, Paving the Way for EU Completion. What the IGC 2000 needs to do, Gütersloh, 2000.

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II A Federal Reform Plan for the Reallocation of Competencies within the EU

As the post-Maastricht ratification debate demonstrated, and subsequently the results of the referendums in Finland and Sweden on the occasion of their accession to the European Union, which were not particularly good, it can no longer be assumed that the dynamic development of competencies facilitated by the European Treaties will be conducive to a further deepening of the integration process. In addition to the fact that it is no longer possible to take for granted that citizens will give tacit approval to a European Union which intrudes upon more and more aspects of daily life in what has become an incomprehensible manner, the course of the integration process, which in the past has pointed in a one-dimensional way towards greater centralization, has provoked growing resistance in a number of Member States. The European Union is obviously in the midst of a period of upheaval in which the federal balance, by continuing to pursue the well-tried logic of integration, has led to too much diversity by insisting on too much unity, a state of affairs which is reflected in the disintegrative tendencies alluded to above.

But at the same time in this critical phase, the European Union is confronted with a number of challenges which, particularly in the controversial areas of redistributional policies and traditional "high politics", suggest that there should be a far-reaching restructuring of the competency system. The accession of the CEEC requires a fundamental reweighting of the aims and functions of the integration process. The creation of economic and social cohesion as an essential feature of the democratic stabilization of these countries and their market economies will be just as important as the new domestic and foreign policy challenges which will result from their accession to the internal market and the associated shift of the European Union's eastern borders. The immediate international context of the enlarged European Union in the Mediterranean area and Southern

and Southeastern Europe will be marked by a high degree of political instability. This will call for more effective foreign and security policy options if the EU is to meet the expectations of the new candidates for accession and perform its function as a stable and stabilizing European power. The effective control of the external borders and of freedom of movement within the internal market, a common policy on immigration, asylum and refugees, and the fight against organized crime are areas which require action on a European level, as does an enhancement of the profile of European fundamental and human rights policy, which will become an acute problem because there is a danger that minority conflicts in the acceding states will spill over into the EU.

Two contrasting developments, the declining approval of and willingness to engage in integration on the one hand, and growing integrational demands on the other, will prove to be irreconcilable and pose a threat for the future of the European Union if the present single-track functional logic of integration continues unchanged. It is already apparent today that the continual increase in the number of Member States of the European Union, their increasingly heterogeneous interests, and the attendant deterioration of the cleavages and conflicts between the Member States have led to a point where the emphatically consensus-oriented nature of European decision-making displays considerable blockade potential. In the past the secret of the success of the integration process was the fact that the respective circle of Member States, but also accession candidates were compensated for their willingness to adopt the whole of the *acquis communautaire* and to expand the range of European tasks by being granted far-reaching participatory rights and considerable preventive powers in the decision-making procedure. It is paradoxical that it is precisely this practice which has contributed to the fact that the number of EU powers has continued to grow. The unchecked increase in the competencies assigned to the European level, which continued in Amsterdam, can be construed to a large extent as an "aggregation" of the increasingly heterogeneous interests of the Member States in the Treaty amendment procedure or in secondary legislation based on Art. 308 TEC-A (Art. 235 TEC-M),[3] both of which envisage unanimous decision-making.

But at the same time in the execution of competencies it has become apparent that the growing number of conflicts (in view of the retention of decision-making rules which were designed for the Community of Six) seriously constrict the European Union's ability to act effectively in those areas in which it in fact possesses a greater problem-solving capacity than the Member States or their subnational divisions. With the impending enlargement to include ten more states in Central and Eastern Europe, and Cyprus and

3 On account of the post-Amsterdam altered numbering of the EU and EC Treaties, references to individual regulations in the two Treaties give the current numbering of the consolidated Amsterdam Treaty (TEU-A, TEC-A) followed by the earlier numbering in the Maastricht Treaty in parentheses (TEU-M, TEC-M).

Malta, the potential for blockade constellations, in the absence of reforms, will once again increase dramatically.

In order to develop a new system of competencies in the European Union, an attempt should be made to reduce the European Union's spectrum of tasks to what is absolutely essential. As a yardstick it might be possible to apply the criteria of higher problem-solving capacity and the sufficient approval of action on the European level in order to defuse potential conflicts between a larger number of Member States and increase their willingness to abandon inefficient decision-making procedures and institutional structures which are primarily designed to serve national interests and not the ability to act of the group as a whole. In addition to relinquishing what continues to be a description of responsibilities in the European "planning constitution" based on tasks and not policy areas, and producing a clear-cut and comprehensible Treaty list of powers assigned to the European level, a reordering of competencies in the Treaties primarily requires the definition of comprehensible criteria which can justify the transfer of responsibilities to the European level. At the same time the competency transfer procedure must make it clear that, despite the precise delimitation of responsibilities, the integration process can still develop in a dynamic manner.

1 How the Treaties currently regulate the way in which competencies are assigned and discharged

The Reflection Group preparing the Intergovernmental Conference 1996/97 already discussed the incorporation into the Treaties of a catalogue of competencies. However, it proved impossible to reach agreement on this proposal, and it disappeared from the agenda of the amendment negotiations at an early stage. Yet the very fact that this subject was discussed within the framework of the preparation of the last IGC tells us that at least some of the Member States would have preferred a fundamentally new system to replace the way in which the Treaties deal with the assignment of competencies instead of the restricted "improvements" to the subsidiarity principle, which finally received assent in Amsterdam in the shape of a primary law document, the "Protocol on the Application of the Principles of Subsidiarity and Proportionality".

However, in the long term, the treaty-based subsidiarity principle in its present form as a regulation that merely deals with competency execution will not be able to ensure that European legislative activities will concentrate on problem-solving and on matters of crucial importance. In the final analysis this also has something to do with the fact that in the Treaties the competency assignment rule of "restricted specific empowerment" does not make sense in its present form.

This principle merely states that the general definitions of tasks and goals in Articles 2, 3 and 4 TEC-A (Art. 2, 3 and 3a TEC-M) do not in themselves empower EU bodies to take action. Rather, the Treaty must confer specific powers upon the Community for this purpose. At first sight the restricted range of the principle of treaty-based specific empowerment seems problematical because the powers authorized by primary law are themselves described in terms of tasks and not, as is the case in federal constitutions, delimited on the basis of policy areas. This is of special importance for the harmonization powers of Art. 94 and 95 TEC-A (Art. 100 and 100a TEC-M), which deal with the establishment and functioning of the internal market and the fundamental freedoms, and for this reason envisage the enactment of secondary legislation designed to approximate the Member States' laws and administrative regulations. Only the fact that the Treaty powers which deal with the harmonization of laws are in the final analysis directed towards the goal of realizing the internal market and the fundamental freedoms has made possible a continual expansion of European secondary legislation to areas such as cultural and media policy, educational and vocational training policy, environmental policy, and social and health policy. On account of its pro-integration rulings (this was clearly apparent in the Casagrande Decision, for example) the European Court of Justice has also contributed to encouraging the wide-ranging initiatives of the Commission designed to complete the internal market.

Even the rather limited degree to which the current specific empowerment principle has in the past been able to counter European legislative activities is further weakened by the "Treaty completion clause" of Art. 308 TEC-A (Art. 235 TEC-M), which represents a kind of general empowerment for Community action if, within the framework of the single market, this is required for the realization of an EC objective and the Treaty does not provide the necessary powers. Even before the powers in question were created in the European Treaties, the Community, on this legal basis, had begun to operate in numerous new areas. For example, Art. 308 TEC-A (Art. 235 TEC-M) continues to be cited in order to justify Community activities in areas such as energy policy, social policy, financial aid to non-EU countries, and economic and cooperation agreements, and often serves as the exclusive basis for EC organizational action which is concerned with the establishment of independent European administrative agencies.

Despite the completion of the internal market programme, the centralizing effect which has emanated from such a definition of powers in the past has certainly not been overcome. In fact, the introduction of the Euro will probably create a great deal of additional need for action on the European level. Furthermore, impending enlargement, the need to revise and implement the Agenda 2000, and the search for a "European Social Model" as an important step towards the completion of political union will lead to increased legislative activity on the European level.

2 A set of criteria for scrutinizing and reorganizing EU responsibilities in a dual catalogue of competencies

The structural model – A dual catalogue of competencies

The development of a federal model for the distribution of powers within the European multilevel system takes its bearings from the *structural concept of a bipolar or dual catalogue of competencies* which was proposed by the "Commission on European Structures" as early as 1994.[4]

The system of competency assignment which is described in this proposal for reform does justice to demands for clear-cut and transparent responsibility delimitation, and also to the need for a simultaneous containment of dynamic centralization in the European multilevel system. For this reason it was used as the basis for the structural model of a federal organization for the European Union.

The Commission model goes beyond the dual listing of responsibilities which belong exclusively to the Member States and the European level by introducing the additional *distinction between primary and partial competencies on both the national and the supranational levels*. The primary competencies define the cases in which the powers of the Member States and the European level are normally exercised in a given policy area, whereas the partial competencies state the exceptions to this rule with regard to the other level. The dual system of a future treaty-based distribution of competencies, which does not simply enumerate the responsibilities of the national and supranational levels, but continues to distinguish between regular and exceptional competencies, initially possesses the advantage that it sheds light on the high degree of linkage between the tasks on the two levels. However, with this structural model it is at the same time of even greater significance that the general precedence of Community law becomes dispensable.

It must be noted that, despite the fact that this dual model of the European competency order is restricted to regulating the relationship between Member States and European level, the regional and local bodies would also have to be sure that it was in conformity with the principle of subsidiarity. Obviously, no reform plan for the primary law reorganization of the distribution of responsibilities can go so far as to enumerate the responsibilities of the subnational level, or merely to contain a general competency assumption in favour of the regions. A three-tier approach of this kind is totally irreconcilable with the decidedly heterogeneous regional structures in the European Union, and would initially presuppose an almost total standardization of regional structures and

4 Weidenfeld (ed.), Europe '96, pp. 18–26.

powers via the national constitutional law of the Member States of the European Union. However, even in the long term this seems a decidedly unrealistic perspective.

Yet the exclusion of the subnational level from explicit competency assignment does not mean that the growing role of the regions as additional actors in the process of European integration, and the significance of decentralization and regionalization processes in many Member States since the middle of the 1970s, should be disregarded in decisions concerning the distribution of competencies.

Rather, in the operationalization of material assignment rules, on the basis of which decisions are made with regard to whether a transfer of competency to the supranational level seems expedient, it is imperative to take into account the question of whether the particular powers under consideration encroach on typical tasks of the regional level.[5] If this is the case, then the application of the appropriate test criterion will lead to conclusions that tend to speak against European and in favour of Member State responsibilities. In this way the retention of autonomous powers of the subnational level based on intrastate constitutional law will be accorded special importance in the material examination of the optimal level for a certain task. However, this already touches on the problem of how to define material test criteria which should be used in order to assign powers to the European or national level.

A test designed to determine the distribution of competencies between the European Union and the Member States

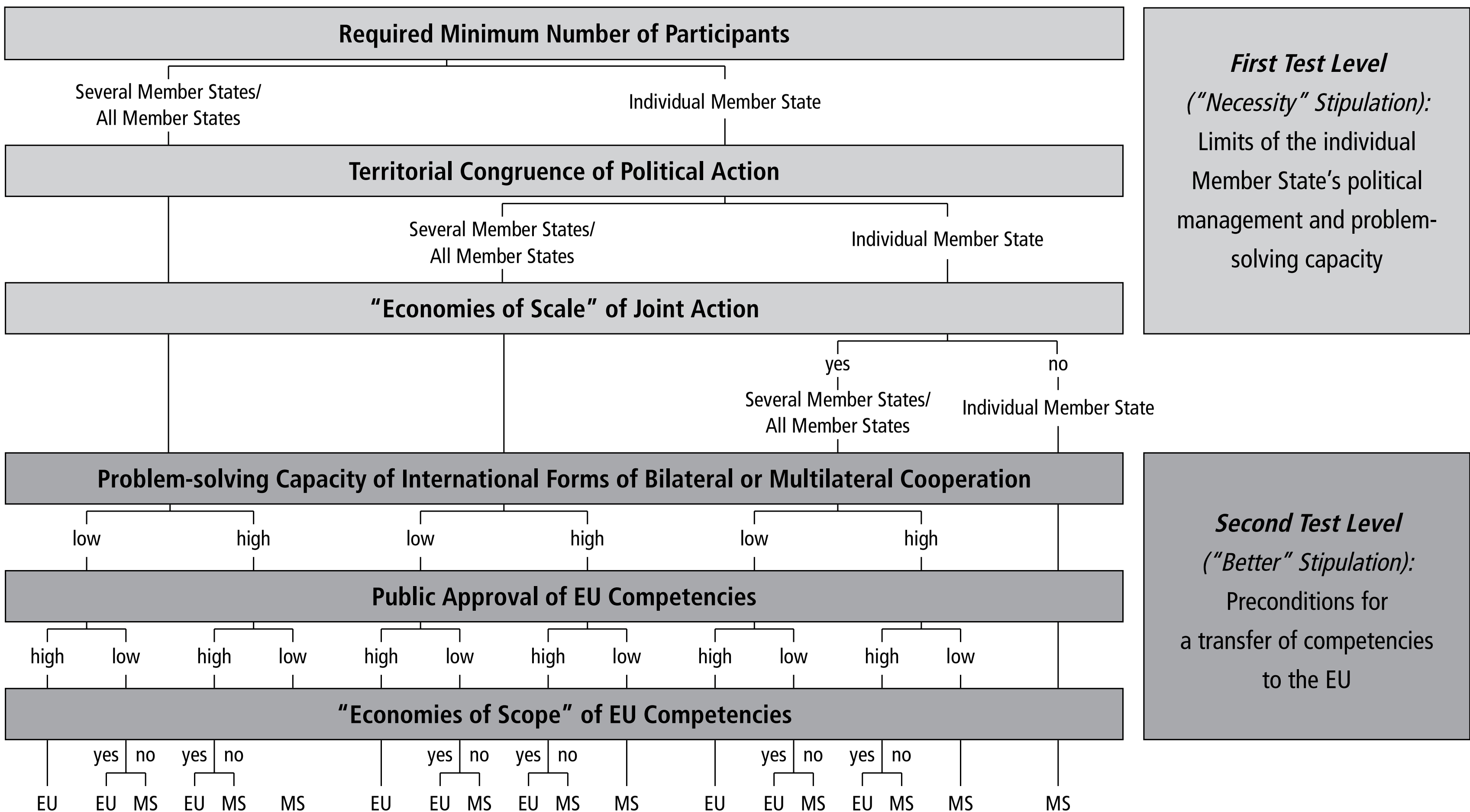
For the *compilation of an appropriate "competency test"* the subsidiarity principle of the Treaties with its "necessity" (insufficient) and "effectiveness" (better) clause has proved to be a satisfactory starting point. However, on the one hand, applying these two stipulations to the test for the transfer of powers to the supranational level implies that the current meaning of the treaty-based subsidiarity rule as a mere "competency execution rule" has to be abandoned. On the other hand, in order to develop this principle into a "distribution of competencies rule", both stipulations had to be redefined and delimited even more clearly from one another than is the case in the new Amsterdam Subsidiarity Protocol.

5 For example, a comparison of the European Parliament's "Community Charter for Regionalization" of 12 December 1988 and the 1995 and 1996 drafts of the State of North Rhine-Westphalia and of the Basque country for the "Charter on Regionalism" of the Assembly of the European Regions shows that tasks in the following areas can be described as typically regional responsibilities: regional economic aid, regional structural policy, development, agriculture and fisheries, infrastructure in the areas of telecommunication and transport, tourism, sport, and leisure activities, culture, schools and education (including vocational and further education), health services, (urban) construction and housing policy, universities and research, landscape and environmental protection, waste and waste water disposal, police and public security.

Hitherto the borderlines between an "insufficient" Member State capability "and thus better" European capacity to implement Treaty objectives have been indistinct. The reasons for this lie in the first instance in the one-sided way in which both criteria target the efficacy of political action, which is construed as the degree of goal attainment which can be achieved by means of political measures on the Member State or European levels. There can be no doubt about the fact that the inability of individual Member States to deal with a specific task, when political action on the EU level is apparently more effective, forms a necessary precondition for the creation of European primary or partial competencies. However, the presence of both aspects can never be treated as a sufficient precondition. The mere fact that the requisite horizontal range of effective political problem-solving transcends national borders, or that joint action on the part of several Member States is more effective or requires less with regard to the cost of efficient political management, does not in itself lead inescapably to the conclusion that the European Union should be given certain powers. Past attempts to spell out more precisely the meaning of the subsidiarity principle were primarily concerned with the problem of when there is an *"insufficient"* capacity for action on the Member State level within an EU responsibility that already clearly existed. The new Subsidiarity Protocol also contains various guidelines designed to clarify this matter. Thus in concrete terms the limits of an individual state's problem-solving capacity are measured on the basis of the presence of transnational features, possible infringements of Treaty provisions or other considerable encroachments on the interests of Member States by measures adopted by individual Member States, or the absence of Community measures. The attempt to operationalize the *"better"* clause is rather more imprecise and restricts itself to the brief statement that "significant advantages" have to be expected if the Community level is to become involved. In doubtful cases EU bodies will always tend to be better at doing what the Treaties require, and the way in which they deal with the task – going by the aims of the Treaties – will also display "significant advantages" when compared to measures adopted by the Member States.

The sweeping pro-EU stance of the current subsidiarity rule is incompatible with any approach which aims to achieve both an effective distribution of responsibilities and a more efficient protection of national (and subnational) autonomy. Nevertheless, the *test* presented below, which aims to facilitate such an *effective and pro-autonomy assignment of tasks* within the European multilevel system, also starts on the first level with a "necessity stipulation" very similar to the one contained in the current wording of the subsidiarity principle. The first test level indicates the limits of the individual Member State's political efficacy, and compliance with it forms a necessary precondition for competency transfers to the European Union (with regard to the following remarks see the scheme on p. 20). However, in this new context the concept of necessity does not

Test to elucidate the distribution of competencies between the EU and its Member States



Abbreviations: **EU** = Primary or partial EU competency **MS** = Primary or partial Member State competency

refer directly to EU action. Rather, it is considerably more wide-ranging than the present "negative clause" of the European Treaties. By means of differentiation and concrete test criteria it will initially serve to clarify the fundamental question of the various ways in which insufficient political capacities in the Member States can become apparent, and thus justify a general need for international cooperation from the viewpoint of the greatest possible political efficacy.

If, on the first test level, there turns out to be a need for bilateral or multilateral cooperation in a policy area or in certain segments of this policy area (primary and partial competencies), then the test of the efficacy of EU competencies commences on the second level with the "better" stipulation. The criteria of this second level are designed to provide some idea of whether Member State cooperation within the supranational framework of the EU structure is to be preferred to other more pro-autonomy and sovereignty-friendly forms of purely international cooperation, or perhaps the retention of Member State (or regional) responsibilities, because the EU level has at its disposal superior problem-solving capacities in the specific area, and/or because without the "communitarization" of responsibilities in the area in question, the effective implementation of core European Treaty objectives might be called into question.

The question of whether the transfer of tasks to the supranational level creates the preconditions for an effective ability to solve political problems certainly plays an important role for the legitimacy and approval of EU competencies. However, this does not mean that an exclusive orientation on the criterion of effective political action whenever completencies are transferred to the European level will automatically secure sufficient approval from EU citizens. In federal multilevel systems, the distribution of competencies between the federation and its constituent parts is normally based on an understanding of subsidiarity which gives precedence to the smaller unit instead of the larger one, whilst accepting a certain loss of efficacy in the process. In the European multilevel system the answer to the question of whether "better" powers on the EU level are justified in a certain policy area is crucially dependent on the sources of "social legitimacy" on which political action in the various areas is primarily based. Thus, for example, the "permissive consensus" of EU citizens for the creation of the internal market was for a long time based on a "utilitarian" attitude, because the superior ability of the European level in this area and its legislative output was expected to lead to the creation of greater wealth.

Policymakers are far more in need of "affective" support from the population in other areas. On the one hand this holds true for policy areas which possess a special identity-formation or socializing effect, such as education or cultural policy. In federal systems these are usually firmly attached to the regional level. But on the other hand this primarily concerns areas which are of central significance for the welfare-state foundations of

the national solidarity community or are strongly moulded by national history, political culture, and ideas of statehood. In all these cases, the legitimacy of political action does not derive primarily from a higher degree of political efficacy, and in federal systems is beyond the reach of an idea of subsidiarity which makes the definition of the optimal level for dealing with these tasks dependent exclusively on the criterion of effectiveness.

In addition to the functional requirements of an effective realization of European Treaty objectives and the examination of possible alternative kinds of intergovernmental Member State cooperation within the framework of international law, this leads to a third central aspect, which in the operationalization of the competency assignment rule for the European multilevel system, has to come into play under the general heading of "public approval". This component of the subsidiarity principle is also located on the second test level of the "better" stipulation, and points in a more pronounced manner towards a pro-autonomy position than has hitherto been the case.

First test level – The "necessity" stipulation

With this the framework for a set of criteria for the future assignment of primary and partial competencies has already been defined. As the first test level, the *"necessity" stipulation* merely seeks to demonstrate that there is a necessity for action requiring a horizontal regulatory range which points beyond the individual Member State. On this first test level it is important to mention *three categories of necessity* which make the capacities of the Member States or the horizontal restriction of their sovereign power to their own national territory seem insufficient:

- This initially concerns the presence of problems which do not as such affect only the territory of a single Member State, or matters jointly perceived to relate to the common good or the values of several states, the implementation of which exceeds the resources of individual states. Whether or not there is a situation of this kind which places too great a strain on the capacities of single states is encapsulated in the question of whether several Member States have to cooperate or whether the *"required minimum number of participants"* for effective political action comprises the managerial capacities of one or several Member States.
- External effects which are the result of one-sided action taken by individual Member States can be dealt with in a second category of the need for action which transcends national borders. This could be a situation in which the interests of a state are harmed by action taken by another state, and the former is neither able to influence the course of events nor receives compensation (negative external effects). Or again a Member State may profit from certain political measures taken by a state without having to do

anything in return (positive external effects). In both cases the restoration of the *"territorial congruence of political action"* between the beneficiaries, those empowered to make decisions, and those affected by a particular measure, requires international action in order to internalize external effects.

– A third category of a decline in the efficiency and effectiveness of political action occurs when Member States decide not to embark on joint action even if this would lead to sizeable savings or in quite general terms would clearly enable them to increase their political management capacities. Whether or not this state of affairs exists in a specific policy area or in a certain segment can be elucidated by means of the question about the *"'economies of scale' of joint action"*.

The general premiss that the Member States belong to a common internal market with its four fundamental freedoms and a single monetary zone is of central importance for the application of all these test criteria on the level of the "necessity" stipulation. This basic assumption is crucial when conducting the test on the first level, especially with regard to the existence of possible external effects. Such political incongruences will occur far more frequently and in far more policy areas within a common market and monetary zone.

Second test level – The "better" stipulation

Only in cases where one of these three criteria, viewed from the vantage point of what is clearly greater effectiveness of political action, suggests that there should be cooperation between several or all of the Member States would the test start with the *"better" stipulation* on the second level, which will help to ascertain the advisability of a transfer of primary or partial responsibilities to the EU level:

– The question initially posed on this second test level is whether, instead of primary or partial competencies on the EU level, the *"problem-solving capacity of international forms of bilateral or multilateral cooperation"* might not be sufficient in order to do justice to the need for joint political action in a certain area. Especially when such alternative forms of international cooperation have proved their worth in individual areas, as for example NATO in the area of defence policy, or cooperation between a handful of Member States (or their subnational contituent parts) is sufficient for the solution of a common problem, the first criterion will suggest pursuing the path of ("horizontal") international cooperation and not of the ("vertical") upgrading of competencies. Depending on the size of the task for which, on the basis of this first criterion of the "better" stipulation, there are good chances of successful cooperation

within the framework of international agreements, this must in general lead initially to a supposition which is in favour of retaining member state primary or partial competencies.

On the other hand, once this criterion assumes more concrete shape by means of formulating individual test questions, it must be ensured that as soon as it is used there is a strong feeling in favour of an EU competency and against what is considered to be the inferior problem-solving capacity of multilateral cooperation agreements, whenever areas are affected in which the rejection of supranational powers could be equated with a negation of central basic principles of the European Treaties, or with a threat to core objectives of European integration. This applies to policy areas in which the solidarity principle of the Treaties, the need for coherent Community policies and a functioning internal market and monetary zone, or perhaps the goal of economic and social cohesion make it imperative to assign powers to the EU level. Thus, for example, as a result of the unequal distribution of advantages and disadvantages of the integration process, and above all of the single internal market and monetary zone, the Member States and their regions, when taking into consideration the requirement of equal burdensharing, see a far-reaching need for supranational action with regard to the policies which support the internal market. Closely linked to this is the realization that, even if there is a shift away from the paramount objective of creating the internal market, it will not be possible to ignore the fact that, in order to achieve central goals of the integration project enshrined in the Treaties, there will continue to be a compelling need for EU powers. This is true no matter whether several or all of the Member States would also, by concluding international agreements, be in a position to deal effectively with tasks in the areas concerned. These fundamental considerations should make it sufficiently clear that the application and the concrete shape of the criterion of "problem-solving capacity of international forms of bilateral or multilateral cooperation" do not of course take place in a vacuum. Despite its primary function, which is to ensure a sensitive way of approaching the sovereignty and autonomy of the Member States in the case of forthcoming decisions concerning competency assignment, its use must nonetheless be characterized by an appropriate attitude towards the central integration goals.

– The second test criterion, the cumulative use of which is obligatory within the framework of the second test level, the "better" stipulation, is *"public approval of EU competencies"*. Even if one accepts a certain decline in efficacy, certain tasks should remain on the lower level if strong "affective" preferences for this solution become apparent in the population. This insight probably represents the central lesson to be learnt from the massive post-Maastricht decline in approval of European integration. Although the operationalization of the criterion of sufficient public approval of EU

responsibilities is fraught with special problems, there are nonetheless two indications that the legitimacy of political measures in a certain area is very much dependent on the *"affective"* support of the population, which is also the expression of a strong preference for the retention of specific powers on the national or subnational level.

- On the one hand considerable *collective preference differences* in regard to European powers, which are clearly defined by national or regional borders, provide an indication that the area in question is strongly characterized by specific national or regional traits and traditions, and should thus on the whole not be subject to European regulatory powers.
- Another indicator of an obviously more formal kind, which, when applying the public approval criterion, tends to disapprove of, or at least approve of no more than a very cautious justification of EU competencies in a certain area, is the fact that the *corresponding powers in Member State constitutions of a federal or regionalized kind are regularly located on the subnational level.* However, this observation merely leads to the supposition that responsibility should be assigned to the national level, since the set of criteria for a distribution of responsibilities which pays due regard to subsidiarity and the concept of a dual treaty-based catalogue of competencies can only be applied to the relationship between the Member States and the European Union. "Smuggling" the corresponding supposition of competency to the regional level must in each case be left to national constitutional law.

It is always a good idea to ascertain the degree of public approval for the creation of supranational competencies even if the test based on the first criterion of the "better" stipulation initially tends to suggest international agreements and thus the retention of national or, in accordance with internal constitutional law, regional competencies.

The need for federal balance, which also figures in the present test criteria for an assignment of competencies that is in accordance with the subsidiarity principle, implies that, in addition to sufficient respect for autonomy, due regard should be paid to the need for a sufficient level of whatever is "conducive to integration". For this reason a high average and transnational level of approval in the total EU population for supranational powers in a certain area can independently also lead to a strong supposition in favour of European primary or partial competencies, since they make an important contribution to strengthening the basic legitimacy of the integration process. This context can once again be illustrated most vividly by referring to the field of security policy. Thus, despite NATO, stronger EU powers received broad public support throughout Europe in the crisis in the former Yugoslavia.

Nonetheless this last (inverse) set of results deriving from a cumulative use of the test criteria "problem-solving capacity of international forms of bilateral or multilateral co-

operation" and "public approval of EU competencies" points quite clearly to the necessity of introducing another test criteria on the second level of the "better" stipulation of the subsidiarity principle as a competency assignment rule. A test of the "federal appropriateness" of responsibility transfers carried out exclusively on the basis of the two criteria of higher effectiveness and public approval of political action can only be regarded as sufficient, using the set of criteria that has been defined hitherto, if both evaluation measures point to the same result. However, reliable conclusions about an appropriate distribution of responsibilities cannot always be drawn from these two criteria on their own. They are insufficient as yardsticks whenever core aims and tasks of the EU Treaty suggest the necessity or suitability of supranational powers in further policy areas, and for this reason the preference of Member States for international forms of cooperation must be regarded as being inconsistent with integration, even if such an alternative procedure in itself would do justice to the requirement of sufficient efficacy of political action.

Whenever such integration requirements exist, it would go against the notion of federal balance and would pose a considerable threat to European unity if, in the final analysis, the yardstick of sufficient public approval were to be used to decide in favour of or against such powers. Furthermore, the use of both criteria can produce quite contradictory results. Thus there might well be situations in which the first criterion is in favour of an adequate capacity to act and solve problems by means of international cooperation, whilst at the same time there are pronounced preferences in the population for EU responsibilities. Conversely, it is also conceivable that from the point of view of effective political action it is clearly imperative to sanction European primary or partial competencies, though at the same time these are totally rejected by the population. Against the background of functional spillovers, that is, "the need to communitarize" in additional policy areas, which has and will probably continue to come about as a result of the creation of the internal market and the common monetary zone, one should above all take note of the large area of redistributional policies, and the "net donor" debate, which may be interpreted as an expression of a weak cross-border feeling of solidarity between the populations of the European Union.

– In all these constellations action-oriented statements about the pros and cons of the centralization of powers in the European multilevel system are only possible if a third criterion is introduced on the "better" stipulation test level. This criterion refers to the scope of competencies in different policy fields required to permit effective political action on the European level. For this reason the criterion of "*'economies of scope' of European competencies*" has been added. It attempts to ascertain the possible increases in efficiency which can be achieved for political action in a certain area by granting powers in other policy fields. In the application of this criterion, the procedural peculiarity lies in the fact that it is used only to complement the two preceding

tests in case it is still not possible on this basis to come out firmly for or against supranational primary or partial competencies. With regard to its applicability, the criterion must be restricted to the question of the extent to which the justification of European powers in the affected area means that the European Union will be in a better position to deal effectively with the core tasks set forth in the Treaties.

Viewed separately, this concluding criterion is certainly very close in structural terms to the strongly functional focus of the task-related norms in the EC Treaty on the completion of the internal market, and thus also a corresponding potential for centralization. Yet there are much greater constraints on the growth of this potential, since it can only be employed in cases of doubt when testing the assignment of competencies to the European Union. Furthermore, the two preceding criteria, which have to be used in every case, focus far more on the principle of not encroaching on either sovereignty or autonomy.

Operationalizing the different criteria by means of a catalogue of test questions

The present division of the subsidiarity principle into six criteria, which are placed on two test levels, forms an adequate conceptual framework within which, prior to making decisions about granting supranational powers to the EU, it is possible to elucidate whether they are compatible with the principles of effectiveness and legitimacy of political action in the European multilevel system.

On the first test level, the *"necessity" stipulation*, three criteria,

- "the required minimum number of participants",
- "the territorial congruence of political action", and
- "the 'economies of scale' of joint action"

are initially employed to ascertain whether there is any need for action within a certain policy area or a particular section of this area which, as it were in horizontal terms, points beyond the regulatory range of national policy, and requires joint action by several or all Member States of the European Union.

If, on the basis of one of the three criteria on this level, there seems to be a need for such action, the test for the area in question begins on the second level, the *"better" stipulation*. This also consists of three criteria:

- "the problem-solving capacity of international forms of bilateral or multilateral cooperation",
- "public approval of EU competencies", and
- "'economies of scope' of EU competencies".

However, the second set of criteria should be examined consecutively in order to ascertain whether, as it were in vertical terms, an increase in the effectiveness and legitimacy of political action is to be expected in the European multilevel system by enshrining supranational primary or partial competencies in the EU Treaty.

Another operationalization of the test seems indispensable in order to ensure its practical applicability in the reorganization of the distribution of competencies. For this purpose there follows a breakdown into specific questions of each of a total of six criteria on both levels (see the catalogue of questions on pages 30–31).

3 A short description of the modified catalogue of competencies

The following short version in tabular form to all extents and purposes reproduces the results of an application of the new set of criteria within the framework of the structural model of a dual catalogue of competencies.[6] The tabular overview is primarily designed to illustrate the new structural model with its policy-related description of competencies of the European and Member State levels. It does not claim to provide a final picture, for each of the policy areas on the list, of the primary and partial competencies which will emerge after thorough testing on the basis of the set of criteria that has been developed in order to reorganize responsibilities within the European Union. A comprehensive project of this kind would have to be based on an exhaustive application of the various steps in every single area, and would have exceeded the scope of the present publication.

However, an exhaustive test was carried out in the policy areas of Common Foreign and Security Policy, Home Affairs and Justice Policy, Regional and Structural Policy, and Social and Employment Policy.[7] These areas have been chosen because they were at the heart of the debate surrounding the Amsterdam Treaty reform and the European Union's Agenda 2000.

The following tabular presentation reproduces the "target" and not the "actual", i.e. Amsterdam Treaty, distribution of responsibilities in the European multilevel system. For this reason, for example, monetary policy is assigned to the European Union as a primary (in this case even exclusive) competency, although, according to the resolutions of the extraordinary meeting of the Council consisting of the Heads of State and Government on 2 May 1998 in Brussels, and the recent recommendation of the European Commission to accept

6 In order to make it possible to compare the "target state" presented below and the "actual state", the appendix of this study also reproduces in tabular form the distribution of competencies according to the Amsterdam Treaty on the basis of the distinction between primary and partial competencies on the EU and Member State levels.

7 The present paper is a shortened version of Thomas Fischer and Nicole Schley, Europa föderal organisieren. Ein neues Kompetenz- und Vertragsgefüge für die Europäische Union, Bonn, 1999. In this comprehensive study the assignment of task within these policy areas on the basis of the proposed set of criteria is examined in greater detail.

Greece into the Euro zone from 2001 onwards, this will have become reality step by step for Belgium, Germany, Finland, France, Greece, Ireland, Italy, Luxembourg, The Netherlands, Austria, Portugal and Spain by the beginning of 2002. As also transpires from the section on the reform of the amendment procedure pertaining to questions of task assignment, which follows the catalogue of competencies (see the catalogue beginning on page 32), it is generally true of all other policy areas that the following representation of responsibility distribution does not necessarily have to apply to all Member States of the European Union. On the contrary, the proposals for a fundamental reform of the procedures relating to changes in primary law are designed to make it possible for smaller groups of Member States to approach the "target state" by means of various different integrational steps, and to permit other Member States to join this "advance guard" later on by means of "opt-ins".

Catalogue of questions designed to elucidate a dual distribution of responsibilities on the basis of the principle of subsidiarity as competencies distribution rule

Minimum number of participants	• Does a task in a particular policy area involve such high financial burdens that it exceeds the resources of individual Member States?
	• Are there fundamental rights standards, or aspects of the common good that are generally accepted in Europe, which individual Member States cannot guarantee on account of insufficient administrative or economic resources?
	• Do the specific contents and goals as such of a particular area exceed the political managerial capacity and assertive power of an individual Member State?
Territorial congruence of political action	• In certain areas, in the case of single-state regulations, is there a danger that other states will suffer directly or indirectly on account of the threat to EU unity?
	• Is there a likelihood in a particular policy area that, in the case of single-state competency execution, other Member States will become "free riders"?
"Economies of scale" of joint action	• Does the cooperation of several Member States in a certain policy area create greater negotiating power with regard to third parties?
	• Do "economies of scale" result from a reduction in transaction costs or in average production costs for certain goods?
	• Can "economies of scale" be attained jointly by utilizing the advantages of early joint planning and coordination which derive from systemic and network interdependence?
Problem-solving capacity of international forms of bilateral or multilateral cooperation	• Does an unequal distribution of costs and benefits for Member States or their subnational entities (which, on the basis of the solidarity principle of the Treaties, has to be redressed) derive from the European integration process itself, and are EU responsibilities required in the area in question in order to guarantee this compensating function in an effective manner and maintain the unity of the European Union?

	• Do the areas about which a decision has to be made in regard to the transfer of responsibilities form a "functional unit" with core competencies on the EU level, and would these core competencies also be called into question without the corresponding EU powers?
	• How many Member States would have to cooperate in order to make a sufficient problem-solving capacity available? Does the homogeneity of the individual states' interests suffice in order to form such a coalition and to create the required agreement, which is a prerequisite for efficient political management?
	• Can the requirement of cross-border cooperation be met by means of new bilateral or multilateral cooperation agreements (on an international basis)?
	• Are there international groupings other than the EU, within the framework of which Member States can cooperate successfully in a certain area? Can, in the affected policy area, the specific interests of EU Member States receive sufficient support in such groupings?
Public Approval for EU competencies *(Degree of diversity of Member State or regional population preferences)*	• Is the responsibility to be examined a policy area in which political, social or cultural traditions and fundamental orientations tend to predominate more than economic factors?
	• Are areas which normally form part of the responsibilities of regional institutions affected ?
	• Is this an area of interpersonal or interregional redistributional policy? Do certain Member States primarily profit from measures in this policy area, whereas others are required to provide financial support?
"Economies of scope" of EU competencies	• Does the retention of a responsibility on Member State level present a noticeable obstacle to the realization of the core objectives of the European Treaties?
	• Does the transfer of a competency seem appropriate because it helps to make EU action more efficient in complementary EU areas or disposes of illogicalities in the current competency structure?
	• Does the transfer of individual responsibilities contribute to the coherence of Community policies?

Primary Competencies of the Member States	Partial Competencies of the European Union
1. *Foreign and security policy*	1. *Common foreign and security policy* – analysis and mutually agreed definition of fundamental EU interests within the framework of common strategies – common positions for the uniform representation of fundamental EU interests within the framework of systems of collective and cooperative security, especially the United Nations, the OSCE, and the European Council – common positions and joint actions in the area of preventive diplomacy and of conflict management without sanctions to protect fundamental EU interests – conclusion of trade, partnership, cooperation and association agreements – agreements with international organizations – coordination of foreign and security policy and constant exchange of information
2. *Defence policy and participation in systems of collective defence*	2. *Sanctions-based European peacekeeping and peacemaking* – joint actions in the form of humanitarian intervention, peacekeeping and peacemaking measures using military means – imposition of economic sanctions in cases of violations of democratic principles, human rights, and breaches of the peace – stepwise realization of a common armaments market
3. *Internal security and order, justice,* including – combatting crime	3. *Home affairs and justice,* including – combatting organized and international crime in the areas of terrorism, smuggling arms and nuclear material, the spread of racist and xenophobic material, narcotics, prostitution, trafficking, the smuggling of immigrants, the trade in organs,

Primary Competencies of the Member States	Partial Competencies of the European Union
	kidnapping, protection rackets, subsidies and investment fraud, illegal gambling, theft and receiving stolen goods, the theft of art and of vehicles, counterfeiting, environmental crimes, money laundering und bribery in political life and the civil service, computer crime – cross-border prosecution in the cases of serious crime (murder, manslaughter, rape, wilful arson)
	In these areas:
– Police and customs	– compilation of CID situation reports – judicial and official aid, incl. data exchange – independent and supportive investigation and searches by Europol and the European Customs Investigation Office – international agreements on police and customs cooperation
– Justice, judiciary	– preferment of charges and investigation by a European Prosecutor's Office – protection of witnesses in cases involving international and organized crime
– Criminal justice	– harmonization of punishable offences and sentencing in cases involving international and organized crime
– Data protection	– minimum data protection standards on a high protection level – supervision of compliance with common data protection standards by an EU control authority
– Civil law	– complementary legislation for international agreements in international private law and international civil law, inasmuch as it is directly linked to the realization of the fundamental freedoms in the internal market or contributes to the enhancement of consumer protection levels and affects the following areas:

Primary Competencies of the Member States	Partial Competencies of the European Union
	– trade, company, and property law, law of contractual and non-contractual debts – family and inheritance law in the case of partnerships between citizens of different Member States – uniform recognition and implementation of rulings by Member State courts
4. State organization, internal administration, public life – fundamental rights protection – citizenship – registration/identity cards; data protection – assemblies and meetings – constitutional policy	*4. EU organization, public life* – ensuring fundamental rights standards in accordance with the EU Charter of Fundamental Rights, the European Convention on the Protection of Human Rights and Fundamental Freedoms and joint constitutional traditions – ban on discrimination based on nationality; combatting discrimination based on gender, race, ethnic origin, religion, belief, disability, age or sexual preference – framework provisions on EU citizenship, on the right to vote in European elections, on the EU right to vote in local elections, European passport – establishment of European administrative agencies for the collection of information, networking and the exercise of control and supervisory powers – regulation and supervision of the data protection regulations for EU bodies and institutions – measures for the compilation of statistics

5. Economic structure/policy	*5. Economic policy*
	– coordination of economic policy
	– economic policy measures including
	  – insurance mechanism against asymmetrical economic shocks
	  – support in the case of balance of payments deficits

Primary Competencies of the Member States	Partial Competencies of the European Union
	– measures in the event of excessive deficits (ban on bail-outs within the monetary union) – measures in cases of difficulty with supplies
6. *Financial and taxation structure*	6. *Harmonization of taxation* – removal of taxation hurdles in regard to the free movement of goods – removal of dual taxation on cross-border movement of capital – minimum rates for income, corporation, energy and environment, value-added taxes
7. *Social policy*	7. *Social policy* – determining the average minimum expenditure for social protection in relation to the GDP per inhabitant of the individual Member States – coordination in questions of international social law, especially the contributions-based social services claims of individuals to whom the social security legislation of one or more Member States applies or are applied – equality of opportunity and equal treatment of men and women – minimum rules on a high level on health protection and safety in the workplace – social work protection and protection of special groups of people – minimum rules on a high level on dismissal procedures and worker participation in transnational companies – minimum rules on a high level on information and consultation rights of employees – support for the convergence of the Member State social systems, including the systems of social security and of the welfare state,- through information exchange, reports, advice and recommendations, especially as concerns the effective fight against poverty and social exclusion in the European Union

Primary Competencies of the Member States	Partial Competencies of the European Union
8. *Employment and labour market policy*	8. *Employment and labour market policy* – formulation of legally non-binding guidelines on employment policy – information exchange between the Member States (best practices, benchmarking) – European Employment Service (EURES) – European Vocational Training and Mobility Promotion Fund (originally ESF)
9. *Health care,* including – ensuring the provision of health care – organization of the health care services – coordination of national policy and programmes with the other EU Member States	9. *Health care provision,* including – food control (labelling and hygiene) – genetic technology regulations – determining general basic principles for uniform administrative practices in the Member States – coordination of national legislation in regard to the free movement of people – information exchange and networks – coordination of the policy and the programmes of the Member States designed to ensure a high level of health care protection – combatting cross-border epidemics – joint guidelines on the therapy of and the fight against drug addiction – regulations concerning medicines
10. *Consumer protection, including coordination of national policy and programmes with other EU Member States*	10. *Consumer protection (measures to support, complement and supervise the policy of the Member States),* including – high level of protection in the areas of health care, safety and the environment (e.g. through control of pesticides, veterinary affairs, and foodstuffs) – consumer information, product clarity – uniform minimum protection level through technical norms

Primary Competencies of the Member States	Partial Competencies of the European Union
11. Schools	*11. Schools* – recommendations – supportive measures (European dimension in teaching of foreign languages, European Schools)
12. Universities	*12. Universities,* including – action programmes for the exchange of students, academic cooperation programmes, teaching assignments abroad, data systems and access to the necessary communications networks – European University Institute
13. Education / Vocational training	*13. Education / Vocational training* – action plans and programmes with concrete supportive measures in the areas of vocational training, promotion of languages, far-distance learning, adult education, cooperation with international institutions
14. Cultural policy, including – preserving historical monuments – libraries/books – cultural institutions/events	*14. Cultural policy,* including – programmes supportive of cultural projects (literature prize, culture city programme, European Youth Orchestra, etc.) – preservation of the cultural heritage and European natural monuments – literary translations, European libraries – cultural institutions/events – support for culture exchange – promotion of cooperation with non-EU states
15. Youth and family policy	*15. Youth policy* – measures to encourage youth exchanges – European Voluntary Service

Primary Competencies of the Member States	Partial Competencies of the European Union
16. Industrial policy	*16. Industrial policy* – complementary measures to promote competitiveness – action programme for small and medium-sized enterprises (SMEs)
17. Regional and structural policy – determining the (re)distributional objectives of national, regional and structural policy	*17. Economic and social cohesion* – complementary financing competency – for transfer payments to Member States which are lagging behind with regard to their regional development in order to support national efforts to dismantle regional disparities
– national regulations on financial equalization	– to secure sufficient financial capacities of Member States suffering from serious regional backwardness, which will enable them to pursue a stability-oriented economic policy
– planning and execution of development programmes as part of the national and regional economic aid programme	– prevention of national and regional aid priorities, which contradict the cohesion-based goal of dismantling territorial disparities in the internal market
– conclusion of bilateral and multilateral international agreements on forms of cross-border cooperation on the sub-national level	– financial support for cross-border and interregional cooperation – definition of organizational minimum standards for forms of cross-border cooperation on the subnational level
– infrastructure policy	– framework legislation and interstate interface coordination in the construction of Transeuropean Networks
18. Spatial planning, housing and urban construction policy	*18. European spatial development planning,* including – framework planning for the coordination of European technical policies – recommendations for the coordination of national and regional development planning – establishment of networks between densely populated urban centres

Primary Competencies of the Member States	Partial Competencies of the European Union
19. *Research and technology,* including – market-based research	19. *Research and technology,* including – framework programmes, especially for aerospace, transport, water, environmental technologies – specific implementation programmes and complementary programmes (primarily in order to promote innovation by means of basic research) – coordination of R&D policy with the economic and social objectives and other policy areas of the EU for the purpose of improved competitiveness and sustained economic and social development – cooperation with non-EU states in basic research
20. *Development policy*	20. *Development policy* – coordination – joint multi-year programmes – conditions on which aid is given
21. *Disaster aid*	21. *Disaster aid,* including – coordination of international disaster aid – coordination of aid in cross-border disasters

Primary Competencies of the European Union	Partial Competencies of the Member States

1. *European policy towards non-EU citizens*
– standards for external border controls
– determining uniform entry conditions; common visa policy
– harmonization of asylum and refugee policy
  – definition of refugee status
  – regulation of limited-term protection of victims of political persecution without refugee status
  – stipulation of safe countries of origin and non-EU states, taking into account the "non-refoulement" principle
  – repatriation agreements or clauses in mixed agreements
  – criteria for the determination of the Member State responsible for processing an asylum application, taking into account the principle of just burden-sharing and the cultural background of the applicant
  – bringing into line the standards of the recognition procedure
– immigration policy
  – European Immigration Regulation
  – freedom of movement of non-EU citizens legally resident in a Member State
  – combatting smuggling organizations
  – measures against illegal employment
	1. *Policy on foreigners*
	– execution of external border controls
	– measures for the maintenance of internal security and public order as agreed with the Commission
	– nationality law
	– law pertaining to foreigners in the areas not regulated by the EU, including
	  – integration policy
	  – nationalization
	  – definition of residence permits for non-EU citizens
	– participation in fixing the immigration quota and in defining the quota-fixing criteria and shares of the European Immigration Regulation
	– immigration policy in the areas not regulated by the European Union

2. *External economic relations and customs duties* – coordination of export subsidies – customs duties and procedures – trade policy, including services and intellectual property rights – export policy – protective measures – political guidelines for arms exports	2. *External economic relations* – trade cooperation, insofar as common trade policy is not affected

Primary Competencies of the European Union	Partial Competencies of the Member States
3. *Agriculture and fisheries policy,* including – market regulations, – direct income support for farmers (national co-financing)	3. *Agriculture and fisheries policy,* including – national agriculture structural policy – animal protection on a high level in accordance with the religious rites, cultural traditions and the religious heritage of the Member States
4. *Enumerated internal market responsibilities* – free movement of goods – free movement of EU citizens – freedom of establishment – recognition of diploma, certificates and other evidence of formal qualifications – freedom to provide services – free movement of capital – competition – approximation of national law	4. *Internal market* – national economic structural policy – occupational and professional policy – national merger control
5. *Monetary policy,* including – monetary policy (ECB) – banknotes and coinage – non-EU exchange rates – supervision of compliance with convergence criteria – determining irrevocable exchange rates	
6. *European media and telecommunications policy, with focus on the technical aspects of granting market access,* including – cross-border dissemination of programmes in order to publicize and encourage the common European cultural area – uniform regulations concerning youth protection, advertisements and the right to reply	6. *Media policy with focus on the protection of cultural diversity,* including – development and financing of public service broadcasting in order to comply with the respective national and regional basic coverage requirement – maintenance of media pluralism – print media and book markets

Primary Competencies of the European Union	Partial Competencies of the Member States
– approximation of copyright rules – creation of favourable conditions for European film productions – liberalization of national telecommunications markets – transnational interoperability of communications networks and services through technical norms – data protection, information security, minimum content standards for the Internet – measures designed to promote the European Information Society	
7. *Environmental policy/Promotion of sustainable development* – cross-border questions, especially cross-border waste and waste water disposal – determining minimum standards on a high level – agreements with non-EU states – coordination of global environmental policy – control procedure for temporary measures of the Member States – establishment of cross-border information networks	7. *Environmental policy* – measures which go beyond the Community protection level – negotiations and agreements with non-EU states, as long as no joint measures are envisaged – temporary, not economically-based measures – caring for the countryside – action programmes
8. *Energy policy* – European energy market – joint regulation of coal policy – joint regulation of nuclear energy – research into alternative forms of energy – reconciling energy policy with economic and social objectives in order to protect the environment – coordination of energy policy with other market sectors (transport, telecommunications, etc.) for the efficient design of a European structural policy for energy markets	8. *Energy policy,* including – inclusion of alternative energy concepts

Primary Competencies of the European Union	Partial Competencies of the Member States
9. *Transport policy,* including – common regulations – registration of transport companies – measures on traffic safety – relations with non-EU states (cooperation and association agreements)	9. *Transport policy,* including – all areas not covered by EC regulations

4 The assignment of competencies and the Treaty amendment procedure: how to sustain the dynamism of European integration despite the catalogue solution

Reservations against the introduction of a treaty-based catalogue of competencies for the European Union are regularly expressed in the belief that through an inflexible framework of responsibilities of this kind the European multilevel system would lose its integrational dynamism and its ability to develop and embrace innovation.[8] The high degree of overlap of political powers and the supranational level's ability to extend its powers to all areas of public life, which is the result of task-related responsibility descriptions and above all of the "Treaty Completion Clause" of Art. 308 TEC-A (Art. 235 TEC-M), are even said to be one of the most decisive factors for the special nature and the ongoing progress of supranational integration.

8 With regard to this kind of argument, see for example Ingolf Pernice's statement to the joint hearing of the Europe Committees of the Bundestag and the Bundesrat on 8 May 1996 on the subject of the subsidiarity principle in the European Union (manuscript, 22 April 1996). The following scholars comment on this: Rudolf Hrbek, "Wie sollen sich Arbeitsteilung, Subsidiarität und regionale Beteiligung nach Amsterdam entwickeln?" in Bertelsmann Stiftung, Forschungsgruppe Europa, eds., Systemwandel in Europa – Demokratie, Subsidiarität, Differenzierung, Gütersloh, 1998, p. 32; Jürgen Schwarze, "Kompetenzverteilung in der Europäischen Union und föderales Gleichgewicht" in DVBl. 23 (1995), pp. 1265–69; Edgar Grande, "Regieren im verflochtenen Mehrebenensystem: Forschungsstand und Forschungsbedarf" (unpublished paper presented to the joint conference of the work group "Integrationsforschung" and the section "Staatslehre und politische Verwaltung" of the DVPW on the subject of "Wie problemlösungsfähig ist the EU? Regieren im Europäischen Mehrebenensystem", Munich, 29–31 October 1998, pp. 8–9). It was also for this perception of insufficient flexibility that in the Reflection Group which prepared the Intergovernmental Conference 1996–97, the Member States failed to reach agreement on the introduction of a catalogue of competencies and the abolition of Art. 235 TEC-M. It was also for this perception of unsufficient flexibility that comments on this subject in the group's final report were to the effect that, as a result of such changes, there was a danger of a considerably higher degree of rigidity in the Treaty structures and that it would have irrevocable and seriously negative effects on the dynamic development of integration potential. See Generalsekretariat des Rates der Europäischen Union, ed., Regierungskonferenz 1996 (RK '96). Bericht der Reflexionsgruppe und dokumentarische Hinweise. Brussels, December 1995. Part B, Reference Numbers 125 and 144.

However, this line of argument ignores the fact that the European Union, by enshrining a catalogue of competencies in the Treaty as the central element of federal structural reform, is certainly not being forced into a "rigid straitjacket" that would be a hindrance to future progress towards integration. The structural pattern selected for the distribution of responsibilities is not of crucial importance for the preservation of dynamic development options. Rather, it is the procedure with which one decides how to assign competencies to the European level. The shape of this procedure will determine whether or not it will be possible to ensure that all competencies assigned to the European Union will actually be included in a Constitutional Treaty in future, and whether or not the possibility of a "creeping" expansion of competencies via secondary law or law made by judges can be excluded or minimized. This goal could probably be reached by means of procedural reforms which directly permit a more flexible implementation of partial Treaty amendments concerning adjustments to the catalogue of competencies.

Any reform approach which aims to maintain the principle that the set of competencies included in the Treaties has to apply equally to all Member States implies that the solution for such a modified Treaty amendment procedure cannot simply be a transition to majority decisions by the representatives of the national governments. Since the transfer of sovereign rights to the supranational level requires ratification in all Member States, there would be an opportunity for Member States who have been outvoted on the European level to block the respective competency-related adjustments to the Treaty in the parliamentary procedure on the national level. Nor could this problem be circumvented by introducing the provision that competency assignments which have been decided upon by all of the Member States would come into force after they have been ratified by a majority of the national parliaments. This kind of intrusion into the constitutional structures of the Member States would be contrary to the principle of subsidiarity.

Over and above these problems, which spring directly from the obligatory ratification prescribed by the national constitutional orders, tasks assigned to the European level by a majority of government representatives of the Member States would also run the risk of outvoted Member States simply refusing to implement and apply European legislation in the relevant areas. For this reason it is initially possible to come to the conclusion that in the case of competency transfers it certainly seems appropriate to adhere to the practice of unanimous approval by government representatives and ensuing ratification by the national parliaments of all of the Member States involved.

Thus, instead of deviating from the unanimity rule, the proposed procedural reform starts out from possible variations in the number of Member States which can and wish to participate in altering the given catalogue of competencies. The concrete proposal is to introduce a system of "flexible" integration which retains the unanimity rule among

the participating Member States. The basic idea of this procedural model for amendments to the dual catalogue of competencies in the EU Treaty is that a small group of Member States willing and able to embark on deeper integration will, if there is mutual consent, be allowed to transfer new tasks to the EU level and thus, unlike the non-participating states, to pursue a path of enhanced integration. There is already a certain analogy to this proposal concerning the Treaty amendment procedure with regard to questions of competency in the Amsterdam Treaty. In the area of police and judicial co-operation in criminal matters, the latter envisages, in its third pillar, that international conventions which the Council has concluded unanimously and presented to Member States for approval in accordance with their constitutional requirements, immediately, after ratification in at least half of the Member States, come into force in these countries.

The proposed Treaty amendment procedure for the partial amendment of the catalogue of competencies starts with the competency assignment test on the basis of the set of criteria presented above. This test must lead to the conclusion, in the opinion of at least a majority of Member States, that the justification for EU powers in certain areas which have not yet been regulated in the Treaty, or which have hitherto been primary or partial competencies of the Member States, is in conformity with the principle of subsidiarity construed as competency assignment rule. These relatively high procedural requirements seem necessary in order to prevent an undue division into various sets of competencies emanating from different groups of participating Member States, and to preserve a minimum degree of homogeneity within the European Union as a whole by erecting certain barriers against individual members "pressing ahead" too fast in the field of responsibilities assignment.

If the preconditions mentioned above apply, then the "pro-integration" majority of Member States is entitled to ask the Commission to produce a draft of the necessary adjustments to the responsibility regulations in the Treaty. However, in order to exclude the purely "symbolic" participation of individual states, all the participants must state, when submitting their request, that, for the execution of the respective area-related primary and partial competencies, they are prepared to accept the co-decision procedure and, as a result, majority decisions in the Council in the areas concerned. In the case of such partial amendments of primary law relating to changes in the list of competencies, Treaty amendments will in future no longer entail convening an Intergovernmental Conference. Rather, they will be dealt with in the Council for General Affairs. After the mandatory consultation of the Committee of the Regions, the Council decision will initially be forwarded to the European Parliament. If it receives support from the majority of the deputies, the participating Member States will present the planned Treaty amendments to their national parliaments, which will have to ratify them in accordance with their respective constitutional requirements.

European primary and partial competencies introduced by a smaller group of Member States in this way will be clearly indicated by including explicit references to protocols attached to the Treaty which enumerate the respective states that have approved EU powers in specific areas. Member States which were initially opposed to the proposal will also be able to accept these EU empowerments by "opting in" at a later date, and thus be included in the respective Treaty protocol. As soon as all of the Member States have agreed to supranational powers in a certain policy area, or in part of such an area, the special reference in the Treaty regarding this area will be dropped, as will the associated protocol which has listed the corresponding group of states.

With regard to its functional range, the proposed reform of the Treaty amendment procedure refers exclusively to partial amendments that deal with individual adjustments to the catalogue of competencies which is to be enshrined in primary law. The situation is different in the case of general amendments to the Treaty, e.g. those which aim to change the institutional structures and the financial constitution, and/or to reorganize the competency structure altogether. In such cases the current Treaty amendment procedure, which envisages convening an IGC and unanimous approval of the negotiation results by all the Member States, should be retained. Yet the procedural model presented above both with regard to the partial amendments of the list of responsibilities in primary law and to general amendments has not appropriately emphasized the question of securing sufficient "democratic legitimation within the procedure". What is required on this central point is greater approximation of the Treaty amendment procedure to the constitutional rules of federal systems of nation-state origin. The independent institutional participation of the federal level in the procedure of constitutional amendment is without exception provided for in the legal structures of federal systems. In general, this participation finds democratic expression in the qualified voting on constitutional amendments of the federal-level chamber of representatives.

Similarly, in order to ensure that there is effective democratic control over the representatives of national governments in the Council, and over the content of their negotiation results in the case of changes to primary law, it is imperative to introduce a requirement that the European Parliament must approve of both partial and total amendments to the European Treaties. Accordingly, the amendment procedure suggested in this study needs complementing. The approval of a simple majority of the Members of the European Parliament should be stipulated in the case of partial amendments, whereas a two-thirds majority should be required in the case of general amendments.

5 Discharging competencies in a pro-autonomy manner and implementing EU law effectively

In order to achieve a clear-cut delimitation of tasks, not even a very detailed list and an explicit description of the powers of the EU and its constituent parts will suffice, especially in view of the growing interdependence of internal and cross-border problems. Per se, the present model for a dual competency structure of the European Union has the advantage of demonstrating the respective powers on the Member State and European levels, and emphasizing their limits. However, in view of the fact that there is a great deal of overlap between tasks on the various levels, it will constitute an insufficient barrier without the help of complementary political and legal yardsticks.

Respect for autonomy as a guideline for the execution of European legislative powers

As early as its 1994 reform programme for the 1996/97 IGC, the Commission on European Structures rightly emphasized that, in addition to compiling a dual catalogue of competencies, it would become necessary to develop "regulating principles to mediate between the claims of either side to have the right to legislate"[9]. The starting point for this recommendation was the insight that, in addition to competency distribution, the idea of mutual respect for autonomy on the European and Member State levels also had to be taken into account in the execution of competencies. For this reason the concrete proposals were based on three guiding principles, which, although they were already enshrined in the Maastricht Treaty, still need to be developed into European legislation which shows greater respect for autonomy. The dual competency catalogue, which had already been proposed by the Commission on European Structures, displays a particular proximity to the *"principle of specific empowerment"*. This should be reflected in a reorganization of the supranational and national regulatory powers on the basis of policy areas, and the abolition of the general empowerment of Art. 308 TEC-A (Art. 235 TEC-M). A strict order of precedence in the choice of legal instruments on the European level was suggested for the implementation of the *"principle of proportionality"*. In essence the members of the reform commission called for "greater tolerance towards divergent national rules" in the practice of harmonization at European level, and to this end, for example, to regulate in the Treaty what has for some time been the dominant procedural practice of the European Commission, which is to give directives precedence over regulations. Furthermore, the expert group suggested introducing a new hierarchy of norms

9 Werner Weidenfeld (ed.), Europe '96.

into primary law, which, in place of the legal instruments of Art. 249 TEC-A (Art. 189 TEC-M), differentiates between
- constitutional laws,
- institutional laws,
- ordinary laws, and
- implementing regulations.

In the end, the suggested hierarchy of norms was not adopted in Amsterdam, though the conclusions reached in Edinburgh and the Subsidiarity Protocol to the Amsterdam Treaty already contain additional suggestions on how a choice of European legal instruments which show respect for autonomy should be spelled out in greater detail. Thus both documents stipulate that (1) a directive is to be preferred to a regulation, and, furthermore, a framework directive is to be preferred to a specific measure; that (2) the European level should if possible restrict itself to establishing minimum standards which permit the Member States to introduce higher norms if the need arises; and finally that (3) recommendations or codes of behaviour are to be preferred to legally binding measures, as long as this does not endanger the realization of the respective Treaty objectives. An option relating to the choice of managerial tools which goes beyond this, and which could also, within the primary law responsibilities of the EU level, ensure the highest degree of respect for Member State autonomy or, inasmuch as they possess their own legislative powers in the respective policy area, their subnational levels, consists in enshrining in the Treaty the legal requirement to examine first of all whether, instead of harmonizing the contents of laws or norms by European secondary legislation, it might not be possible to resort to the *"principle of mutual recognition"*.

However, the overall basic idea, which in the end is also of crucial importance with regard to the restrictions which govern the intensity of European regulatory activities and the retention of the greatest possible political room for manoeuvre on the Member State level, lies in the *"principle of loyalty to the Union"*, the maxim formulated by the Commission on European Structures with regard to the execution of competencies. Although the European Court of Justice has decided in the meantime to "bilateralize" the duty of Member States to show solidarity stipulated in Art. 10 TEC-A (Art. 5 TEC-M), that is, in analogy to the German principle of "federal comity", to require not only Community-friendly behaviour from the Member States, but also, on the part of the EU level, consideration for the responsibilities of the Member States, this is still not contained in the wording of this stipulation in the Treaty. It continues to insist one-sidedly that it is the duty of Member States to help Community institutions to carry out their tasks and to desist from all national measures, be they legislative, administrative or judiciary, which endanger the realization of the Treaty goals. In order to emphasize more

strongly also in this context the injunction to respect autonomy in the execution of competencies, the Commission on European Structures suggested that, in addition to the improvements achieved in Maastricht, and enshrined in Art. 6 paragraph 3 TEU-A (Art. F paragraph 1 TEU-M), that the European Union must respect the identity of its Member States, it should be made clear by rewording Art. 10 TEC-A (Art. 5 TEC-M) that this is an injunction calling for mutual respect. In this way a pro-autonomy choice by the EU level of secondary law, managerial instruments could also be ensured in areas belonging to EU primary responsibilities. Furthermore, the Member States must be accorded the right to appeal to the European Court of Justice if their room for manoeuvre is restricted illegally. With its statements concerning the *regulatory principles* of

– loyalty to the Union,
– specific empowerment, and
– proportionality, though this needs to be complemented by the principle of mutual recognition,

the Commission on European Structures has in fact defined to a large extent the framework for a way in which the European legislator can proceed whilst paying due respect to autonomy. However, when setting the goal of mutual respect for autonomy both with regard to the distribution of competencies and the execution of responsibilities, it should not be forgotten that the European Union is, as Walter Hallstein once put it, a "legal community" which, when incorporating EU law into national law and implementing laws in adminstrative terms, is dependent on the integrational ability and willingness of the Member States and their administrations.

Improving the implementation and application of law within the Member States

Both the proposed dual model of competency delimitation and the suggestions for an execution of competencies which shows respect for autonomy is primarily related to the area of legislative powers. Despite the increasing importance of direct and indirect administration on the EU level, the structural similarity to the functional division of tasks in the German federal system, where the federal government has largely legislative responsibilities, whereas the responsibility for the administration is primarily assigned to the federated states, will continue to be a characteristic feature of the European Union as a legal community.

The functional dependence of the supranational level on the implementation and application of law by the Member States has led, as a result of the growing diversity of the Member States and the extension of EU competencies, to a situation in which the Member States' room for manoeuvre has been curtailed considerably as a result of

judges' rulings which gave precedence to Community law on the one hand, and of a growing and obsessive attention to detail in European directives and their immediate applicability, which was also justified by the ECJ, on the other. The differentiation in the Treaties between directives and regulations has thus become rather vague, and more and more often the legislation of the European Union contains execution provisions which are designed to ensure a uniform implementation and application of the law. But as a result of these developments, the original approach showing respect for autonomy, which was supposed to find expression in the instrument of the directive, was turned on its head.

Real respect for autonomy in the execution of competencies as defined in secondary legislation cannot realistically be achieved in the European Union by creating a comprehensive EU administrative apparatus on the supranational level in order thus to reduce the EU's functional dependence on the application of its law by Member States or their substate entities. As the recent incorporation of the "Declaration on the Protocol Concerning the Application of the Principles of Subsidiarity and Proportionality" into the appendix of the Amsterdam Treaty and its justification of the principle that the administrative implementation of Community law "is fundamentally the task of the Member States" underlines, it will be very difficult to change the functional division of labour in the European Union. Rather, in the case of legislation on the European level, a way must be found of achieving the lowest possible regulatory intensity, whilst ensuring that this does not lead to a situation where there is a danger of insufficient and highly fragmented implementation by the Member States and their administrations. This danger will continue to increase in an enlarged European Union if it fails to introduce reforms designed to improve the implementation and application of the law.

There are a number of proposals for such improvements. It is of vital importance that, within the framework of a new *hierarchy of norms*, there will in future be a clearer distinction between the tasks of the European legislator, who as a rule should restrict himself to determining the framework of basic political decisions, and in certain cases implementing regulations, which should no longer be incorporated into legislation, and delegated exclusively to the European Commission. Only if there is a clear differentiation of this kind between regulations issued by the executive (and this should remain the exception) and legislation itself will it be possible to ensure that the European legislator will primarily restrict himself to laws which define a particular legal framework.

In this context it should also be pointed out that the frequent criticism of "comitology", the framework within which the European Commission exercises the execution powers which the Council of the European Union has delegated to it, seems to be justified primarily in regard to the complexity of the different procedures and the insufficient separation of powers within the European Union. Although the Council's Comitology

Decision of 1999 has improved the situation with regard to greater transparency and a stronger involvement of the European Parliament, the state of affairs is still not very satisfactory. It could be ameliorated by restricting the three basic types of procedure laid down in the Decision to the procedures of the Advisory Committee and the Management Committee. Only after deciding to adopt a certain measure would the Commission have to inform the Council and the European Parliament which could reject the proposal (separately) within one or two months ("evocation right"). The ensuing reinforcement of the role of the European Parliament would be of particular importance, partly because it places greater emphasis on the principle of the horizontal separation of powers. On the European level the chamber of deputies should also be given a central role in the delegation of legislative powers to the executive; this is normal practice in a national context.

But basically the comitology committees provide a clear indication of the real need for action which becomes apparent if the compatibility of legislation which shows respect for autonomy, and effective implementation of this European law in a Union organized on federal lines is to be ensured. Because these committees are made up of representatives of the Commission and the governments of the Member States (as a rule the same people also participate in the Council's working groups), they have an indispensable function in regard to the vertical coordination between the regional, national and supranational levels, and also the horizontal coordination between the administrations of the Member States.

In an EU political decision-making system which, in realistic terms, will in future continue to have to take its bearings to a significant extent from the model of functional federalism, these horizontal and vertical forms of cooperation on the administrative level and the rise of *"epistemic communities"* associated with them will become considerably more important than sanctions mechanisms designed to enforce conformity with the Treaties such as, since Maastricht, have primarily been available to the ECJ in Art. 228 TEC-A (Art. 171 TEC-M). For this reason the main emphasis should in future be placed on promoting the formation of networks between the Member State and European administrations. A move in this direction which would also help to dispel some of the feeling that the Commission is "omnipotent" consists in the establishment of further European agencies such as the European Environment Agency, the Community Plant Variety Office, the European Monitoring Centre for Drugs and Drug Addiction, the European Agency for the Evaluation of Medicinal Products, or the European Agency for Safety and Health at Work. These institutions are primarily concerned with gathering information and developing joint methods of analysis for the evaluation of the effectiveness of EU action in the respective policy areas. In isolated cases such agencies can also be given supervisory and executive powers: thus under the supervision of the Commission, if this is deemed necessary, they can be empowered to make individual administra-

tive decisions, as, for example, is already the case in the area of competition policy or with the EU inspection service in the field of fisheries.

In general terms it may be expected that, after the completion of the internal market legislation programme and in view of the challenges which will come from the adoption of the *acquis communautaire* by the Central and Eastern European accession candidates, the Commission's managerial function with regard to ensuring the uniform implementation of Community law will continue to increase. In this area the European Commission has developed some promising measures which in future should be continued and expanded. Above all there are various kinds of aid, for example, financial support and training schemes for administrative staff, the KAROLUS and MATHAEUS programmes for the exchange of civil servants between Member States, the ROBERT SCHUMAN PROGRAMME, which is designed to improve lawyers' knowledge of European law, or the GROTIUS programme for the exchange of those involved in the judiciary.

Because the human and material resources of the European Union as a legal community will continue to remain limited, such consciousness-raising and identity-forming approaches to the improved implementation and application of legislation will be more important, even in a federal Europe, than the legal implementation powers of the European Commission. In the long term it will hardly be possible to extend its effective control powers beyond the possibility of exercising a certain degree of control over the supervising authorities in the Member States in the area of the implementation and application of legislation, or, as in the case of structural policy, of sending single representatives to monitoring committees. However, this supervisory function could be made much easier for the Commission if it were to prove possible to develop standard criteria for the evaluation and control of Member States' administrations or policies.

III Realizing the need for political action

At the beginning of the 21st century the European Union, both in the context of the new international order which has succeeded East-West confrontation, and on account of the advent of monetary union, finds itself facing far-reaching challenges which, unless there is a departure from the prevailing logic of integration, could seriously endanger the fabric of European unity. Steps leading to enlargement and greater integration can no longer be 'switched on' one after the other in a linear manner. Rather, the specific nature of the demands currently being made on the political managerial capacity of the European multilevel system is the fact that both processes have to be mastered simultaneously.

At all costs steps must be taken to prevent the joint realization of Treaty objectives being replaced by renationalization tendencies and a growing fragmentation of interests. Unavoidable though the reorientation with regard to the choice of future integrational strategy may be, it must not be reduced to the option of 'deepening *or* enlarging' the Union. This threat may be deflected by espousing federalism as the organizational principle of the European Union. Its realization in all democratic multilevel systems, no matter whether they are genuine federal states or the European quasi-federal system, is intended to ensure the simultaneity and equality of unity and diversity.

This kind of federalism is certainly not reducible to the structural features of the constitution of a multilevel polity, and should be construed as a permanent process of striving for a state of balance. This calls for certain institutional and procedural preconditions in regard to the formation of political will. Yet the present study has restricted itself to the structural reform of the European Treaties because, on the one hand, elements of federalization are already clearly perceivable in the development of institutions and decision-making procedures, as, for example, was demonstrated in Amsterdam by the successive upgrading of the position of the European Parliament through the simplification and

extension of the co-decision procedure, or by the extension of the powers of the Committee of the Regions. This tendency of "institutional federalization" will certainly be continued by the Treaty of Nice. On the other hand, far-reaching proposals for institutional and procedural reform have been put forward elsewhere. In conjunction with the present proposals for structural reform, they are certainly suited in the long term to implementing federalism as a dynamic system, even in a very much larger European Union.

However, the proposed structural reforms in particular constitute the essential feature of a departure from what has hitherto been the practice of incremental Treaty amendments. Europe and its Member States can no longer afford to keep putting off a fundamental reorganization of the Treaty structures if the European Union is to make a significant contribution to prosperity, political stability, and democracy in the whole of Europe. Unfortunately this kind of reorganization failed to materialize in Amsterdam. The governments of the Member States should not repeat this mistake in the current IGC preparing the Treaty of Nice. Instead they should at last face up to the challenge and recast the structures of the Union in a comprehensive manner on the lines of a federal organizational model.

Appendix

The state of the distribution of competencies reached in Amsterdam[10]

Primary Competencies of the Member States	Partial Competencies of the European Union
1. *Foreign policy, external security and peace-keeping, armed forces*	1. *Common Foreign and Security Policy (CFSP) (generally in conjunction with Art. 2–2, Art. 3 paragraph 2, Art. 11, Art. 17 TEU, and declaration on improved cooperation between the EU and WEU, declaration on WEU)* – common strategies, foreign policy coordination, mutual information *(Art. 13, 16, 19, 20 TEU in conjunction with Art 12 TEU, declaration on the establishment of a strategy planning and early warning unit and Art. 301–303 TEC)* – common actions and standpoints *(Art. 14, 15 TEU in conjunction with Art. 12 TEU)* – implementing decisions *(Art. 23 TEU in conjunction with Art. 14, 15 TEU)* – conclusion of international agreements *(Art. 24, 38 TEU and declaration concerning Art. 24 and 38 TEU, Art. 49 TEU, Art. 133, 300, 310 TEC)*

10 The dual representation of the distribution of competencies between the European Union and the Member States which reflects the state of affairs reached in the Amsterdam Treaty is based on the model of the European Structural Commission for the Maastricht Treaty (see Werner Weidenfeld, ed., Europe '96, pp. 17–24). The new features of the Treaty of Amsterdam and some other emendations, which are in italics, were added as part of the "Organizing a Federal Structure for Europe" research project.
In general the principles of specific empowerment, subsidiarity and proportionality as stipulated in Art. 1 paragraph 2 and Art. 2 paragraph 2 TEU and Art. 5 TEC in conjunction with the Protocol on the Application of the Principles of Subsidiarity and Proportionality, which were added to the TEC in Amsterdam, apply to the primary and partial EU competencies in the Amsterdam Treaty. Although various other Treaty protocols and declarations are of importance for the delimitation of competencies in the Treaty, explicit references to them were as a rule omitted in order to make the catalogue more comprehensible.

Primary Competencies of the Member States	Partial Competencies of the European Union
	– operations in the area of humanitarian and rescue missions, peacekeeping tasks, and of armed forces involved in crisis management, including peacemaking *(Art. 17 paragraph 2 TEU)* – armaments cooperation *(Art. 17 paragraph 1 subparagraph 4 TEU)*
2. *Internal security and order, justice,* including – police – combatting crime – justice, jurisdiction – civil law – criminal law, prisons	2. *Justice and home affairs (generally in conjunction with Art. 2–4 TEU, Art. 61 TEC)* – external border controls *(Art 62 paragraph 2 a TEC in conjunction with Art. 3 paragraph 1 letter d TEC, protocol on the incorporation of the Schengen agreement into EU framework, declaration on the maintenance of the level of protection and security provided by the Schengen agreement)* – visa policy and short-stay permits *(Art. 62, Art. 63 paragraph 1 figure 4 TEC)* – asylum and refugee legislation *(Art. 63 paragraph 1 figures 1,2 TEC)* – immigration policy *(Art. 63 paragraph 1 figure 3 TEC)* – narcotics policy *(Art. 29 paragraph 2 TEU, Art. 152 paragraph 1 subparagraph 3 TEC)* – customs *(Art. 29, 30 TEU, Art. 134 TEC)* – judicial cooperation in criminal cases (*Art. 31, 37 TEU in conjunction with Art. 29 TEU, Art. 280 TEU*) – measures establishing criminal law minimum standards on criminal offences and sentences in the areas of organized crime, terrorism and illicit drug trafficking *(Art. 31 letter e TEU)* – police cooperation to combat international crime with special emphasis on Europol *(Art. 30, 37 TEU in conjunction with Art. 29 TEU)*

Primary Competencies of the Member States	Partial Competencies of the European Union
	– coordination of cross-border official and judicial aid between prosecuting and criminal investigation authorities *(Art. 30, 31 TEU)* – judicial cooperation in civil cases of a cross-border character *(Art. 65 TEC)* – international agreements on police and judicial cooperation in criminal cases *(Art. 34 paragraph 2 letter d, Art. 38 TEU in conjunction with Art. 24 TEU)*
3. State organization, internal administration, public life – fundamental rights protection – citizenship – registration/identity cards; data protection – assemblies and meetings – constitutional policy	*3. EU organization, public life* – ensuring fundamental rights standards in accordance with the European Convention on the Protection of Human Rights and Fundamental Freedoms and joint constitutional traditions *(Art. 6 paragraphs 1 and 2, Art. 7 TEU, Art. 309 TEC)* – ban on discrimination based on nationality; combatting discrimination based on gender, race, ethnic origin, religion, belief, disability, age or sexual preference *(Art. 3 paragraphs 2, 12, 13, 137, 141 TEC)* – framework provisions on EU citizenship, on the right to vote in European elections, on the EU right to vote in local elections, European passport *(Art. 2 short dash 3 TEU, Art. 17–21 TEC)* – regulation and supervision of document access and of the data protection regulations for EC bodies and institutions *(Art. 163, 286 TEC, declaration concerning the rules on transparency, access to documents, and combatting fraud)* – measures for the compilation of statistics *(Art. 285 TEC)* – legal position of Community employees *(Art. 283 TEC)*

Primary Competencies of the Member States	Partial Competencies of the European Union
4. *Economic structure/policy*	4. *Economic policy (Art. 3 paragraph 2 TEU, Art. 98–104 TEC in conjunction with Art. 2 and Art. 4 paragraphs 1 and 3 TEC)* – coordination of economic policy – economic policy measures – support in the case of balance of payments deficits – measures in the event of excessive deficits – measures in cases of difficulty with supplies – coal and steel policy (TECSC)
5. *Financial and taxation structure*	5. *Harmonization of taxation* (Art. 90–93, Art. 95 paragraph 2 TEC in conjunction with Art. 3 paragraph 1 letters c, g, h TEC)* – removal of taxation hurdles in regard to goods – removal of dual taxation in cross-border movement of capital
6. *Employment and social policies*	6. *Employment and social policies (Art. 2–1 TEU, Art. 125–130, 136–148 TEC, in conjunction with Art. 3 paragraph 1 letters i and j TEC)* – guidelines on employment policy *(Art. 128 TEC)* – supporting measures and incentives to stimulate employment *(Art. 127, 129, 130, 137 paragraph 3, Art. 140 paragraph 1 TEC)* – minimum standards in the areas of • conditions of work and work environment *(Art. 137 paragraph 1 TEC)* • promoting the dialogue between the social partners *(Art. 138, 139 TEC)* • combatting social exclusion *(Art. 137 paragraph 1 TEC)* • social security and social protection of workers, especially itinerant workers *(Art. 42, 137 paragraph 3, 140 TEC)*

* Action can be taken on the basis of the EU “internal market” primary competency.

Primary Competencies of the Member States	Partial Competencies of the European Union
	• conditions of employment of non-EU citizens *(Art. 137 paragraph 3 TEC)* • European Social Fund *(Art. 146–148 TEC)*
7. Energy policy	*7. Energy policy* – European energy market* *(in conjunction with Art. 3 paragraph 1 letters c, g, h TEC, Art. 154–156 TEC)* – common regulations concerning coal policy *(TECSC)* – common regulations concerning nuclear energy *(TEAEC)*
8. Development planning, housing and urban construction policy	*8. – –*
9. Schools	*9. Schools (Art. 149 paragraph 2 TEC in conjunction with Art. 3 paragraph 1 letter q TEC)* – recommendations – supportive measures (European dimension in teaching of foreign languages, European Schools)
10. Universities	*10. Universities (Art. 149, 150 TEC in conjunction with Art. 3 paragraph 1 letter q TEC)* – recommendations – supportive measures (exchange and mobility of students, European University Institute)
11. Vocational Training	*11. Vocational Training (Art. 150 TEC in conjunction with Art. 3 paragraph 1 letter q TEC)* – recommendations – supportive measures (vocational training, promotion of languages, cooperation with non-EU states and international institutions)

* Action can be taken on the basis of the EU “internal market” primary competency.

Primary Competencies of the Member States	Partial Competencies of the European Union
12. *Cultural policy,* including – preserving historical monuments – books – libraries – cultural institutions and events	12. *Cultural policy (Art. 151 TEC in conjunction with Art. 3 paragraph 1 letter q TEC)* – recommendations – supportive measures (preserving the cultural heritage, European natural monuments, literary translations, European libraries, and cultural institutions and events)
13. *Youth and family policy*	13. *Youth policy (Art. 149, 150 TEC)* – recommendations – measures to encourage youth exchanges
14. *Consumer protection*	14. *Consumer protection (Art. 153 TEC in conjunction with Art. 3 paragraph 1 letter t TEC)* – measures to support, complement and supervise the policy of the Member States
15. *Health care* including – organization of the health care services – ensuring the provision of health care	15. *Health care (Art. 152 TEC in conjunction with Art. 3 paragraph 1 letter p TEC)* – complementary health protection measures (quality and safety standards for human organs, substances, blood and blood-based products; animal health; pesticides) – supportive measures – recommendations
16. *Infrastructure policy*	16. *Transeuropean networks (Art. 154–156 in conjunction with Art. 3 paragraph 1 letter o TEC)* – guidelines – specific actions
17. *Industrial policy*	17. *Industrial policy (Art. 157 TEC in conjunction with Art. 3 paragraph 1 letter m TEC)* – complementary measures to promote competitiveness

Primary Competencies of the Member States	**Partial Competencies of the European Union**
18. Structural and regional policy	*18. Structural and regional policy, social cohesion (Art. 2–1 TEU, Art. 158–162 TEC in conjunction with Art. 3 paragraph 1 letter k TEC)* – Structural Fund (objectives) – Regional Fund (implementation) – specific actions – Cohesion Fund – implementing regulations EAGGF / Social Fund
19. Research and Technology	*19. Research and technology (Art. 163–173 TEC in conjunction with Art. 3 paragraph 1 letter n TEC)* – framework programmes – specific implementing and complementary programmes – cooperation with non-EU states
20. Development policy	*20. Development Policy (Art. 3 paragraph 2 TEU, Art 177–181, 182–188 TEC in conjunction with Art. 3 paragraph 1 letters r, s TEC)* – coordination – joint multi-year programmes
21. Media policy / Telecommunications policy	*21. European media policy* (in conjunction with Art. 3 paragraph 1 letters c, g, h TEC)* – cross-border television – support for European film and television productions – support for the European information society

* Action can be taken on the basis of the EU "internal market" primary competency.

Primary Competencies of the European Union	Partial Competencies of the Member States
1. *External economic relations, customs and trade policy (Art.23–31, Art. 131–134 TEC in conjunction with Art. 3 paragraph 1 letters a, b TEC)* including – coordination of export subsidies – customs duties and procedures – export policy – protective measures	1. *External economic relations* – agreements concerning services and intellectual property rights – trade cooperation, insofar as common trade policy is not affected – arms exports
2. *Agriculture and fisheries policy (Art. 32–38 TEC in conjunction with Art. 3 paragraph 1 letter e TEC)*	2. *Agriculture and fisheries policy* – national agriculture structural policy – animal protection on a high level in accordance with the religious rites, cultural traditions and the religious heritage of the Member States
3. *Internal market (generally in conjunction with Art. 2/1 TEU, Art. 3 paragraph 1 letters c, g, h TEC, Art. 14 paragraph 2 TEC)* – free movement of goods *(Art. 23–31 TEC)* – free movement of EU citizens *(Art. 39–42 TEC)* – freedom of establishment *(Art. 43–46 TEC)* – recognition of diplomas, certificates, and other evidence of formal qualifications *(Art. 47 TEC)* – freedom to provide services *(Art. 49–55 TEC)* – free movement of capital *(Art. 56–60 TEC)* – competition *(Art. 81–89 TEC)* – approximation of national law *(Art. 94–97 TEC)*	3. *Internal market* – national economic structural policy – occupational and professional policy – national merger control
4. *Monetary policy** (Art. 2–1 TEU, Art. 105–124 TEC in conjunction with Art. 2 and Art. 4 paragraph 2, 3 TEC)* – monetary policy (ECB) – banknotes and coinage	

** The exclusive EU competency in the field of monetary policy including the circulation of banknotes and coins will be attained in 2002 for Member States participating in the European Economic and Monetary Union. In the case of Member States not participating, this field continues to be a primary national competency. However, the actual powers of these "outsiders" are also curtailed by their membership in EMS II.

Primary Competencies of the European Union	Partial Competencies of the Member States
– non-EU exchange rates – supervision of compliance with convergence criteria – determining irrevocable exchange rates	
5. *Environmental policy / promotion of sustainable development (Art. 174–176 TEC in conjunction with Art. 3 paragraph 1 letter l and Art. 6 TEC)* – cross-border questions – determining minimum standards on a high level – agreements with non-EU states – coordination of global environmental policy – action programmes – control procedure for temporary measures of the Member States	5. *Environmental policy* – all areas not covered by EC/EU regulations – measures which go beyond the Community level of protection – negotiations and agreements with non-EU states, as long as no joint measures are envisaged – temporary, not economically based measures
6. *Transport policy (Art. 70–80 TEC in conjunction with Art. 3 paragraph 1 letter f TEC)* – common regulations – registration of transport companies – measures on traffic safety	6. *Transport policy* – all areas not covered by EC regulations – national and regional infrastructure

Project partners

Bertelsmann Foundation

The Foundation was established by Reinhard Mohn in 1977, and currently owns 71,1 % of the share capital of Bertelsmann AG. It sees itself as an institution which operates on the basis of specific concepts. It designs and initiates its own projects, which it takes to the point of practical implementation. The Foundation cooperates with partners in academic, political and business life.

The Bertelsmann Foundation is currently involved in about 170 projects in the areas of politics, economics, the media, government and administration, public libraries, higher education, foundations, culture, and medicine and health care, and seeks to make a concrete contribution towards the solution of current social problems.

Bertelsmann Group for Policy Research

The Bertelsmann Group for Policy Research at the Center for Applied Policy Research (C·A·P) of Ludwig Maximilian University in Munich was responsible for the research involved in developing, carrying out and publicizing the current project. In this it was able to look back on many years of experience in providing policy advice based on research into European issues. Its work is documented in numerous publications on European unification, including participation in the 'Jahrbuch der Europäischen Integration'. C·A·P also has at its disposal a comprehensive infrastructure: two editorial teams, a research library, and the European Documentation Center, which holds every document and publication issued by the various European Union institutions, and is linked to European databases.