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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

**DRAFT REPORT
SUMMARISING THE REPLIES
TO THE QUESTIONNAIRE
ON FEDERAL AND REGIONAL STATES**

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FOREWORD

This report is the result of the work of the European Commission for Democracy through Law, in particular within the framework of the activities of the Sub-Commission on the Federal State and Regional State.

The report was drawn up following the decision taken by the Venice Commission at its 27th meeting (Venice, 17-18 May 1996) to undertake a study on the current problems of federalism. At its 28th meeting (Venice, 13-14 September 1996), the Commission adopted a questionnaire on federal and regional States. This questionnaire is general in scope and is intended to address all the main issues arising for federal and regional States. It should, moreover, be seen in the context of the constitutional reform which is under way in Italy and, in particular, of the plans to modify Italy's constitutional structure along federal lines. Special emphasis has therefore been placed on subjects of current concern in Italy, such as taxation matters (point II.4 of the questionnaire).

The report is based largely on the replies to the questionnaire on federal and regional States. This questionnaire (document CDL-FED (96) 1) is attached in the Annex. The replies are contained in document CDL-FED (97) 2. The general approach of the questionnaire, and also of this study, is inspired largely by the document drawn up by the President of the European Commission for Democracy through Law, Mr. Antonio La Pergola, entitled : "Form and reform of the State: choosing a federal model" (doc. CDL-FED (96) 2).

The replies to the questionnaire concern the following federal and regional States: Argentina, Austria, Belgium, Bosnia and Herzegovina, Canada, Germany, Italy, Russia, Spain, Switzerland and the United States.

In addition, members from other States were invited to reply, if they so desired, to the questions which they considered relevant to their particular country. Replies were provided by the following States: Bulgaria, Finland, Portugal and Ukraine. The parts of these replies concerned in particular with decentralised structures are summarised in the footnotes of this report, which otherwise concentrates on federal and regional States.

It should also be noted that the following terminology has been chosen:

- the expression "Central State" describes the central organs of the State (whether it is federal or regional);
- the term "entities" denotes the constituent communities of the State.

The same terminology applies *mutatis mutandis* to the decentralised unitary States which replied to the questionnaire.

INTRODUCTION

The continent of Europe has lived through considerable changes over the past few years. These have been expressed in a trend towards both integration and decentralisation, or even, in some cases, disintegration. The integrationist trend, the construction of Europe, in turn combines territorial extension - enlargement - and extension at a practical level -deepening. The decentralisationist trend does not manifest itself solely by decentralisation pure and simple, but also and above all by regionalisation and federalisation. These changes should be seen in a general context of intense constitutional activity, characterised not only by the adoption of new democratic constitutions in central and eastern Europe, but also by structural reforms in western Europe.

In particular, a trend towards transferring powers from the Central State to the periphery is under way in a number of States. For instance, in a quarter of a century Belgium has changed from a traditional unitary State to a regional State, then a federal State, while the powers of Spain's autonomous communities are increasingly wide-ranging. The debate on Italy's transformation into a federal State is in full swing. Nascent Russian federalism is characterised by great complexity and the way in which it operates still raises a number of questions which have not been fully resolved.

The trend towards transferring powers to the periphery has even been reflected at the supranational and international level. Thus under the Maastricht Treaty the Committee of the Regions within the European Community was set up. The Conference of European Local and Regional Authorities has been transformed into the Congress of Local and Regional Authorities; the latter adopted, at its third session, Resolution 37 (96) on the European Charter of Regional Self-Government, which stresses the importance of transferring powers from the State to the lower-level public authorities in the Europe of tomorrow.

It is in this context that the present study should be seen. The approach is therefore not intended to be theoretical but, through examining the situation of federal and regional States, it seeks to answer specific questions, from the perspective of future constitutional reforms.

The structure of the report is of course based largely on that of the questionnaire (CDL-FED (96) 1) and contains six chapters covering the most important aspects of federal and regional States.

- The first chapter deals with the basic aspects, such as whether there is a symmetric or asymmetric federal or regional system in operation, the basis of the existence of the entities and whether their territorial basis or number may be modified.
- A second chapter is concerned with the distribution of powers and focuses on tax matters.
- A third chapter identifies the entities' organs and political systems and determines whether the latter are similar to the political system of the Central State.

- A fourth chapter focuses not on the powers of the entities as such but on participation by the entities in the decision-making process of the Central State, in particular via the second chambers.
- A fifth chapter is concerned with co-operation between the Central State and the entities (co-operative federalism and regionalism).
- A sixth and final chapter deals with the mechanisms which enable the Central State or the entities to satisfy themselves that the organs of the other legal system have not contravened the higher rules, in particular the rules on the distribution of powers.

THE STRUCTURE OF THE STATE

1. Determining the federal and regional States

This report does not start with a theoretical definition of the concept of a federal or regional State. It is concerned with States which are described by their national law as federal or regional States and aims to determine the substance which may be given to these concepts.

Of the States which replied to the questionnaire, the following are federal States: Austria, Belgium, Germany, Russia, Switzerland, Argentina, Bosnia and Herzegovina, Canada and the United States. Italy and Spain are regional States.

2. The choice of the federal or regional system

a. The federal States

Most of the federal systems considered were formed by the association of States or pre-existing communities. Their creation can thus be explained by historical reasons.

In Switzerland, the Confederation - an old and very loose association of rural and urban communities - gradually developed into a federal State. The Confederation of States based on the Federal Pact of 1815 was thus transformed, in 1848, into a federal State consisting of the same cantons, most of which had been in existence for centuries.

The federal structure of the United States is also based on the transformation of a confederal system consisting of pre-existing entities. The former British colonies united under the Articles of Confederation of 1777 formed a federal State based on the Constitution of 1787. Canadian federalism was established by association, in 1867. It brought together previously separate British colonies for political, economic and military purposes; a federal State was created to provide protection from possible US designs on its territory, in order to ensure the stability of Canada Province, which included Ontario and Quebec, and to guarantee the country's economic development, in particular with regard to the construction of railways. In Argentina, the basic entities, known as "provinces", also existed prior to the creation of the federal State.

German federalism is rooted in a thousand-year-old history, during which Germany constituted a unitary State only during the National Socialist period (1933-45). After 1945, the *Länder* (federal states) were reconstituted before the Central State and a Parliamentary Council made up of delegates from the *Länder* adopted the State's Basic Law.

After the disappearance of the Austro-Hungarian monarchy, seven existing historical regions and two newly constituted regions grouped together in the form of a federal State, the Republic of Austria. Austrian federalism therefore also has a historical basis.

Other federal States, however, were formed by the dissociation of unitary States.

Belgium was formerly a traditional unitary State which, between 1970 and 1993, was gradually transformed into a federal State consisting of communities and regions.

In the context of the Soviet Union, although the Russian Soviet Federated Socialist Republic (RSFSR) was officially federal in nature, insofar as it consisted of autonomous republics, autonomous regions and autonomous districts, real federalism only began with the breakdown of the USSR and, subsequently, the conclusion, on 31 May 1992, of the Federal Treaty of the Russian Federation with the members of the Federation. The regions, territories and cities of federal status henceforth became members of the Federation just like the autonomous republics, for instance.

b. The regional States

The two regional States which exist in Europe today were once unitary States.

The Italian Constitution of 1947 provided for the division of the territory into regions. The establishment of a regional State was undertaken gradually, since it depended on the adoption of laws on regional elections, the regions' financial resources and the transfer of administrative functions to the regions, not to mention laws relating to the regions with special status (five regions which have specific ethnic, cultural or linguistic characteristics). The statutes of the special regions were adopted before the laws concerning the ordinary regions, and the special regions started to function before the ordinary regions. The powers of the different special regions are not identical.

It should be noted that the Constituent Assembly which adopted the Italian Constitution rejected the idea of a federal system, since it considered that such a system would imply a sharing of sovereignty between the Central State and the entities. The question no longer arises today in the same terms. As the developments referred to below suggest, the distinction between a federal and a regional State is more a difference of degree than of kind.

In Spain, the 1978 Constitution enabled the regions to request autonomy. Gradually, the demand spread, to such an extent that there is no longer any part of the country without political autonomy. Spain can therefore be described as the “State of autonomies”, rather than as a regional State, even though the autonomous communities correspond largely to the old historical regions.¹

3. The basis of the existence of the entities

The constitutional texts of the federal and regional States studied all refer to the existence of entities, except for the Spanish Constitution. Some mention them all by name, while others refer to other secondary texts.

The first category includes the Austrian and Swiss Constitutions, which list the federated States. In Belgium, the Constitution expressly recognises the existence of three communities, (French, Flemish and German-speaking) and three regions (Walloon, Flemish and Brussels) and refers to them by name. The Constitution of Bosnia and Herzegovina refers to the two entities (the Federation of Bosnia and Herzegovina, and Republika Srpska).

The Russian Constitution also contains an exhaustive list of the members of the Federation

¹ Ukraine is the only one of the unitary States which replied to the questionnaire to have been faced with the question of establishing a federal structure after its accession to independence; such a transformation was rejected as this would have been an innovation that would have been out of keeping with the Ukrainian mentality.

Bulgaria, on the other hand, is a centralised State, divided into regions which are of a purely administrative nature and do not therefore have any autonomous powers; this centralised character is justified by the country’s small size, its relatively homogeneous national composition and the fact that it has been undergoing a transition from totalitarianism to a democratic government.

Portugal also has a pronounced unitary character. The Constitution provides for the creation of ordinary regions, simple decentralised administrative districts. However, these do not yet exist. The report will therefore be concerned only with the autonomous (island) regions of the Azores and Madeira, which are characterised by their specific geographical situation.

Like Portugal, Finland is a unitary state to which an island territory with special autonomous status belongs, viz. the Åland Islands. After the inhabitants of these islands - who are mainly Swedish-speaking but regard themselves as a separate entity from Finland’s other Swedish-speaking inhabitants - expressed the desire to become part of Sweden again, the Council of the League of Nations decided, in 1921, that the islands belonged to Finland, which was, however, required to confer upon them a certain measure of autonomy. The autonomous status, which was subsequently extended, is therefore related to a specific situation, not only from the geographical but also from the linguistic and historical point of view. On the Finnish mainland, however, federations of municipalities have enjoyed powers in respect of regional physical planning for decades; since 1993, they have been known as "provincial federations", and their powers have been extended to cover regional development in general.

(republics, territories, regions, cities of federal status, autonomous regions, autonomous districts).

The situation of Canada is fairly similar: while the 1867 Constitution refers only to the original four provinces, the other six provinces joined the Canadian Federation or were established by laws or legislative measures which are constitutional in their scope.

In Italy, the Constitution lists all the regions. It provides for five regions enjoying special forms and conditions of autonomy, under special statutes adopted through constitutional laws.

The German Constitution provides for the division of the Federation into *Länder* - a principle which is inviolable. It lists the *Länder* in its preamble. However, federal legislation may, in certain circumstances (see below, Section I.6), modify the territorial basis or even the number of *Länder*.

In the United States, the existence of the States is referred to in the Constitution but they are not listed. Congress is responsible for the admission of new States.

Lastly, the situation in Spain is specific, since the Constitution confines itself to recognising the right to autonomy, without even providing for the existence of a single autonomous community. It is at their request that the different parts of the territory have become autonomous, and the geographical framework of these autonomous communities is established by their statutes of autonomy, complex normative acts which are subject to a special drafting procedure and are adopted in the form of a national organic law.²

4. Local autonomy (general survey)

This report does not intend to deal in detail with the question of local autonomy. It is, however, interesting to ask oneself whether the existence of a federal or regional State affects the question of local autonomy.

Generally speaking, in the federal States the question of local autonomy is, to a greater or lesser extent, a matter for the entities.

Three States (Switzerland, Canada and the United States) leave it to the federated States to organise their territorial subdivisions and thus to legislate concerning the existence and, where appropriate, the powers of the lower-level public authorities.

The Constitutions of the other States studied guarantee the existence and the autonomy of the local public authorities.

² In the unitary States studied, however, the entities are listed in the Constitution only in the case of Ukraine. The Finnish and Portuguese Constitutions refer by name only to the autonomous regions; in Finland, the establishment of provincial federations is provided for in an ordinary law. In Bulgaria, the existence of the entities is provided for in the Constitution but the determination of their territory is a matter for the President of the Republic, upon a proposal from the Government.

The constitutional principle of communal autonomy limits the powers of both the legislature of the Central State and, where applicable, the legislatures of the federated States or regions. However, the authorities of the entities or Central State exercise a degree of supervision over the activities of the local authorities.³

5. Symmetric/asymmetric federalism and regionalism

The existence of a federal or regional structure does not mean that the entities are necessarily equal. On the contrary, there are major differences between the States studied with regard to two points:

- the powers of the entities;
- participation by the entities in the decision-making process of the Central State.

Where the equality of the entities is guaranteed in general terms, it is a question of symmetric federalism (or regionalism); however, where there is a certain inequality between the entities, it is a question of asymmetric federalism (or regionalism).

In the United States and Argentina, the States or provinces have the same powers and the same rights to participate in the decision-making process of the Central State, through the Senate (which has two members per State in the United States and three members per province in Argentina). To that extent they represent symmetric federalism.

In the United States, the States also have equal powers with regard to amendments to the Constitution (which must be ratified by three-quarters of the States and which may be requested by a convention called at the request of two-thirds of the States).

The Swiss system is also symmetric; it is completely so with regard to powers but there is one exception, mainly for historical reasons, with regard to participation in the federal will. The six half-cantons are each entitled to only one seat in the States Council - the second federal chamber - whilst the 20 full cantons are entitled to two seats. The half-cantons have a half-vote (and not a full vote) in constitutional referendums (which require a majority of the people and the cantons), the referendum which eight cantons may request with regard to laws, federal decrees of a general nature and certain treaties, as well as in the context of the convening of an extraordinary meeting of the federal chambers, which may be requested by five cantons.

³ Local autonomy is also recognised in the four unitary States which replied to the questionnaire.

German and Austrian federalism is also symmetric with regard to the distribution of powers (except for the special status of Vienna, which is both a province and a commune) but not insofar as participation by the *Länder*/provinces in the second chamber is concerned: the number of deputies representing the *Länder*/provinces in the German or Austrian *Bundesrat* (federal council) varies according to their population, even though it is not directly proportional to the size of the population (in Germany, it varies from three to six, in Austria from three to twelve).

In Canada, all the provinces in principle have the same legislative powers. On the other hand, participation by the provinces in the decisions of the Central State varies:

- the composition of the Canadian Senate is based on four major regions: Quebec has 24 senators; Ontario 24; the West 24 (six for each of the provinces of British Columbia, Alberta, Saskatchewan and Manitoba); and the Maritime Provinces 24 (ten for Nova Scotia, ten for New Brunswick and four for Prince Edward Island). Newfoundland has six senators and the Northwest Territories and Yukon Territory one each;
- the population of the provinces is crucial for amendments to the Constitution, which may generally be modified only with the consent of seven provinces representing 50% of the Canadian population;
- Quebec also occupies three of the nine seats in Canada's Supreme Court.

The arrangements in Bosnia and Herzegovina are also symmetric with regard to powers and asymmetric with regard to participation in the organs of the Central State: two-thirds of the members of the central authorities (the Parliamentary Assembly - both the House of Representatives and the House of Peoples - the Presidency, the Council of Ministers, the Constitutional Court and the Central Bank) come from the Federation of Bosnia and Herzegovina, and one-third from the Republika Srpska.

Unlike the above, the Russian constitutional system provides for full equality among the members of the Federation with regard to participation in the organs of the Central State (each member of the Federation delegates two representatives to the Federation Council, the upper house of the Federal Assembly) and constitutional amendments (which must be approved by the organs of the legislative authority of at least two-thirds of the members of the Federation). There is, however, a certain asymmetry with regard to the distribution of powers. On the one hand, there are different types of members of the Federation - autonomous republics, regions, cities of federal status, autonomous region, autonomous districts - which do not have exactly the same powers; for instance, only the republics have the right to determine their official languages. On the other hand, the asymmetry stems more from a peculiarity of Russia, whereby the distribution of powers does not result from the Constitution alone; this states that, insofar as the joint (concurrent) powers of the Federation and its members are concerned, treaties determining the areas of responsibility and functions may be concluded between the organs of the State authority of the Russian Federation and the organs of the State authority of the members of the Russian Federation. Since, by definition, these treaties do not necessarily have the same content, they introduce a relatively large degree of asymmetry.

In the last three States to be examined (Belgium, Italy and Spain), the question of symmetry

arises only with regard to the distribution of powers, as the participation of the entities in the decision-making process of the Central State is very limited in those countries (see below, Section IV). In particular, the entities are not represented as such in the second chamber (roughly a fifth of Spanish senators and a quarter of Italian senators are, however, elected in regional constituencies, the others in subdivisions of regions, in an asymmetric manner, since the number of senators is based essentially on population). At the very most, a limited element of symmetry is discernible in the fact that five regional assemblies in Italy may, on an equal footing, request a referendum.

With regard to the distribution of powers, the three States in question may be categorised as follows, from the most symmetric to the most asymmetric:

- in Belgium, the three communities and the three regions in principle have the same powers, although there are exceptions: the German-speaking community is not competent to decide the use of languages. The Brussels institutions have certain special characteristics making them particularly complex; it may, for instance, be noted that the Brussels Capital region is subject, in respect of certain matters, to a kind of “high-level supervision” by the federal authorities.

The Belgian system is asymmetric with regard to the entities’ power to organise themselves: the German-speaking community and the Brussels Capital region do not have the entities’ powers to organise themselves which have been conferred on the Flemish community, the Walloon region and the Francophone community;

- the Italian system is asymmetric since it is characterised by the coexistence of regions with special status and ordinary regions. The special regions have more powers than the ordinary regions and the powers of the different special regions are not identical;
- the greatest degree of asymmetry can be found in the case of Spain, since it is not the Constitution which determines the powers of the autonomous communities but the institutions and powers of each autonomous community are determined by its statute of autonomy, a complex act subject to a special drafting procedure and adopted in the form of a national organic law.⁴

6. Modification of the territorial basis or the number of entities

Modification of the number of entities (by merger or secession) or of their borders is not governed in the same way by all the constitutions; these are even sometimes silent on certain aspects of this matter.

⁴ Of the four unitary States studied, only Bulgaria is fully symmetric. The existence of special autonomous status in the other three States examined entails a certain asymmetry: in Finland it involves the Åland Islands, in Portugal the Azores and Madeira and, in Ukraine, the Autonomous Republic of Crimea. In Ukraine, the cities of Kyiv and Sebastopol also enjoy special autonomous status.

Generally speaking, such modifications are exceptional and can only take place following a cumbersome procedure involving both the Central State and the entities concerned.

Only Belgium appears - officially - to be an exception to this rule. The borders of the linguistic regions (on which the communities are based) and the regions may be modified by special laws which require a majority of two-thirds of the members present in the two assemblies (Chamber of Deputies and Senate) and a majority of each linguistic group (French and Dutch), with a majority of the members of each group being present. The regions or communities therefore have no power to intervene in decisions in this matter; however, the requirement for there to be a majority of each linguistic group guarantees that their interests will not be damaged by the central authority; in actual fact, modification of the frontiers is virtually impossible in political terms.

All the other States studied require the agreement of the Central State and of the entities concerned.

In Argentina, the merger or division of provinces requires the consent of the provinces concerned and of Congress; the same applies to the States of the United States (the consent of the States being expressed by their legislative bodies).

In Russia, any territorial change requires the agreement of the Federation and of the members concerned; in Austria, constitutional laws agreeing to such changes must be adopted by the Federation and the provinces in question.

In Canada, the Constitution provides for the modification of frontiers, subject to the agreement of the central parliament (Senate and the House of Commons) and the provincial legislatures affected by the change; merger or partition requires a constitutional amendment.

In Bosnia and Herzegovina, the delimitation between the two entities provided for in Annex 2 to the Dayton Agreements could in theory be modified with the agreement of the two entities; there is no provision for division and, *a fortiori*, merger of the entities.

Other States provide for direct participation by the people, to a greater or lesser extent, in territorial modifications.

In Switzerland, this participation takes three forms: firstly, the approval of the people concerned is necessary, secondly, that of the people of the cantons affected and, thirdly, a federal amendment to the Constitution, which requires a twofold majority, of the people and of the cantons. In Italy a merger or partition, proposed by the municipal assemblies representing at least a third of the population concerned, must be approved by a regional referendum, then by a constitutional law; modification of the borders of the regions, proposed by the municipal assemblies concerned, must be approved by regional referendum, then by ordinary law. The result of the regional referendum is not binding on the national legislator.

In Germany, reorganisation of the territory is possible under federal law, but only after the *Länder* concerned have been given a hearing, and must be confirmed by a plebiscite on the territory in question; in addition, territorial modifications are possible only if they have a historical, cultural, economic and linguistic basis.

Finally, in Spain, while modification of the regional borders is not expressly ruled out by the Constitution, there is no provision for a mechanism for such modification and no changes have taken place so far - the Constitution lays down only the procedural arrangements for a possible merger between the Basque Country and Navarre.⁵

II. DISTRIBUTION OF POWERS

An examination of the distribution of powers between the Central State and the entities makes it possible to determine the substance of federalism or regionalism. In other words, the greater the number of matters which do not fall within the remit of the Central State, the more marked the federalism or regionalism.

This subject is therefore central to the study; taxation matters will be elaborated upon in detail, since the extent of resources, especially tax resources, largely determines the entities' and, moreover, the Central State's scope for action.

1. Principles governing the distribution of powers

Before examining the distribution of powers, its legal basis must be established. Is the distribution of powers provided for in the Constitution or another act? Does the text which distributes powers contain one or two lists of powers?

In most of the federal States studied, the Constitution is the only basis for the distribution of powers. More often than not, it contains a list of federal powers: the entities enjoy residual power. This applies to Switzerland, Germany, Austria - even though the residual powers of the Länder/provinces are relatively limited - Bosnia and Herzegovina, Argentina and the United States (admittedly, in this country the clauses conferring powers to the Union are given a very broad interpretation).

The situation is similar in Russia. However, given the extent of the powers conferred upon the Federation, the powers of the constituent entities could well be excessively limited. That is why treaties defining the limits of competence and functions have been concluded by the Federation with a number of its members.

Of the federal States studied, two deviate from the rule that the Central State is responsible for conferring powers, viz. Canada and Belgium.

⁵ Modifications to the borders, or even the number, of non-autonomous entities in the unitary States should in principle be easier. Thus, in Bulgaria, they are decided by the President of the Republic on a proposal from the Government. In Finland, however, it is in practice possible for a municipality to move from one provincial federation to another only if all the municipalities concerned are in agreement (in particular, those of the federation which will have to accept the municipality which wishes to change federation). In Ukraine, the merger or division of the entities requires a constitutional amendment. Finally, modification of the borders of the autonomous island regions of Finland (the Åland Islands) or Portugal (the Azores and Madeira) is not really a practical proposition.

In Canada, the distribution of powers is entirely governed by the Federal Constitution, which contains both a list of the federal powers and a list of the provinces' powers. Residual power in principle belongs to the Central State; this rule must, however, be qualified by the fact that responsibility for local and private matters is conferred upon the provinces, which may be regarded as a minor residual power.

The Belgian system is in a class of its own. First of all, the Federal State enjoys residual power. At the most, the Constitution states that a constitutional amendment at a later date will transfer residual power to the communities and the regions. Secondly, while the community powers are in fact listed by the Constitution, only the principle is occasionally referred to, so that they must be specified by special law (and by an ordinary law insofar as the German-speaking community is concerned). Lastly, there is only a very vague reference in the Constitution to regional powers, which are spelt out in detail in special laws. It should be noted that, while the distribution of powers is therefore laid down to a large extent in subconstitutional acts, the special laws are very rigid, and that in practice changing the distribution of powers therefore seems as difficult as in most other federal States.

In the regional States (Italy and Spain), the Central States enjoy the residual power. The Italian Constitution lists the powers of the ordinary regions, whilst the specific powers of the regions with special status are contained in the constitutional laws relating to those regions. The constitutional provisions must be implemented by ordinary national legislation where the ordinary regions are concerned and by special governmental decrees where the special regions are concerned, in agreement with these regions in the latter case. In Spain, it is the various statutes of autonomy - adopted following a complex procedure, ultimately in the form of a national organic law - which determine the powers of the autonomous communities. The listing by the Constitution of the powers which may be delegated to the autonomous communities or for which the Central State is "exclusively" responsible is only of a historical or indicative nature.⁶

2. Types of powers

The purpose of this section is to define general categories of legislative powers of the Central State and the entities. Clearly, such an exercise cannot take into account the finer points of the distinctions made under the laws of the different States; it is more concerned with formulating a common terminology by extracting the essential points.

The question studied here, which is of a constitutional nature, is the distribution of the powers to

⁶ In the unitary States, the entities may quite simply not have any autonomous powers (Bulgaria). If not, it is only natural for the Central State to have subsidiary power. In Portugal and Ukraine, the powers of the autonomous entities are listed in the Consitution; the situation in the Finnish province of Åland is similar, since the law on the autonomy of the province is of a constitutional nature; this law contains two lists, enumerating on the one hand the powers of the Finnish State and, on the other, those of the Åland Islands, without there being any subsidiary power. The powers of Finalnd's provincial federations and Ukraine's oblasts are the subject, however, only of ordinary laws (which have not yet been adopted in Ukraine).

adopt normative acts, or legislative powers. The distribution of administrative or executive powers, however, is not dealt with in the context of the questionnaire or of this report (however, see section II.3.c below).

a. Exclusive powers

The first type of power is exclusive powers.

Only the Central States and entities respectively may legislate in areas for which they have exclusive responsibility. At the most, it could be accepted that, in order to avoid a negative conflict of responsibilities, the conferring of a new exclusive power to the Central State will not *ipso jure* abrogate legislation enacted by the entities.

The idea of exclusive power is accepted in all the federal States studied, both at the federal level and at that of the federated States. In Russia, however, it appears to be difficult to define exclusive powers of the members of the Federation on the basis of the Constitution alone; these may be provided for in the context of Russia's asymmetric federalism by treaties between the Federation and its members.

Exclusive powers are the rule in Belgium, Canada, Argentina and, it would appear, Bosnia and Herzegovina.

In the United States, both Union and States, in principle, have exclusive powers, although many of their powers are parallel. In some areas, the States have the power to act in the absence of federal legislation, although they are ousted if the federal government acts (concurrent power).

The approach is different in the regional States (Italy and Spain), where the Central State has residual power. In Italy, it is not explicitly a matter of exclusive powers although there are grounds for applying this idea to the Central State's powers in areas where the regions do not have any power; on the other hand, there is no such thing as exclusive powers of the regions. In Spain, the idea of exclusive power may be applied to areas for which the Central State is wholly responsible, insofar as both the legislative as well as executive and administrative aspects are concerned. The autonomous communities also have certain exclusive powers.⁷

b. Concurrent powers

It is a question of concurrent powers, in accordance with the German terminology, when the Central State has the power to exhaust all aspects of a matter, the entities retaining the power to legislate only insofar as that matter has not been exhausted by the Federation. The crucial distinction between areas where the Central State has exclusive powers and those where it has concurrent powers is that in the first case, in principle, the entities may not legislate (unless on an absolutely exceptional and provisional basis, or by delegation), whereas in the second case the legislation of entities often coexists on a lasting basis with legislation by the Central State, which has not exhausted the matter.

⁷ In Finland, the powers conferred upon the Åland Islands, on the one hand, and the Central State, on the other, are in principle of an exclusive nature.

The concept of concurrent powers in the sense referred to above is accepted above all in Germany, Russia and Switzerland. In Germany, the Federation's right to legislate in areas where it has concurrent powers is subject to the principle of subsidiarity being observed (where federal laws and regulations are needed in order to achieve equivalent living conditions or to safeguard legal or economic unity in the interests of the State as a whole). In Russia, the field of concurrent powers is often the subject of agreements between the Federation and its members (under which the Federation in particular renounces the right to exhaust the matter). In the United States, matters in respect of which the States may legislate in the absence of or subject to federal legislation fall within concurrent powers.

In Canada, the only areas in which there are concurrent powers as defined here (concurrent powers weighted in favour of the Federation) are agriculture and immigration. Allowances and old-age pensions, however, are areas where there are concurrent powers weighted in favour of the provinces, in that federal legislation applies only in the absence of conflicting provincial legislation: in these matters, contrary to a general rule, provincial law takes precedence over federal law. Austria also has a similar category of legislation, since the Federation has subsidiary authority where the provinces do not adopt the necessary implementing laws in connection with a federal law or an international agreement in respect of a matter falling within their jurisdiction. In such cases, the central State may legislate on a provisional basis.

c. **The power to adopt framework laws**

Many States also have a system in which the Central State adopts framework laws, ie it legislates on matters of principle while the entities are competent to legislate on matters of execution and detail and with regard to execution proper.

The system of framework laws exists first of all in Germany, Austria, Switzerland and Belgium. In Belgium, the mechanisms for supervising the activities of the federated entities (for instance, in the fields of international relations or finance) may be considered similar to the power to enact framework laws.

Italy's regional system is based largely on the adoption of framework laws in various forms.

The extent of the role played by the Central State varies according to the type of power which the regions have.

Two types of power apply to all the regions: "concurrent" and "supplementary" powers:

- with regard to "concurrent" powers, the regions act in accordance with the framework laws of the State;
- with regard to "supplementary" powers, the regions act on the basis of delegation by the central legislature.

In addition, the special regions enjoy two other types of power:

- "primary" powers, which are limited only by the general principles of the national legal

system, the basic rules of the economic and social reforms and international obligations entered into by the State (which enables the national legislature to adopt certain laws); and

- "integrative" powers, which enable the regions to supplement national law with detailed rules aimed at safeguarding local interests.

Concurrent and integrative powers are therefore limited by framework laws. On the other hand, supplementary powers may be regarded as delegated (see Section II.3.a below). Finally, regulations limiting primary powers may have the character of framework laws, but legislation on international undertakings and economic and social reform may also be of a more detailed nature, which would be a case of concurrent powers in the sense meant here (see section II.2.b above).

In Spain, the system of framework laws must also be regarded as a cornerstone of regionalism. In many matters which are the subject of statutes of autonomy the State determines solely the questions of principle, leaving the autonomous communities to legislate on questions of detail. It should be noted that the State sometimes tends to legislate beyond the principles. In addition, a framework law might establish basic principles and directives, conferring upon the autonomous communities the right to legislate on questions of detail; this possibility has, however, so far never been used.⁸

d. Parallel powers

Some States still have the concept of parallel powers. This has been especially developed in Switzerland. The Constitution entrusts a task or a responsibility to the Confederation without necessarily preventing the cantons from exercising an identical task or assuming a similar responsibility. The Confederation and the cantons each legislate in their respective spheres of competence. Federal and cantonal powers do not encroach upon one another. For instance, civil and criminal proceedings before the Federal Court come under federal law while cantonal laws apply to civil and criminal proceedings before the cantonal courts; direct income taxes are levied both by the Confederation, on the basis of federal law, and by the cantons, on the basis of cantonal law.

Such a concept exists in Spain under the name of "indistinct powers", in Argentina with regard to indirect taxation, and in Canada with regard to both direct taxes and certain indirect taxes. In Belgium, the same applies, at least in principle, with regard to grants and taxation. In practice, in the United States, the Union and the States have parallel powers in many areas of social welfare.

3. Arrangements for exercising the powers

⁸ The system of the Åland Islands, in Finland, has a specific type of power which may be referred to as "joint powers", in the sense that the agreement of the authorities of the Central State and of the entity concerned is required for them to be exercised. Thus national laws concerning the principles of property ownership in the province require the agreement of the provincial legislature.

Briefly, some details should be given of certain arrangements for exercising the powers, in particular with regard to the general matter of the delegation of powers.

a. The delegation of powers

Certain States (Austria, Belgium, Argentina and Canada) rule out the delegation of legislative powers from the central parliament to the parliaments of the entities and vice versa.

The delegation of powers from the entities to the Central State is provided for solely in Bosnia and Herzegovina.

In Russia, the device of treaties between the Federation and its members replaces the delegation of powers. These treaties may transfer powers both from the Federation to the entities and from the entities to the Federation.

In all the other States where it is accepted, delegation applies only to the powers of the Central State. It is expressly provided for in Germany and is common in Switzerland (especially in the field of concurrent powers). Italian laws may delegate certain powers, the so-called “supplementary” powers, to the regions.

In Spain, delegation by means of ordinary laws is ruled out; only amendment of the statutes of autonomy can transfer a power from the Central State to the autonomous communities, but it must not affect the core competences which the State may not relinquish.⁹

b. Participation by the Central State in the exercising of powers by the entities

In Germany, there is also a specific category known as “joint tasks”.

In a number of areas for which the *Länder* are responsible, the Federation participates in carrying out the *Länder*'s tasks if those tasks are important and if such participation by the Federation is necessary to improve living conditions; the federal law lays down a framework plan, with the agreement of the *Land* concerned, and bears at least half of the cost.

c. The granting of executive powers to the entities

Where the Central State possesses a legislative power, the power to apply the legislation enacted by it may, however, fall to the entities. It is then a matter of executive federalism. Executive federalism, ie the application of the law of the Central State by the entities (which therefore have executive powers in areas where the Central State has the legislative power), is the rule in Germany and Switzerland, and is frequently applied in Austria, Spain and Canada, where, for instance, criminal law is a federal matter but administering it is a matter for the provinces. In Russia, the executive organs of the members of the Federation (like the organs of local self-government) apply the federal law. The Russian system is based on there being a single

⁹ The delegation of powers to autonomous entities of unitary States is provided for in Portugal in respect of matters of specific interest to the regions which are not the preserve of the central organs; the same applies to Finland, in limited areas, with the agreement of the provincial legislature of the Åland Islands.

executive power: in the fields falling within the exclusive or concurrent powers of the Federation, the organs of executive power of the members of the Federation are obliged to implement the decrees and instructions of federal organs of executive power and are answerable to them. In the United States, however, it is generally the federal organs which apply federal law. There are numerous exceptions however; for instance, the State bodies implement programmes financed jointly by the Union and the States.

4. The scope of the various types of powers

After defining the various types of powers, it is necessary to determine the matters to which they apply. The report will briefly examine the distribution of internal powers. The subject is so complex that there is no question of listing in this report all the powers of the Central State and the entities; you are referred to the replies to the questionnaire for further details. The specific case of powers with regard to international relations will then be studied.

The question of powers with regard to tax matters, which is particularly relevant to certain legal systems that are undergoing changes, will, however, be examined in greater detail.

a. Internal powers

As already stated, the subject is so complex that it is not possible to summarise here all the replies to the questionnaire, in order to set out in detail which areas are covered by a type of power of the Central State or the entities; it is also difficult to define general rules that are applicable in the States concerned. For further details, you are referred to the actual text of the replies.

A study of the powers, especially the internal powers, does, however, enable one to determine to a large extent the degree of centralisation or, conversely, federalisation or regionalisation of a State, even though other factors, to which we shall return later, come into play (whether the entities have judicial organs, participation by the entities in the Central State's decision-making process, how closely the entities are supervised by the Central State).¹⁰

Of the States studied, the regional States are, as one might assume, more centralised than the federal States. However, there are also differences of degree among the regional States and among the federal States. Thus Italy, at least insofar as the ordinary regions are concerned, is more centralised than Spain. In Italy, a constitutional amendment or the adoption of a constitutional law would be necessary to extend the powers of the regions, except where "supplementary" powers are concerned. In Spain it is accepted that powers may be transferred to the autonomous communities to a greater extent than expressly provided for in the Constitution, and such transfers of powers have taken place in favour of all the autonomous communities.

¹⁰ In the unitary States legislative powers are the preserve of the Central State - subject to special statutes of autonomy, which confer wide powers on Finland's autonomous province of Åland, and the fairly extensive powers of the Portuguese regions of the Azores and Madeira. The Ukrainian Constitution states that the Autonomous Republic of Crimea may adopt normative regulations in certain matters of local interest.

With regard to the federal States, Austria may be regarded as the most centralised; matters which are the exclusive preserve of the provinces are fairly few in number and are similar to those for which the regions are responsible in Spain or Italy (eg agriculture, hunting, fisheries, tourism, regional roads); most matters are the legislative, if not executive responsibility of the Federation.

In Argentina, federal powers - which are nearly all exclusive in nature - are numerous and leave little scope for the provinces, especially as they are often given a wide definition (for instance, the federal State is responsible for providing for the advancement and well-being of all provinces or, to quote another example, for human development and economic progress with regard for social justice).

The Belgian system remains based on the residual power of the federal State; to a large extent this concerns matters in which the federated States have, as in the other States, few powers (civil and commercial law, criminal law, social law, military affairs) but also extends to home affairs, justice, social security and, for the key points, finance and tax law. The relatively wide range of federal powers is strengthened by the fact that the power to execute federal law remains with the Central State.

Russian federalism, it should be remembered, is asymmetric insofar as the distribution of powers is concerned, so that the extent to which the State is federal can be defined only in relation to a given member of the Federation. On the basis of the text of the Constitution, it may be considered that the residual power of the members of the Federation is very limited, and that a fairly centralised system remains in place: this is true for the members of the Federation which have not concluded a treaty with the Federation; however, those members which have concluded such agreements with the Federation do have wider powers.

Except for the specific case of Bosnia and Herzegovina, whose Central State is still weak, the States in which federalism is most pronounced are Germany, Switzerland, Canada and the United States.

Insofar as the relevant powers have not been transferred to the European Community where EC Member States are concerned, a number of matters are the subject of an exclusive or concurrent federal power in these four States, and in all the other federal or regional States studied, except Bosnia and Herzegovina. They may be regarded as the Central State's core competences, viz. defence, the currency, intellectual property, bankruptcy, post and telecommunication, weights and measures, criminal law and customs. Only the United States and Canada do not have a unified system of civil law (although the law governing marriage and divorce is federal in Canada). Quebec has a system based on civil law and the other provinces a system based on common law. Only in Canada is social security largely the responsibility of the entities.

The system in Bosnia and Herzegovina seems to grant even fewer powers to the Central State than the systems in the above-mentioned States. However, it is still too early to prejudge how it operates: in particular, the Central State is responsible in respect of matters which "are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina"; only time will tell whether or not this phrase is to be interpreted in a wider sense.

The above information concerning the powers which the Central State possesses in all the cases studied are of interest from a comparative point of view but it would be foolhardy to deduce from this that the State can continue to exist only if certain matters are centralised.

Conversely, it is virtually impossible to determine what the spheres of competence of the regions or federated States must be in the case of a "real" regional or federal State, especially as certain matters may fall only partly within the responsibility of the entities, particularly where there are concurrent powers or framework laws.

b. Powers in the field of international relations

aa. Traditional international law

In principle, the Central State enjoys general power to conclude international treaties in the sense that it may enter into obligations at the international level even in respect of matters for which the entities are responsible at the internal level. The only exception is Belgium, where international competence corresponds to internal competence in the sense that the communities and the regions alone conclude treaties concerning matters which are their exclusive preserve (with the federal authority being able, for reasons strictly enumerated in the special law, to take action to oppose the conclusion of such treaties). The State, the communities and the regions have concluded a co-operation agreement on the procedures for concluding joint treaties (which relate to both community or regional powers and to federal powers): these treaties must be approved by all the legislative assemblies concerned.

In Germany, the Federation's power to conclude treaties in areas falling within the exclusive legislative power of the *Länder* is disputed. A *modus vivendi*, known as the "Lindau agreement", between the Federation and the *Länder*, has led to the following situation: in areas which are an internal matter for the *Länder* (such as cultural affairs), the procedure for negotiating treaties takes place in close co-operation with the *Länder*, which are sometimes even involved directly. The *Länder* may, within the framework of their legislative power and with the consent of the Federal Government, conclude treaties with foreign States.

In Russia, international treaties affecting areas for which members of the Federation are responsible are concluded in agreement with the organs of the State authorities of those members. Members of the Federation may maintain external economic and international relations; the Russian Federation's Ministry of Foreign Affairs exercises a co-ordinating role in order to ensure that the Russian Federation pursues a single external policy.

Provided that the federal law (including the international treaties concluded by the federal State) is observed, a number of federal States allow the federated States to conclude certain treaties. In Austria, the provinces may, with the agreement and under the supervision of the Federation, conclude international agreements in matters falling within their legislative power with adjacent foreign States or their entities. In Switzerland, the cantons have the power to conclude treaties on matters concerning the public economy, relations with neighbours and the police; in practice, the cantons have even concluded treaties in other areas. The conclusion of these agreements in principle takes place via the Federal Council. Argentina's Constitution states that the provinces may conclude international treaties provided that they are not incompatible with the external policy or powers of the Federal Government and are not detrimental to the nation's credibility. The provinces may sign, *inter alia*, partial treaties concerned with the administration of justice, economic interests and works benefiting the community, after informing the Federal Congress. In Bosnia and Herzegovina, the entities are authorised to conclude international treaties with the agreement of the (federal) Parliamentary Assembly. A law adopted by the Parliamentary Assembly may enable the entities to conclude certain types of agreement without its consent.

Furthermore, consultation of the federated entities prior to the conclusion of international treaties does not concern only topics which are an internal matter for them. Thus in Austria, the provinces must be given a hearing prior to the conclusion of an international agreement which affects their interests; in Germany, a *Land* must be consulted in good time prior to the conclusion of a treaty which affects its particular situation.

In the United States, the Union has the exclusive power to conclude international treaties.

In the regional States, the role of the entities with regard to international affairs is very limited. In Italy, the regions may maintain certain relations with regional authorities of other States but may not conclude treaties; the Central State must be informed and, in certain cases, give its consent; in Spain too, the international activities of the autonomous communities must not involve the conclusion of treaties nor entail immediate and current obligations vis-à-vis foreign public authorities, have implications for the State's external policy or involve Spain's responsibility towards other States or international or supranational organisations.¹¹

In general, the *powers to execute international treaties* are shared between the Central State and the entities in the same way as the purely internal powers (for instance, in Germany, Austria, Belgium, Switzerland and Canada). In the United States, however, only Congress has the power to adopt the legislation implementing international treaties. Italy also seems to be an exception, since the implementation of international law by the regions is subject to a delegation of powers. The execution of international treaties concluded by the Russian Federation is the joint (concurrent) responsibility of the Federation and its members.

¹¹ The autonomous entities play a role in international affairs in two of the unitary States studied. In Finland, if a treaty falls within the legislative power of the province of Åland, its ratification and the entry into force of its provisions in respect of the province presuppose the adoption of implementing legislation by the provincial legislature. In Portugal, the autonomous regions may participate in the negotiation of international treaties and agreements which concern them and share in the resulting benefits.

However, a number of States accept that the Central State may substitute itself for entities which fail in their obligations, in order to avoid an infringement of international law (Austria, Switzerland, Belgium, in the event of censure by an international or supranational court). The importance of the question varies, however, according to the State: the execution of treaties clearly plays a far more important role in a State which adopts a strictly dualist approach, such as Canada, where any treaty requires an implementing law, than in a monist State such as Switzerland, which readily acknowledges that international treaties are directly applicable.

bb. The decision-making process of the European Union

With the increase in the powers of the European Community and the European Union, the question of the participation of the federated States and the regions in the decision-making process of the Union is of growing importance. As with the conclusion of international treaties, there is a difference here between federal States and regional States, the role of the entities being far more limited in the case of the latter.

Thus in Austria, if measures to be adopted within the context of the European Union affect the powers of the provinces, the Federation must inform them; if the provinces share a uniform viewpoint, it is binding upon the Federation, which may also delegate to a representative of the provinces the right to represent the Federation within the relevant organs of the Union, in agreement with the representatives of the Federation.

Where matters which are the legislative responsibility of the German Länder are brought before the European Union, the exercise of the rights enjoyed by the Federal Republic of Germany as a Member State of the European Union must normally be transferred by the Federation to a representative of the Länder designated by the Bundesrat. The rights in question are exercised with the participation of the Federal Government and in agreement with it. The Länder do not participate directly in European procedures in other fields, but the Federal Government must take account of the opinion of the Bundesrat if the interests of the Länder are affected.

Provision has also been made enabling Belgium to be represented within the Council of the European Union by a member of the regional or community governments.

In the regional States, the role of the entities in the European decision-making process is, however, purely consultative. In Italy, this consultation is obligatory. In Spain, it is organised via a number of multilateral or bilateral conferences to promote co-operation between central government ministers and autonomous councillors.¹²

The *implementation of European Union law* is generally carried out by the Central State or the entities in accordance with the internal distribution of powers provided for in the Constitution.

¹² Where a matter for which Finland's autonomous Province of Åland is responsible or which is especially important for the province is dealt with in the context of the European Union, the Governing Board of the Province of Åland is kept informed by the government and participates in the preparation of Council meetings in cooperation with the central government. The Governing Board formulates Finland's positions concerning the application of the common policies in the province.

The arrangements whereby the Central State can be substituted for the entities apply in this matter as for the execution of international treaties (in Austria and Belgium).

In Italy, the implementation of European Union law falls to the regions if the area in question is one for which they are responsible internally, but the Central State may substitute itself for them not only in the event of failure to act but also if the matter is particularly urgent.

5. Tax matters

A study of the distribution of powers and tax resources is of prime importance in determining, in practical terms, what weight the entities carry in the functioning of the State. That is why this matter will be developed. The distribution of powers (to legislate) in the tax sphere must be distinguished from the distribution of tax revenue, as the product of a federal tax, for example, is not necessarily earmarked for the tasks of the Federal State but may pass, wholly or partly, to the entities.

a. The distribution of powers in tax matters

In the federal States where the federated States have residual power, the Central State's powers of taxation are expressly provided for in the Constitution. In Austria, tax sovereignty belongs, in principle in its entirety, to the Federation, and taxes are levied by the federal authorities; the provinces have no powers of taxation (the communes have autonomy in tax matters limited to certain minor taxes).

In Russia, the Constitution states that the Federation has the power to levy federal taxes and charges, without specifying their content, and that there is a concurrent federal power for establishing the general principles of taxation and assessment. The concepts used in Bosnia and Herzegovina's Constitution are also fairly vague: the Central State is responsible for financing its institutions and Central State obligations, while the taxes raised by the entities finance the activities of the entities. In Germany, the Federation has an exclusive right to legislate only in respect of customs and tax monopolies: it has concurrent competence with regard to a series of taxes expressly provided for in the Constitution and where the regulation of a matter by a *Land* law could affect the interests of other *Länder* or of the community.

Argentina also has exclusive power in respect of customs and tax monopolies; it has parallel power with regard to indirect taxation, and also in respect of direct taxation for a specified period if the defence, security and general well-being of the State so require.

Switzerland is the only country in which the Constitution lists in detail all the taxes which are a federal matter.

The Constitution is of course far less explicit in States where the Central State enjoys residual power.

In Belgium, according to the Constitution both the federal State and the communities and regions may, in principle, all levy taxes. The law has, however, prohibited the communities and regions from levying surtaxes which are additional to the taxes of the federal State or from taxing items which have already been taxed at the federal level. A special law, which will be dealt with below, specifies the system for financing the communities and regions (except for the

German-speaking community, for which an ordinary law is sufficient).

In Canada, the Constitution enables the federal authority to levy direct and indirect taxes; the provinces may levy direct taxes, indirect taxes on their non-renewable natural resources and forestry resources, as well as the primary products derived therefrom, and on their sites and installations for generating electricity and on the actual electricity generated.

In the United States, the Union and the States in principle have parallel powers in matters of taxation; the States cannot, however, levy taxes on imports and exports, except with the agreement of Congress, and the revenue derived from such taxes must then be contributed to the Union. The Federal Constitution expressly provides not only for the general authority of the Union in matters of taxation but also for its specific authority with regard to income taxes.

In Spain, a distinction should be drawn between the general model and the special model. Under the general model, taxes are in principle national. An organic law provides for the possibility of autonomous taxes, while at the same time imposing major restrictions on the ability to levy such taxes - which cannot, for instance, be applied to taxable items taxed by the State or constitute an obstacle to the free movement of persons, goods, services or capital. In practice, very few autonomous taxes are levied (they account for only 1.6% of autonomous revenue). On the other hand, under the special model, which is applied in the foral community of Navarre and in the three provinces of the Basque Country, the State has concluded an agreement with each of the provinces concerned, on the basis of a specific constitutional clause; the arrangements in question are implemented by various State laws and enable the provinces concerned to levy virtually all taxes - which, however, remain essentially national taxes; only the taxes levied for customs purposes or via a tax monopoly and also the special tax on hydrocarbons in Navarre are excluded. However, the taxes which these provinces may levy on the basis of an agreement with the State do not differ in kind from the taxes levied in the rest of the territory. The provinces do not therefore have real legislative power in matters of taxation but rather the power to levy State taxes for their own benefit.

Lastly, in Italy, taxes are in principle a matter for the Central State; national laws and regulations determine the list - which is often amended - of the taxes which the regions have the power to levy. Regional laws and regulations determine the amount of each regional tax and the additional charges levied by the regions.

For a precise list of the taxes levied both by the Central States and the entities, you are referred to the text of the replies to the questionnaire. The following information is therefore illustrative and is intended to give some idea of the relative importance of taxation by the Central State and the entities respectively.

A distinction may be drawn, in simplified terms, among the federal and regional States studied, between those in which taxation by the entities plays an important role and those in which taxation by the entities plays a secondary role.

The first group (States in which taxation by the entities plays an important role) includes:

- i. Switzerland: the Confederation levies, on an exclusive basis, the value added tax and certain special consumption taxes, the advance tax, customs duties, stamp duty and road

taxes. The cantons levy, on an exclusive basis, the personal wealth tax, real estate tax, estate duty, duty on conveyancing and entertainment tax. The Confederation and the cantons levy in parallel personal income tax and taxes on the profitability, capital and reserves of legal persons.

- ii. Germany: the Federation legislates, on an exclusive basis, with regard to customs duties and tax monopolies. Its concurrent powers extend to all the other taxes whose product passes wholly or partly to it and to all the areas in which it has concurrent powers. This includes *inter alia* taxes on consumption, road haulage of goods, capital transactions, income and corporations. The *Länder* levy in particular taxes on wealth, inheritance, motor vehicles, beer, gaming establishments and, in general, any consumption taxes which are not identical to federal taxes.
- iii. Russia: the federal taxes include value added tax, the excise on certain categories and types of goods, personal income tax, the tax on corporate profits and inheritance tax. The taxes which accrue to the members of the Federation or the local self-governing authorities include the tax on personal property, the land tax, the tax on commercial dues, the taxes which go towards town and country planning, the tax on advertising, the tax on the resale of motor vehicles and the tax on dog owners.
- iv. Canada: customs duties and excise are levied by the federal State and financial taxes by the provinces. Personal income tax, the tax on the earnings of commercial companies, sales taxes and VAT are levied by the federal State and the provinces in parallel.
- v. Argentina: the Nation levies customs duties and indirect and direct taxes. The provinces levy indirect taxes.
- vi. the United States: both the Union and the States and local governments levy income taxes, sales taxes, property taxes and estate and gift taxes.
- vii. Bosnia and Herzegovina: here the situation has not yet been clarified. The entities should, however, levy a substantial proportion of the taxes (at present there are not even any tax laws at Central State level but only in the entities).

The second group of States (in which national taxes predominate) include:

- i. Italy: the Central State levies most taxes, on the basis of laws that are often being amended. The regions levy a number of minor taxes (on the use of motor vehicles, the concession allowing citizens to use public property, natural gas for heating purposes, heating oil and refuse disposal).
- ii. Austria: in this country the provinces do not even have any powers of taxation; the communes have tax autonomy limited to certain minor taxes (for instance, real estate tax).
- iii. Belgium: even though, under the Constitution, the regions and the communities could have extensive powers of taxation, the special law which establishes the system for financing the communities and regions leave them little room for manoeuvre: the only

regional taxes are certain taxes which can easily be localised (property taxes, estate duty, etc); the regions have certain powers, depending on the case, concerning the rates, exemptions and even the basis of the taxes. They may also levy surtaxes on top of the federal income tax (or reduce the rate in respect of the portion of the tax allotted to them). However, the communities do not have any power, in practice, to lay down rules regarding tax matters.

- iv. Spain: under the general model, virtually all taxes are levied by the Central State; the autonomous communities have made hardly any use of their autonomous power to raise taxes, apart from minor taxes such as the tax on bingo. Nor have they used their ability to increase state taxes. Under the special model (Basque provinces and Navarre), nearly all the taxes (as already stated) are levied at the provincial level although they are not strictly speaking provincial taxes but national taxes levied by the provinces.¹³

b. The distribution of tax revenues

In all the States considered (except for Bosnia and Herzegovina, whose tax system has not yet been consolidated), a certain proportion of the Central State's taxes accrues to the entities. This proportion is obviously greater where the entities' own powers in matters of taxation are limited. The redistribution of the Central State's tax revenue is often intended to ensure, *inter alia*, an equitable distribution of resources between more developed and less developed regions.

Thus in Austria, the Federation negotiates with the provinces the allocation to them of a (variable) percentage of its revenue, according to their needs (*Finanzausgleich*).

In Belgium, the regions are financed, apart from via the "regional" taxes already referred to, by a proportion of personal income tax, based on the taxpayer's place of residence; explicit assistance as a sign of national solidarity is provided for in favour of the region where the income tax yield is lower than the national average (the Walloon region). The radio and television licence fees and part of the personal income tax are allotted to the communities depending on the taxpayer's place of residence; part of the VAT proceeds, earmarked for education, is shared among the communities according to how many pupils they have (which implies a certain solidarity on the part of the richest community, viz. the Flemish community). Generally speaking, two-thirds of expenditure takes place at Central State level, a third at the level of the federated entities.

In Italy, the revenue from a number of taxes is destined for a special fund, which is to be divided up between the regions according to criteria laid down by the legislature; another fund is established by the State each year for the regions' economic projects and is distributed

¹³ In the unitary States studied, most of the taxes are national taxes. The entities do not generally have any powers of taxation (unlike lower-level public authorities, such as the Finnish municipalities and Ukraine's local self-governing bodies). In Finland, the (autonomous) Province of Åland may, however, provide for provincial taxes on income, commercial activities and entertainment, as well as communal taxes. Portugal's autonomous regions may levy certain taxes in accordance with the law and with what is laid down in their administrative and political statutes.

according to criteria adopted by Parliament in line with the national economic policy. These funds enable the revenue to be redistributed to help the less-favoured regions. The total, consisting of the regions' own resources, taxes and health-related contributions levied by the State and redistributed to the regions, accounts for 53% of the regions' revenue.

Spain's general model provides for the transfer of a proportion of the State budget, in accordance with general criteria such as population, area, tax contributions and relative wealth, to the administrative units of the different autonomous communities. In this way, the latter on average obtained 61% of their revenue prior to the reform of December 1996 (with big differences between the communities). In addition, 30% of the "territorialised" yield (in each autonomous community) from income tax (15% up to 1996), as well as the full amount of certain taxes (estate duty and the taxes on gifts, wealth and gambling) are transferred to the autonomous communities (the taxes transferred in full accounted for 13.6% of the autonomous communities' revenue prior to the 1996 reform). More extensive "territorialisation" of income tax is under discussion. An interterritorial compensation fund benefits regions whose average *per capita* income is less than 75% of average *per capita* income in the European Union; the distribution of this fund among the various autonomous communities is weighted according to the relative population of the communities and the relationship between the income of the beneficiary authorities and the national *per capita* income. Finally, the Constitution states that the general State budget may earmark funds for the autonomous communities depending on the extent of State services and activities which they have assumed and of the minimum levels of basic public services which they undertake to provide throughout the territory of Spain; for lack of a definition of the basic services and given the practical difficulties of applying this provision, it has never been put into effect. Under the special arrangements for the Basque provinces and Navarre, internal financing is the rule (at a rate of 66% in the Basque Country and 88% in Navarre); thus it is the foral territories which undertake a transfer of resources as a contribution to the general services of the State as a whole, which transfers only limited resources to them (19% of revenue in the Basque Country, 11% in Navarre).

Part of the taxes of the Central State is also allotted to the entities in States where taxation by the entities plays an important part.

The German constitution states that half the revenue from income and corporation taxes is to be distributed between the Federation and the *Länder*. The Federation's and *Länder's* respective shares of the revenue from turnover tax are laid down in a federal law which requires approval by the *Bundesrat*. (In addition, *Länder* legislation apportions to the communes or associations of communes part of the total revenue from the joint taxes - on income, corporations and turnover.) Where federal legislation imposes additional expenditure on the *Länder* or withdraws revenue from them the additional burden may be offset by grants from the Federation. The *Länder's* share of revenue from the turnover tax is calculated primarily on a *pro rata* basis according to their number of inhabitants; federal legislation may provide for additional shares for *Länder* whose *per capita* income is lower than the national average; the constitution also requires appropriate compensation to be paid to offset disparities between the *Länder* with regard to their financial means.

In Switzerland, part of the revenue from federal taxes is paid to the cantons, which are divided into three groups according to their financial means. An amount corresponding to 13% of the direct federal tax is distributed among the cantons according to their financial means and

approximately 6% of the advance tax is apportioned only to cantons whose financial means are below the Swiss average (the Confederation thus pays between 5 and 10% of its revenue to the cantons). The Confederation's share of total federal and cantonal taxes is three-fifths, the cantons' share two-fifths.

In Canada, for a number of decades the provinces' share of total revenue has exceeded that of the Central State. The latter takes about 45% of taxes and the provinces 55%. In addition, equalisation payments are in operation, whereby the better-off provinces pay a certain contribution to the less well-off provinces.

In Argentina, a framework law, based on agreements between the nation and the provinces, lays down "co-participation" arrangements which are applicable to direct and indirect federal taxes (except customs duties and resources earmarked for specific purposes). The distribution of these resources between the nation, the provinces and the city of Buenos Aires is related directly to their respective responsibilities, services and functions; it is aimed at achieving an equivalent degree of development of the quality of life and at equality of opportunities within the national territory.

Approximately 55% of United States taxes are federal taxes, 26% State taxes and 19% local taxes. Some 16% of the revenue from federal taxes is transferred to the States and local authorities, on the basis of population and personal wealth (in particular the number of poor) but also on the basis of the local ability to use the funds and the political influence of the members of Congress elected in the territories concerned.

In Russia, the sum of revenue from taxes on corporate profits and personal income entered in the budgets of the members of the Federation are determined when these budgets are approved. The reply to the questionnaire does not contain further details of the equalisation mechanisms used in this country.¹⁴

Generally speaking, it has therefore been found that transfers of resources from the Central State are made towards the periphery, the size of those transfers of course depending, in part at least, on the extent of the Central State's powers of taxation. The transfer of resources in the opposite direction is exceptional - it does happen under Spain's special model but the taxes in question are provided for under national legislation. The equalisation mechanisms also invariably make use of national taxes, and not of the entities' own taxes. At the most, the situation may be different under the system in Bosnia and Herzegovina, where there is provision for the

¹⁴ The autonomous regions of the unitary States studied receive part of the revenue from certain national taxes. In Portugal, this is a variable amount, intended to correct disparities resulting from the fact that the regions in question are islands; in Finland, the Province of Åland receives 0.45% of the State's total revenue together with the amount (if any) by which the income and wealth taxes levied in the province exceed 0.5% of the total yield of the same taxes for the country as a whole. In Ukraine, the Autonomous Republic of Crimea, like the other regions - oblasts - and cities of Kyiv and Sebastopol, receives a predetermined share of the national taxes (varying between 10 and 100%, depending on the type of tax). In addition, State subsidies may be apportioned to the non-autonomous entities in a differentiated manner, account being taken inter alia of their economic and social situation (Finland, Ukraine).

Federation to contribute two-thirds of the budget and the Republika Srpska one third. In practice, it is, however, clear that equalisation implies solidarity being shown by the "rich" entities towards the "poor" entities.

c. The spending powers

It is clear from the previous paragraph that central governments' tax revenue is not reserved solely for their own purposes, also being used to finance the activities of lower tiers of government.

In one instance, this just means contributing to lower authorities' general budgets and financial equalisation. In principle the nature of the authorities' activities is unaffected.

In Argentina, for instance, central government may make grants to the provinces which have incomes insufficient to cover ordinary expenditure. In Canada, the federal government may donate funds to individuals, bodies and governments within fields for which the provinces are responsible, but it cannot at the same time pass legislation to regulate those fields. One result of federal spending power has been equalisation, so as to ensure a fairer distribution between wealthy and less well-off provinces. In Russia, central government is still entitled to take responsibility for the expenditure of the subjects of the Federation. German law also provides for federal grants to cover the general expenditure of financially weak Länder. In Switzerland, the cantons' shares of the proceeds of federal taxes, which serve to compensate them for their shrinking financial powers and, in addition, to offset the costs of collecting federal taxes, are also used for equalisation. Austria, Belgium, Spain, Italy and the United States also have equalisation systems, about which no more will be said here (see chapter II.5.b above).

In a second instance, in contrast, central governments may make specific expenditure in fields for which lower tiers of government are responsible, which does have some effect on their activities. Such expenditure is not allowed in Austria, Belgium or Argentina. In Germany, in contrast, the federal government may grant financial assistance to the Länder for their investments and for those of municipalities and associations of municipalities, where this is necessary to avoid jeopardising the general economic balance, to "equalise" economic capacities throughout federal territory or to promote economic growth. The federal government and Länder may also co-operate, on the basis of agreements, on educational planning and on promoting research institutions and projects of supra-regional benefit. The sharing of the costs arising is regulated by the agreements. Swiss law provides for financial assistance to encourage cantons to take on certain public tasks (in spheres such as public works, nature and landscape protection and universities). In the United States, the spending power of the national government is an independent source of power, allowing the national government to spend money for public purposes not limited by the other direct grants of legislative power found in the Constitution. The national government may put reasonable conditions on the receipt of federal money to induce states (and private parties) to cooperate with federal policies, although the States and localities remain free to reject the federal monies if they find the conditions unacceptable. Lastly, in Italy, central government may, generally speaking, spend on matters for which the regions bear legislative responsibility. Similarly, regions may incur expenditure in fields for which central government is responsible, especially where public works are

concerned.

Central government expenditure in fields for which lower tiers of government are responsible has to be distinguished from the funds granted to these tiers when they apply the law of the central state, which exist in Germany, Russia and Switzerland, in particular, and which will not be covered in detail in this report.

III. THE STATE ORGANS/THE POLITICAL SYSTEM

1. The organisational autonomy of the entities

The aim of this section is to define what room for manoeuvre the entities have with regard to organising their respective political systems.

Most federal States give the entities the power to adopt their constitutions. This is the case in Austria, Germany, Switzerland, Argentina, Bosnia and Herzegovina and the United States. The same goes for Russia, although only the republics adopt constitutions; the other members of the Federation adopt statutes. Historically, the constitutions of the Canadian provinces have been adopted in various forms. However, the 1982 constitutional law now authorises the provinces to amend their constitutions, so that the situation in Canada has become similar to that in other federal States.

In two States, the procedure for the adoption of the constitution by the entities is followed by a procedure at federal level. In Austria, the constitution - like any provincial legislation - must be communicated, prior to promulgation, to the Federal Government, which may object; if the provincial parliament confirms and promulgates this text, the Federal Government may ask the Constitutional Court to consider its constitutionality. In Switzerland, the Federal Assembly examines whether the cantonal constitution complies with federal and international law before giving its backing.

The primacy of federal law is one of the foundations of any federal State. The constitutions of the entities must therefore always comply with federal law. This sometimes imposes specific rules with regard to the content of such constitutions.

In Germany, the constitutional systems in the *Länder* must be in accordance with the principles of a State which is by rights republican, democratic and social within the meaning of the Basic Law. In the *Länder* (as well as the districts and communes), the people must be represented as a result of elections by universal suffrage, direct, free and secret.

In Switzerland, the cantonal constitutions must guarantee the exercising of political rights in accordance with republican, representative or democratic forms, ie they must establish a parliament elected by the people if the legislative function is not exercised directly by the people. In addition, the cantons must make provision for the compulsory constitutional referendum and the popular initiative with regard to constitutional matters.

In Argentina, the provinces must ensure a republican form of government and guarantee the separation of powers. The Federal Constitution provides for all the provinces to have an elected government.

In the United States, the Constitution also imposes a republican form of government; this results in hardly any restrictions on States' organisational autonomy. More substantial constitutional restrictions are imposed by the equal protection clause, which establishes "one-person - one-vote" requirement in electing representatives, by prohibitions on discrimination in districting and elections, and by guarantees regarding free speech and ballot access.

In Canada, the provinces may not, however, call into question the monarchical nature of the State.

In Russia, finally, the constitutions and statutes of the members of the Federation must be in accordance not only with the Federal Constitution but also with the federal law on the general principles governing the organisation of the representative and executive organs of the State authority of the members of the Federation, which, however, has not yet been adopted.

In the regional States, and in Belgium (which recently became a federal State, following a centrifugal process which transformed a unitary State into a regional and then federal State), the entities do not have the power to amend their constitutions or statutes.

In Spain, the organisation of the institutions of the autonomous government is laid down in the statutes of autonomy, which are complex normative acts subject to special drafting procedures but which are finally adopted in the form of organic laws by the national parliament.

In Italy, the statutes of the ordinary regions establishing the internal organisation of those regions are adopted by regional assemblies and approved by the national parliament; the constitutional laws relating to the special regions are adopted by the national parliament.

Belgium is also characterised by the fact that it has no real federated constitution, the rules defining the organs of the federated entities being included in the Federal Constitution or in federal laws, most with a special majority. However, three entities (the Flemish community, the Walloon region and the French community) may, within fairly narrow limits, amend certain rules relating to the composition and functioning of their organs by "special" decrees, adopted by a two-thirds majority.¹⁵

2. The organs and political systems of the entities

Generally speaking, the entities, like the central State, have a legislative organ and an executive organ (except the Flemish region of Belgium whose powers are exercised by the Flemish

¹⁵ While certain autonomous entities of the unitary States may adopt their basic texts (Constitution of the Autonomous Republic of Crimea in Ukraine, political and administrative statutes of Portugal's autonomous regions), these texts are subject to the approval of the national parliament. The situation of the Åland Islands, in Finland, is the other way round: the (national constitutional) law on the autonomy of this province is subject to the approval of the provincial legislature (by a two-thirds majority); the statutes of the provincial federations (which have only purely administrative autonomy) must be approved by all the communes of the Federation.

community). Furthermore, the political system of the entities hardly differs from that of the central State.

In the United States and Argentina, the presidential system has been imposed upon the Central State, and parallels to the presidential system have been adopted at the State or provincial level. In contrast, in Germany, Belgium, Italy, Spain and Canada, the parliamentary system prevails with regard to both the Central State and the entities. There are, however, certain differences between the two levels of the State structure: a parliament which is unicameral at the level of the entities and bicameral at the central level; the fact that there is no right to dissolve the legislature of the entities in Belgium and Spain, except in the Basque Country, although in Belgium there does exist the “constructive mistrust motion”; the obligation incumbent upon political parties in Italy to present their candidates for the presidency of the regional executives alone before the elections.

In Austria, the political system of the Federation is mixed (parliamentary and presidential), while the systems of the provinces are more parliamentary (although there is a governor - the "*Landeshauptmann*" - in addition to the parliament and the government). In Russia, there are, broadly speaking, only differences of detail between the political system of the Federation and that of its members; thus the latter often have, in addition to their parliament and government, posts of president or governor, at the head of the executive authority. However, in certain members of the Federation attempts have been made to restore the soviet form of government, which officially concentrates all power in the hands of the legislative organ; the Constitutional Court has opposed such attempts.

In Switzerland, a very specific system, often described as "collegial" exists both at the federal level and in the cantons (there is no real Head of State or Government). Furthermore, the executive is not responsible to the legislature and cannot dissolve it; the people have very considerable powers - more, incidentally, at the cantonal than at the federal level. In particular, they elect the cantonal executive directly.

Bosnia and Herzegovina has a presidential system, like the Republika Srpska, while the Federation of Bosnia and Herzegovina has a parliamentary system.

Whilst the entities therefore have legislative and executive organs in all the federal and regional States studied, the judicial system is often only national: this is the case in the regional States (Italy and Spain) and in Belgium and Argentina. In Austria, there are no provincial judicial authorities; regional administrative courts are being set up and “independent administrative authorities” have been established on a provisional basis. In Russia, except for the constitutional courts and statutory tribunals operating in a number of members of the Federation, the courts are federal organs only.

On the other hand, in Germany, Switzerland, Bosnia and Herzegovina, Canada and the United States, the federated States have their own judicial organs; in Germany, there are even constitutional courts in most of the *Länder*. Judicial organisation is essentially federal in Germany, while it is primarily a matter for the entities in Switzerland, and the United States. In Canada, judicial organisation is shared between the central State and the entities; at the top, however, the system is centralised and overseen by the Canadian Supreme Court.

In Germany, Switzerland and Bosnia and Herzegovina, only the supreme courts are federal; in Canada and the United States, there are also lower-level federal courts.¹⁶

IV. PARTICIPATION OF THE ENTITIES IN THE DECISION-MAKING PROCESS OF THE CENTRAL STATE

The federal or regional State is not characterised only by the organisational autonomy of the entities or the extent of the powers which they exercise. It is often also marked by the fact that the entities are recognised as having the status of organs of the Central State, which participate in its constitutional or legislative decision-making process.

Another form of participation by the entities in the national decision-making process is of an indirect nature. It is exercised via the second chamber, where this institution represents the federated States or the regions.

These two aspects (direct and indirect participation) will be examined separately.

1. Direct participation

Direct participation by the entities in the decision-making process of the Central State is generally more developed at the constitutional than at the legislative level.

Thus in Russia, constitutional amendments may enter into force only after they have been approved by the organs of the legislative authorities of at least two-thirds of the members of the Federation. In the United States, they require the agreement of the legislatures of three-quarters of the States; constitutional amendments may be proposed by a convention called at the request of the legislatures of two-thirds of the States. In Canada, they require the agreement of seven provinces covering 50% of the population; the most important rules cannot even be amended unless the provinces are unanimous. In Switzerland, the federal constituent assembly consists of the federal electorate and the cantons. Constitutional amendments must therefore be approved by a majority of the federal electorate and a majority of the cantons (a text is considered to have been approved by a canton if a majority of the electors who have voted in that canton have voted in favour). In Italy, direct participation is far more limited; five regional assemblies may request a constitutional referendum on a constitutional law adopted by parliament without a two-thirds majority.

At the legislative level the ability to request a referendum is conferred upon five Italian regions and eight Swiss cantons (in Switzerland, referendums may also be concerned with certain

¹⁶ The situation in the unitary States varies according to the State and type of entity. In Bulgaria, the entities do not have organs of their own; Portugal's and Finland's autonomous regions have legislative and executive organs; the Ukrainian entities and, to a certain extent, Finland's ordinary regions have an executive organ. It should be noted that in Portugal the political system of the autonomous regions is parliamentary, while that of the Central State is semi-presidential.

In the unitary States the entities do not have any judicial organs.

international treaties). Apart from in these two states, the entities' right of initiative in constitutional or legislative matters also exists in Russia and Spain. Its scope is, however, limited, for the legislature is free to decide whether or not it wishes to comply with such an initiative. In none of the States studied does the adoption of ordinary laws require the agreement of the entities or of some of the entities.¹⁷

2. Indirect participation

The second chamber may be regarded as representing the entities in the following States: Austria, Germany, Russia, Switzerland, Argentina and the United States.

The closeness of the link between the second chamber and the organs of the federated States varies, however: in Germany, the *Bundesrat* is composed of members of the governments of the *Länder*; in Russia, the members of the Federation are represented in the Federation Council by the head of their executive organ and the head of their representative organ (if the representative organ is bicameral, its representative in the Federation Council is determined by a joint decision of the two chambers); in Austria, the second chamber is elected by the provincial parliament; in Bosnia and Herzegovina, the House of Peoples is designated two-thirds by the House of Peoples of the Federation and one-third by the National Assembly of the Republika Srpska. In Argentina, Switzerland and the United States, the second chamber is elected directly by the people of the province, canton or State.

The representation of the entities within the second chamber is symmetric in Russia, Switzerland (except in the case of the half-cantons, which elect only one member of the States Council instead of two), Argentina and the United States (see above, Section I.5). In Germany and Austria, the number of deputies from each *Land*/province in the *Bundesrat* varies according to its population, while the House of Peoples in Bosnia and Herzegovina is asymmetric, as mentioned in the preceding paragraph.

The powers of the two chambers also vary: Switzerland, Argentina and Bosnia and Herzegovina have a system of perfect bicameralism (except, in the case of the last of these countries, for sessions of the Federal Assembly comprising both chambers, where the 46 State councillors carry less weight than the 200 national councillors); in Austria, Germany and Russia, however, the second chamber has fewer powers than the chamber of deputies. In the United States, the Senate has powers in certain fields, such as ratifying treaties and confirming the appointment of certain officials, which the House of Representatives does not possess.

¹⁷ There is no direct participation of the entities in the unitary States which replied to the questionnaire. However, there is one exception: in Finland, the Province of Åland participates in amendments to the (constitutional) law on its autonomy (which require a two-thirds majority in the provincial legislature); the consent of the provincial legislature is also required in respect of national laws concerning the principles of ownership in the province.

In Russia, the approval of the Federation Council is required only for constitutional amendments (by a qualified majority) and constitutional laws; for ordinary laws, the Council has a veto, which may be reversed by the State Duma by a two-thirds majority of the total number of deputies.

In Germany, the *Bundesrat* has the same powers as the *Bundestag* in constitutional matters and for certain laws. In other legislative matters, the *Bundesrat* may enter an objection to a bill by a majority vote; the *Bundestag* may reject this objection by a majority of its members; if the *Bundesrat* opposed the bill by at least a two-thirds majority, the waiving of the objection by the *Bundestag* must be decided by a two-thirds majority of votes cast or at least a majority of the members of the *Bundestag*.

The approval of the *Bundesrat* is also required for a number of acts adopted by the *Bundestag* or the Federal Government (a legislative state of emergency, declaration of the state of defence, approval of certain regulations).

In Austria, only laws of a constitutional nature which limit the powers of the provinces require the consent of the *Bundesrat*; the same applies to international agreements governing matters for which the provinces are responsible. The *Bundesrat* may also oppose ordinary laws adopted by the lower house - except for financial laws; the chamber of deputies may decide to finally adopt these laws by a qualified majority.

In Bosnia and Herzegovina, acts adopted by the Parliamentary Assembly in principle require the approval of at least a third of the representatives of each entity, in both the House of Representatives and the House of Peoples. If a majority vote of a chamber does not include the votes of a third of the deputies of an entity, the Chairs and Deputy Chairs of the chamber meet in an effort to arrive at an agreement within three days. If they fail, decisions may be taken by a majority, provided that the dissenting votes comprise less than two-thirds of the votes of the deputies elected in each entity.

Furthermore, if a majority of the Bosnian, Croat or Serb deputies of the House of Peoples declare that a bill of the Parliamentary Assembly is "destructive of a vital interest", that bill may only be approved by a majority of the Bosnian, Croat and Serb members of the House of Peoples present and voting. If this is not the case, a tripartite commission comprising delegates of each community must seek to resolve the problem; if there is no solution within five days, the matter is referred to the Constitutional Court, which will decide whether the procedure has been carried out correctly.

In Canada, the Senate is of a regional nature: major regions are represented in the Senate and therefore take part in the decision-making process of the Central State; Quebec is represented by 24 senators, Ontario by 24, the Maritime Provinces by 24 (ten for Nova Scotia, ten for New Brunswick, four for Prince Edward Island), the West by 24 (six for each of the provinces of British Columbia, Alberta, Saskatchewan and Manitoba), Newfoundland by six senators and the Northwest Territories and Yukon Territory by one each.

In the United States, the way in which the President is elected also enables the States to participate indirectly. Officially, the President is not elected directly. Presidential electors are elected in the States, who will vote for the candidate who has received the largest number of

votes in the State; the candidate who obtains an absolute majority of the votes of the presidential electors is elected President. In the absence of an absolute majority, the House of Representatives elects the President from among the top three finishers, with each State having one vote (this has not happened since 1824).

In Belgium, Spain and Italy, there is no real indirect participation of the entities in the decision-making process of the Central State. In Belgium, it is more a question of linguistic parity - which therefore concerns the different linguistic groups but not the communities or the regions. In Spain, less than a fifth of the senators are elected by the regional assemblies; the Senate does not therefore represent the autonomous communities, and it has a limited role in any case, since the Congress of Deputies always has the final word.¹⁸ In Italy too, the Senate does not represent the regions as such. A quarter of its members are elected under a proportional representation system by the people at the regional level, the other three-quarters in constituencies returning a single member divided up within the regions.¹⁹

V. CO-OPERATIVE FEDERALISM/REGIONALISM

All the federal and regional States studied are co-operative in nature. This does not, however, always appear to be the case from a rapid read-through of their constitutions, which sometimes suggest a dual system, implying a strict division between matters for which the Central State is responsible and those for which the entities are responsible, without any overlap or obligation for the two levels of the State structure to co-operate (Belgium, Spain). Indeed, it does not seem possible for a State to function harmoniously without close relations between the organs of its various constituents: to be more precise, horizontal co-operation (between entities) tends to develop in parallel with vertical co-operation (between the Central State and the entities).²⁰

The principle of co-operative federalism is not proclaimed explicitly in the constitutions. It is nevertheless regarded as an unwritten principle of constitutional law, at any event in Austria, Germany and Switzerland.

a. The vertical aspect of co-operative federalism is manifested in various ways:

- through the execution of federal law by the organs of the entities in respect of most matters for which the Federation has legislative responsibility (Germany, Switzerland, Austria).

In Spain, the autonomous communities are responsible for executing a number of laws

¹⁸ In the absence of a second chamber there is no indirect participation by the entities in the unitary States studied.

¹⁹ In the absence of a second chamber there is no indirect participation by the entities in the unitary States studied.

²⁰ This matter is, however, only of secondary importance in the unitary States considered, where such mechanisms exist only in exceptional circumstances, in the context of a statute of autonomy.

of the Central State.

The system of framework laws, under which the Central State legislates with regard to the principles whilst the entities are responsible for matters of execution and detail, ties in with this aspect of co-operative federalism or regionalism. It is practised in Austria, Italy, Spain and Switzerland;

- through the participation of the entities in the decision-making process of the Central State (see above, Section IV);
- through co-operation between the Central State and the entities in areas for which both are responsible. In Italy, institutional arrangements are adopted in order to guarantee this co-operation, very often in the form of constitutional laws. In Russia, not only do the Federation and its members confer with one another on federal bills in areas for which they are responsible but above all contractual relations between the Federation and its members are highly developed: treaties between the Federation and its members may both give concrete expression to the distribution of responsibilities in the field of concurrent powers and transfer powers from one legal system to the other. The executive organs of the Federation and its members form a single system.

In the United States, the Central State and the federated States co-operate in both the funding and regulation of programmes, particularly welfare, health care, job training and environmental programmes.

The Constitution of Bosnia and Herzegovina requires each entity to provide the necessary assistance to the Government of Bosnia and Herzegovina, in order to enable it to honour Bosnia and Herzegovina's international obligations;

- through co-operation agreements of a legislative or executive nature (Belgium) or agreements between the provinces and the Federation (Austria);
- through the participation of the Central State in the exercising of the entities' powers (the "joint tasks" under German law, see above, Section II.3.b);²¹

²¹ Conversely, there may be provision for participation by an entity in the adoption of national laws ("joint power") of the Central State of Finland and the Province of Åland, see footnote 8 above).

- through the obligation, for the competent authority to take a decision, to consult another authority which is not competent but which may be indirectly affected by the decision taken. This system is intended, in Belgium, to avoid conflicts of interest, just like the Concertation Committee, a body consisting of an equal number of Francophones and Flemish and an equal number of federal ministers and community or regional ministers. In Russia, advisory councils of the members of the Federation have been created under the auspices of the federal ministries (such as the advisory council of the members of the Federation on international and external economic relations, under the auspices of the Ministry of Foreign Affairs);²²
- through periodic negotiations between the federal and provincial governments on the distribution of revenue (in Austria).

b. A number of forms of co-operation fall within both the vertical and the horizontal aspect of co-operative federalism

This applies in particular to Canada's constitutional conferences, which study amendments to the Constitution and, more generally, constitutional issues, and which consist of representatives of the Federal Government and the provincial governments - they have something of the nature of what is referred to as "executive federalism". Other federal/provincial conferences frequently meet in Canada ("co-operative federalism").

In Austria, periodic conferences are organised involving the heads of regional governments, the heads of the different departments and the heads of the regional administrative authorities, which are attended by members of the Federal Government or the federal administrative authority concerned. In Italy, the conference of the presidents of the regional executives, which is chaired by the President of the Council, advises the Government on matters of common concern. In Bosnia and Herzegovina, the Presidency may decide to facilitate co-ordination between the entities in matters for which they are responsible, unless an entity objects in a particular case.

c. There also exist forms of co-operation which are of a purely horizontal nature.

Firstly, there are the agreements between federated States. Thus in Switzerland, the Federal Constitution provides for the conclusion of "concordats"; the situation is similar in Austria; in Belgium, co-operation agreements of a legislative or executive nature may be concluded between the entities. In the United States, there are "compacts" and informal arrangements between States. The Spanish Constitution also provides for the conclusion of agreements between the autonomous communities.

Conferences and joint bodies or committees, at the executive or administrative levels, have been

²² In Portugal, the autonomous regions are called upon to participate in the definition and implementation of fiscal, monetary, financial and exchange rate policy and of the policies concerning the territorial waters, the exclusive economic zone and the adjoining sea bed. They participate in the negotiation of international treaties and agreements. Lastly, they may comment generally on matters which concern them.

established in a number of States, in order to ensure that the activities of the entities are coordinated.

This is the case in Russia, Germany (for instance, there is a Conference of Ministers of Justice and a Conference of Ministers of Cultural Affairs), or in Switzerland (conference of cantonal governments, conference of heads of departments responsible for a given activity).

Interprovincial conferences take place annually in Canada, which the provincial prime ministers take it in turn to chair.

Lastly, regional associations have been established in which members of the Russian Federation who form part of a large region participate; in Argentina, it is possible for the provinces to create regions for economic and social development and to establish bodies within that context.

VI. RECIPROCAL CONTROL BETWEEN THE CENTRAL STATE AND THE ENTITIES

Both the Central State and the entities may consider that the organs of the other legal system have contravened the law, particularly with regard to the distribution of powers. If so, what means are available to them? Broadly speaking, two possibilities may be distinguished:

- i. Verification, or supervision, by the central authority, to ensure that its law is being respected by the entities. This verification has no equivalent the other way round: on the one hand, the law of the entities is hardly ever applied by the organs of the Central State; on the other, and this is particularly important, checking to ensure that the law is being observed by the entities implies that they are subordinate to the central authority, which could not be subject to similar control. The supervision is carried out by an executive body, the administrative authority and, more rarely, a legislative body.
- ii. Disputes concerning the distribution of powers and disputes in general call into question whether a standard of the other legal system complies with the higher law and are brought before the courts in accordance with a judicial procedure.

In the following sections of this paper a distinction will be made between the two aspects.

1. Supervision of the activities of the entities

Central State supervision is exercised first of all with regard to the adoption of certain normative acts.

Thus, in Austria, the provincial constitutions and laws must be notified, before they are promulgated, to the Federal Government, which may oppose them. If the provincial parliament nevertheless promulgates the law, the dispute may, however, only be settled by the Constitutional Court. International treaties concluded by the provinces require the agreement of the Central State and are submitted for its scrutiny.

Italy has similar arrangements: the Council of Ministers may request, prior to the promulgation of a regional law which it considers to be unconstitutional, that the draft be reconsidered; if the

regional assembly upholds the law, the Government may refer the matter to the Constitutional Court for infringement of the higher law. In addition, it may submit the matter to the national parliament in the event of its affecting national interests or the interests of other regions. Some of the most important regional administrative acts (for instance, with regard to the regulation of economic activity and town and country planning, public services, the pay and working conditions of regional government officials, or public works) are automatically referred to special State bodies established in each region which are responsible for supervising regional economic activities.

In Switzerland, the cantonal constitutional provisions are subject to verification of their compliance with federal and international law by the Federal Assembly (parliament). Intercantonal concordats (treaties between cantons) are subject to the approval of the Federal Council (Government), which not only checks their legality but also, to a limited extent, their desirability. The Federal Council is obliged to sign - unless authority has been expressly delegated - the cantons' treaties with foreign States, after examining them to ensure that they are in accordance with federal and international law. However, it is only in special cases that cantonal laws or orders are subject to the approval of the Federal Council. The above-mentioned decisions of the Federal Council or the Federal Assembly may not be the subject of a judicial appeal.

In Spain, the *Cortes Generales* (parliament) monitor the rules and regulations of the autonomous communities enacted pursuant to a framework law of the State; the Government, after consulting the Council of State beforehand, verifies that the autonomous communities are exercising certain functions delegated by an organic law.

In Belgium, the federal authority may, for reasons strictly enumerated by law, intervene to oppose the conclusion of an international treaty which falls within the exclusive jurisdiction of the regions or communities.

Furthermore, in Belgium again, the State has a right of substitution, in the event of failure to act by a community or region, in order to guarantee that the country's international or supranational obligations are met; in Austria, the federal authorities may legislate on a provisional basis if a province fails to adopt the necessary implementing laws in connection with a federal framework law or an international treaty; the same applies to Switzerland in the event of failure to implement an international treaty.

Some States have specific control over the activities of entities in the implementation of federal law.

In Russia, the organs of the executive authority of the Federation and its members form a single system, which enables the federal executive organs to monitor the activities of the executive organs of the members of the Federation aimed at implementing federal decisions. This applies in particular to the monitoring by the Federal Government of the implementation of financial, credit and monetary policy, or also of policy in the field of culture, science, education, health, social welfare and ecology. The federal organs of the executive authority may also, for the purposes of exercising the functions conferred upon them, set up territorial bodies and appoint the relevant officials, but, if it does so, these are not organs of the entities. In Austria, in areas where the implementation of federal laws is entrusted to the provinces - ie most matters - the relevant federal minister is the hierarchical superior of the regional administrative authority and, in principle, his is the first department to which appeals against decisions of that authority are to be made. The Federal German Government may enact, with the approval of the *Bundesrat*, general administrative rules in matters where the *Länder* implement federal law. The constitution allows a law subject to the approval of the *Bundesrat* to confer upon the Federal Government, in order to ensure that federal laws are implemented, the power to give special instructions in particular cases. Where the *Länder* implement federal laws by delegation from the Federation - which is the exception - and not on the basis of laws of their own, the federal administrative authorities exercise a hierarchical authority over the administrative authorities of the *Länder* which extends to desirability.

Central State control over the activities of the entities may also involve economic and budgetary matters: in that case, the supervisory body is the Court of Auditors. This body operates in Spain and Austria, where the Court of Auditors then functions as an organ of the provincial parliament.

The Italian constitutional system also provides for control of a more political nature of the regions by the Central State. The Head of State may, on the basis of a decision of the Cabinet, dissolve a regional assembly in the event of a lack of majority or resignation of its members, and also on grounds of national security.

A number of legal systems allow the Central State to take a decision establishing that an entity has contravened the higher law.

The President of the Russian Federation is entitled to nullify acts of the organs of the executive authorities of members of the Federation if they are contrary to federal law (including international undertakings of the Russian Federation and human and citizens' rights and freedoms). In Germany, the *Bundesrat* may, at the request of the Federal Government, find that a *Land* is not implementing federal law correctly; the *Bundesrat* decision may then be brought before the Constitutional Court.

Failure to respect federal law may lead - notably in Germany and Switzerland - to federal coercion of the recalcitrant entity (in Germany, such measures require the approval of the *Bundesrat*).²³

²³ In the unitary States, Central State control over the entities is of a purely administrative (and hierarchical) nature where the entities act as organs of the Central State (which is always the case in Bulgaria and often the case in Ukraine). In other cases the central authorities may exercise control not only of legality but also of desirability (for instance, the

2. The judicial mechanisms

Judicial control of the distribution of powers between the Central State and the entities may be exercised initially within the framework of a procedure concerning a specific case; it may subsequently take place in the event of a dispute between the Central State and the entities, and that is what we shall be dealing with in this section.

In the federal and regional States and Portugal, the Constitutional Courts (Austria, Germany, Bosnia and Herzegovina, Spain, Italy, Portugal, Russia) or equivalent bodies (Court of Arbitration in Belgium, Federal Court in Switzerland, Supreme Courts in Argentina, Canada and the United States) are competent to decide in conflicts of jurisdiction or rules, at the request of the Central State or the entities. In Switzerland, however, the Federal Court is not able to verify the constitutionality of federal laws, federal decrees of a general nature or international treaties concluded by the Confederation; it may therefore not sanction encroachment by the Confederation upon the cantons' powers unless this applies to simple orders. In the other federal and regional States studied there is, however, symmetry in the supervision of the distribution of powers, since acts of the Central State do not enjoy immunity. The supervision exercised by the Constitutional Court or the equivalent body may also, at the request of the Central State or an entity, concern conformity with the constitutional rules relating to human rights, for instance in Germany or Russia. In Spain too, both the Central State and the autonomous communities may challenge normative acts emanating from the other legal system on grounds unrelated to the distribution of powers; however, the autonomous communities have authority to take action only if the disputed act can affect matters for which they are responsible, which seriously restricts the scope of the legal means available to them; they may also take action against regulatory and administrative acts of the State through administrative litigation.

The entities of the unitary States studied, except for Portugal's autonomous regions, may not, however, apply to a judicial authority to challenge the validity of acts of the Central State.

CONCLUSION

The key words emerging from this study are complexity and diversity.

First, complexity. The distribution of powers - particularly legislative powers - among a number

Finnish Environment Ministry with regard to town and country planning measures adopted by the provincial federations).

Furthermore, in Portugal, the President of the Republic exercises control over the legislative and executive organs of the autonomous regions, which he may dissolve in the event of acts contrary to the Constitution; the region in question is then governed on an interim basis by the Minister of the Republic.

The laws of Finland's autonomous Province of Åland are submitted to the President of the Republic; if the provincial legislature has exceeded its powers, the President may, after consulting Finland's Supreme Court, annul the law completely or in part.

of legal systems inevitably leads to a hodgepodge of normative, executive and judicial powers. The legal practitioner and, to a certain extent, potential litigants must be able - more so in a federal or regional State than in a unitary State - to pick their way through the legal minefield.

Secondly, diversity. There is no model of a federal State or a regional State which can be replicated exactly. Each State remains a specific case, with its history, its structure and the specific problems which it has had to resolve.

Nor is it possible to establish a clear dividing line between federal and regional States, or even between regional and unitary States. Particularly with regard to the distribution of powers, it is more just a question of degree, if that: Austria, a federal State, seems to be hardly any less centralised than Spain, a regional State; Navarre and the Basque provinces receive a larger share of the tax revenue than any federated State studied.

If one wishes to establish criteria for distinguishing between the different types of State - and therefore features which are common to each of the different types - it should be borne in mind that the federal and regional States have two different legal systems, that of the Central State and that of the federated States or regions. This means that both the Central State and the entities have legislative powers.

Other factors would appear to be peculiar to federal States:

- in a federal State, there is a second chamber which represents the federated States and participates in the determination of the will of the Central State (the situation in Canada is unusual in that the Senate consists of representatives of the major regions, which may comprise a number of provinces). The closeness of the links between this second chamber and the organs of the federated States varies, however: the links are far closer when the second chamber consists of members of the governments of the federated States than when it is elected by the parliaments of those States, or even the people;
- the federated States have the authority to adopt their constitutions and, more generally, the power to govern themselves (in Belgium, however, there is no federated constitution, and only the Flemish community, the Walloon region and the French community have limited powers of self-government);

Furthermore, modern federalism is characterised by a number of features which are common to all the federal States studied:

- dual federalism - the rigid separation of the fields of activity of the Central State and of the entities - is no longer the order of the day: on the contrary, co-operative federalism has gradually taken hold in all the States studied. It is reflected in co-operation not only between the Central State and the entities but also between the entities. In particular, taxation may no longer be dealt with by the Central State or an entity in ignorance of the financial situation of its environment, but mechanisms for participating in the revenue of the Central State and for equalisation are increasingly being developed. The ever-increasing overlapping of the two levels of the State structure is also manifested in the development of concurrent powers, framework laws and executive federalism (application of the law of the Central State by the entities);

- the precedence of federal law over the law of the federated States is recognised;
- while it is true that rules on the distribution of powers remain important for federalism not to be deprived of all substance, the participation of the federated States in the decision-making process of the federal State, particularly via the second chamber, is also very important;
- the existence of a federal State does not rule out local autonomy; on the contrary, the federal constitution often guarantees it - if not, it is guaranteed by the law of the federated States.

To sum up, there is no single model and there is no simple model which can be proposed to a State which wishes to become a federal or regional State. There is a whole host of solutions to specific questions, formulated in a given context. The fact remains that the systems of the States examined - of which this study has attempted to identify the broad lines and which have for the most part been in operation for decades if not centuries - may provide inspiration for future constitutional reforms, in general terms or with regard to certain specific aspects.

ANNEX**Preliminary remarks**

The following terms are used in this questionnaire: central State on the one hand, "entities" (to refer to *Länder*, cantons, regions, etc) on the other hand.

I. Basic aspects

1. a. Is there a federal or regional system in operation?
1. b. If so, indicate the reasons for its adoption. If not, indicate why such a system was not provided for, and whether the question of its introduction has been recently discussed.
1. c. How is the matter of local (as opposed to regional) autonomy provided for?
2. Which norm is the basis of the existence of the entities?
 - in general does the Constitution or another Act provide for their existence?
 - does the Constitution or another Act provide for the existence of each entity?
3. Are the entities equal, or is federalism/regionalism asymmetric (in particular insofar as their powers and participation in the decision-making process of the Central State are concerned)?
4. How could the territorial basis or the number of entities be modified?
 - is a merger between entities possible, and by which process?
 - is a partition possible, and by what means?
 - can the borders of the entities be modified, and by what means?

II. Distribution of powers

1. Which text distributes powers between the Central State and the entities? Does this text contain one or two lists of powers? Does the residual power belong to the Central State or to the entities?

2. Various types of powers of the Central State and the entities.

Which types of powers of the Central State and the entities are provided for? Are there exclusive powers, concurring powers, and/or powers limited to the adoption of framework legislation? For each type of power, explain the respective role of the Central State and the entities.

Is it possible to delegate powers from the Central State to the entities, and vice versa?

3. The scope of the various types of powers

a. Powers in the field of international relations

- Conclusion of international treaties
- Participation in the decision-making process of the European Union
- Domestic implementation of international treaties and European Union law

b. Internal powers

- in general: highlight the areas where there are exclusive, concurring powers, etc of the Central State and of the entities
- is the distribution of powers the same for the legislative, executive and judicial branch? Please indicate which organs are competent to apply the law of the Central State.

4. Tax matters

a. What is the distribution of powers between the Central States and the entities in tax matters?

b. What are the various kinds of taxes of the Central State and of the entities?

c. Are they provided for by the Constitution/by Statute (by other legislation)?

d. How are tax revenues divided between the Central State and the entities?

e. What proportion of the tax revenues of the Central State is transferred to the entities and vice versa?

- f. Are there compensatory mechanisms between the most and the least developed entities or between the Central State and the entities? How do they work? Point out the importance of the transfer of funds carried out on this basis.

III. The State organs/the political system

1.
 - a. Are the entities free to adopt a political system of their choice?
 - b. Are the entities free to adopt their Constitution, or is it adopted by the Central State?
 - c. If the entities are competent to adopt their Constitution, what are the limits set by the Central State regarding its contents?
2. Do the entities have legislative, executive and judicial organs of their own?
3. What are the political systems of the Central State and of the entities (presidential, parliamentary, etc)?

IV. Participation of the entities in the decision-making process of the Central State

1. Direct participation
 - a. with adoption and revision of the Constitution
 - b. in legislative power (referendum, legislative initiative)
2. Indirect participation
 - a. What is the procedure for the designation of the Second Chamber?
 - b. How are the entities represented within the Second Chamber?
 - c. Powers of the Second Chamber
 - in constitutional matters
 - in legislative matters

V. Co-operative federalism/regionalism

Is there provision for co-operation between entities or between entities and the Central State and what are the constitutional rules in this field? Which bodies have been created in this context, and how do they work?

VI. Reciprocal control between the Central State and the entities

1. Control of the Central State over the entities
2. Control of the entities over the Central State

The following points should be examined:

- whether this control is exercised by legislative, executive or judicial bodies
- whether it takes place *ex officio* or at the request of another body
- emphasise in particular the control of the respect for the distribution of powers by the judicial bodies of the Central State.