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The Post-Nice Agenda of the European Union:

What's the Problem, How to Deal With It, and What to Avoid

by

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Executive Summary

Is There a Problem?

1. The EU's overall legitimacy is fairly unstable, reaches rather modest levels and is based to a large degree on output legitimacy. Since few people are aware and well informed about EU policies, judgements about the benefits from EU membership appear rather arbitrary. Moreover, there seem to be at least two large cleavages concerning the level of support for the EU. The first concerns the huge gap between political, economic, and social elites, who overwhelmingly support the union, on the one hand, and ordinary citizens who appear to be more sceptical, on the other. The second gap concerns the cleavage between "Europhile" countries including the Southern European members, Ireland, and the Benelux countries, on the one hand, and "Eurosceptics" including the UK, Sweden, Finland, and Austria.

2. Treaty-making in the European Union resembles more and more the policy-making processes that characterize the daily business of the European Union as a non-hierarchical and continuous negotiating system involving (sub) national, transnational, and supranational levels of governance. But the treaty-making process in the union is caught in a vicious circle of negative feedback loops. Suboptimal bargaining outcomes at the European level are bound to decrease support for the treaties among the domestic constituencies of the member states. Governments are acutely aware of their lesser margins of maneuvre which is likely to result in tougher bargaining behavior and, as a consequence, in even less satisfactory solutions. Moreover, the current IGC method is dominated by executives. Increasing the representation of civil society along functional and transnational (horizontal) lines is one of the most urgent tasks for improving the legitimacy of the EU.

Guiding Principles for the Post-Nice Process

3. The EU constitutes a continuous negotiating system, which characterizes both its daily policy-making and the treaty-making process. The task ahead is to improve the input legitimacy and the quality of the treaty-making process so as to allow for a continuous "constitutional conversation" rather than convening a one-time "constitutional assembly."

4. The EU is a multi-level system of governance whereby the competencies and powers are shared rather than divided between the supranational, national, and subnational levels. A clear and fixed "catalogue of competencies" which ignores this institutional makeup of the EU, is either bound to fail or will wreck the EU's structure as it has been built over the past decades.

5. Tackling the legitimacy deficit of the European Union requires increasing the input legitimacy of the decision-making process. This entails that those concerned by a policy or decision should have a fair chance that their voices are being heard and their interests are being represented in the policy-making process ("stake-holder principle"); that territorial representation of citizen interests by member states governments and parliaments should be complemented by functional and transnational representation of civil society so as to avoid decision blockages ("transnational principle"); that institutionalized arenas exist for the free exchange of views and debate on the European level without jeopardizing effectiveness ("deliberative principle").

Reforming the IGC Process

6. **What To Avoid:** Proposals currently on the table for reforming the IGC process suffer from two problems. First, they confine the representation of European citizens' interests in the proc-

ess to their elected representatives in the EP and national parliaments. While this is a step in the right direction, it overlooks interest groups and representatives from civil society. The second danger concerns the possibility that the „wide-ranging discussions" called for by Nice Declaration are organized along territorially defined lines, i.e., predominantly in the national polities of the member states. If the debate on the future on the union is „pillarized" along national lines, it would simply lead to a further politicization of EU questions as a result of which the margins of maneuvre of the national governments in the subsequent IGC are further reduced.

7. **What To Do:** Our proposal to reform the constitutionalization process includes four steps. First, whenever national groups debate among themselves about the future of the union, they should routinely include voices from their fellow Europeans. At the same time and at the EU level, European institutions should organize transnational roundtables bringing together public and private stakeholders along sectoral lines including representatives from civil society. These roundtables could cover the various areas of European policy-making. The second and third steps would constitute the drafting procedure for treaty amendments. A Steering Committee of „Wise (Wo)men" would overlook the drafting process of the treaty amendments including the actual drafting of treaty provisions. An Inter-Institutional Caucus composed of EP members, national Members of Parliament, Commission officials, and representatives of the member state governments would deliberate about the draft treaty amendments and organize a series of hearings with the various sectoral roundtables. Fourth, the final draft treaty prepared by the Steering Committee and adopted by a two third majority of the Inter-Institutional Caucus would then be submitted to the European Council for a final and unanimous decision, followed by the regular ratification procedures of the member states.

On the Delimitation of Powers

8. **What To Avoid**: Proposals suggesting a vertical redistribution of competencies such as a *Kompetenzkatalog* that ultimately fixes the areas in which the EU may (or may not) legislate, ignore both the dynamics of the European integration process and the horizontal distribution of competencies in European decision-making. The EU is a multilevel negotiating system in which competencies are shared both vertically and horizontally. First, there are hardly any areas of exclusive EU powers where the member states may not legislate. Second, the member states hold co-decision powers in EU legislation which compensate for the loss of autonomous decision powers at the domestic level. Finally, to reduce EU powers on its core competence of market integration would produce negative externalities, such as "social or environmental dumping," that the member states cannot address effectively on their own.

9. **What To Do**: While a strict *Kompetenzkatalog* appears to be impossible, clarifying the vertical division of powers between the EU and the member states appears appropriate and should be part of the broad public debate outlined above. To the extent that member states can define core areas of exclusive national competencies, they should include opening clauses to insure flexibility, thereby allowing for EU action in individual cases and under certain conditions. The most important question is not so much whether and what the EU should legislate, but *how* the EU and the member states should exercise their shared competencies. The legislative activities of the two levels should be guided by two principles: while European action should preserve the autonomy of the member states, national measures must be Community friendly in the sense of the already existing "duty of sincere cooperation". In areas of shared competencies, the EU would essentially confine itself to framework legislation. In addition, we suggest to institute an EU-level "Competence Committee" composed of MEPs and national MPs that would review the EU's work in light of the autonomy preservation or subsidiarity principle. On the national

level, parliamentary committees should routinely monitor the Community-friendliness of national legislation and issue regular "European impact assessments".

Increasing the Role of National Parliaments:

10. **What To Avoid:** Instituting a second chamber of the European Parliament composed of national MPs would duplicate the current EP, unless a "senate" model were followed according to which each member state sends equal numbers of deputies to Strasbourg. In this case, however, an EP Senate would compete with the Council of Ministers over the representation of territorially defined interests in the EU. As a consequence and to further decision blockages, the Council of Ministers would have to be abolished, a highly unlikely possibility. It is much easier to transform the Council into a second chamber of the EP and to restrict it to legislative functions, at least in those areas, which are already fully Communitarized.

11. **What To Do**: National MPs could be represented in the "Competence Committee" as suggested above. More important, the role of national MPs in EU policy-making should be strengthened on the level of governance for which they have been elected, i.e., on national levels. This means strengthening the role of parliamentary European Affairs Committees as well as giving the specialized committees of national parliaments greater influence on the national positions in the sectoral Council of Ministers. Last not least, joint committees of national parliaments and MEPs could be in charge of overseeing "European Impact Statements" of national legislation to insure their Community friendliness.

1.   Introduction[1]

The "Declaration on the Future of the Union" adopted by the European Council in Nice, December 2000, calls for a "deeper and wider debate about the future of the European Union" and encourages "wide-ranging discussions with all interested parties: representatives of national parliaments and all those reflecting public opinion, namely political, economic and university circles, representatives of civil society etc." This process should address the following topics, among others:

- "how to establish and monitor a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity;
- the status of the Charter of Fundamental Rights of the European Union …;
- a simplification of the Treaties with a view to making them clearer and better understood without changing their meaning;
- the role of national parliaments in the European architecture."

The declaration then maintains that "the Conference recognizes the need to improve and to monitor the democratic legitimacy and transparency of the Union and its institutions, in order to bring them closer to the citizens of the Member States" (Treaty of Nice, OJ 2000/C80/85-86).

This paper attempts to contribute to the agenda outlined in the declaration and to the post-Nice process in general. First, we analyze in more detail the nature of the problem which the debate on the future of the European Union (EU) needs to address. This concerns, on the one hand, the above-mentioned legitimacy problem of the union and the shortcomings of the Intergovernmental Conference (IGC) method for revising the EU treaties, on the other. We argue that the IGC method is in need of reform, if the member states and the EU institutions are serious about bringing the union "closer to the citizens."

Second, we make some proposals for the post-Nice debate. In particular, we concentrate on how to organize the debate on the future of the EU in such a way that it increases its democratic and participatory quality without hampering the efficiency of the outcome. This part of the paper builds on a previous RCSAS report on reforming the treaties' amendment procedures (Ehlermann and Meny, 2000b). Moreover, we focus on the question of "delimitation of powers" or competencies between the EU and the member states which has received so much attention in the post-Nice discussions. Again, our purpose is to make some constructive suggestions, which accept the general need for a

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[1] For comments on the first draft, we thank particularly Grainne de Burca and Helen Wallace.

debate on a "catalogue of competencies" without jeopardizing the political and constitutional structure of the emerging European polity. Finally, we discuss the issue of increasing the role of national parliaments in the European architecture. As to the question of how to simplify the treaties, we refer to a previous RSCAS report (Ehlermann and Meny, 2000a).

The following proposals are fairly modest and try to accommodate and to integrate as many suggestions as possible that are already on the table for the post-Nice process.

2. Analyzing the Problem: The Legitimacy of the European Union and the Limits of the IGC Method

2.1 Is There a Legitimacy Problem?

There is a widespread recognition among European policy-makers that the EU faces problems of democratic legitimacy and accountability. Many proposals concerning a European Constitution or a delimitation of competencies between the EU level and the member states appear to be motivated by the need to increase the EU's legitimacy. The same holds true for the European Council's call for a "deeper and wider debate about the future of the European Union." But is there a problem?

A political and social order can be considered legitimate if it generates a normative motivation for voluntary compliance with the rules, even if these rules conflict with one's perceived self-interests. Diffuse support for and collective identification with a polity in conjunction with law enforcement is supposed to generate compliance with legal norms. Moreover, if democratic governance constitutes government "by the people for the people," we can further distinguish between an input and an output dimension of legitimacy (Scharpf, 1999). Input legitimacy refers to the degree of participation of those who are potentially concerned by a norm or rule in the process of rule-making, while output legitimacy concerns the effectiveness of the norms and rules in terms of their problem-solving capacity. Empirically speaking, we can then ask three questions as regards the EU's legitimacy in the eyes of the European citizens:

1. To what extent do people express diffuse support for the European Union?
2. Do people perceive that they have a real chance to express their concerns in European policy-making?
3. Do people consider European policies as effective in terms of problem-solving?

Unfortunately, available data do not give clearcut answers to the three questions. In particular, we lack reliable data on how the EU compares to the legitimacy of national polities, which often face accountability problems and low levels of trust, too. The following is based on a "quick and dirty" reading of Eurobarometer and other surveys, without any sophisticated statistical analysis. Overall, the level of the EU's legitimacy appears to be fairly modest. Let us start with the first question, that of diffuse support. Opinion poll data demonstrate an enormous gap between elite support (in fact, elite *consensus*) for the EU, on the one hand, and widespread scepticism among the larger public, on the other. According to 1998 data, for example, European elites supported EU membership almost unanimously (94% mean across EU 15), while only about half of the mass public supported membership of their own country. Countries with the largest gaps between mass public and elite support for EU membership include Germany, Austria, Sweden, Belgium, Spain, Finland, and the United Kingdom (Spence, 1998). The variation among citizen support for EU membership is also enormous. In the fall of 2000, it varied between 28 % (United Kingdom) and 75 % (Ireland; see European Commission, 2001, 3). The same is true for the EU's image among its citizens. While two thirds of the Italians hold a positive image of the EU, less than one third of the British citizens regard the EU positively. A plurality of Danish, Swedish, Austrian and British citizens hold a negative image of the EU (European Commission, 2000, 26).

Trust levels in European institutions are fairly modest, too. The most trusted EU institution is the European Parliament (despite low voter turnout in European elections), followed by the European Court of Justice, the Commission, and the European Central Bank, while the Council of Ministers occupies a distant fifth place (European Commission, 2000, 33). Again, the variation among the citizens of the member states is huge. Average trust levels in EU institutions reach only 18 % in Great Britain, 34 % in Germany and Sweden, in contrast to 54 % in Ireland and 53 % in the Netherlands. These numbers have to be taken with a grain of salt, since information levels about EU institutions among European citizens appear to be rather low (European Commission, 2000, 75). A qualitative study based on focus group discussions in all member states and nine accession countries shows an "impressive" lack of knowledge as to the institutional system (OPTEM, 2001, 11).[2] More important, the study demonstrates that attitudes about the EU are not very stable: Focus group participants were given some basic information about the institutional structure of the EU and EU policies in the various issue-areas. As a result and across all countries, interest and support for European

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[2] We thank the European Commission's Governance Unit for making this study available to us.

policies and institutions increased quite substantially. This concerned particularly support for the Commission!

As to input legitimacy, the EU currently knows two sources, the directly elected European Parliament (EP) and the Council of Ministers composed of democratically elected member states governments. We have already noted the considerably lower voter turnout in European as opposed to national elections. As to the Council, citizens do not seem to know about its significance in European governance. Available data also show a significant gap between the satisfaction with national as compared to EU democracy (see graph). The gap is most pronounced in the Netherlands and Denmark, followed by Sweden and Austria. Only in Greece and Italy are citizens slightly more satisfied with the functioning of European as opposed to their national democracies. Perceptions of the European Parliament confirm the problem: While almost 2/3 of the European citizens consider the EP an important institution, only little more than 1/3 believe that it can protect their interests (Gallup Europe, 2001, 14).[3] These data have to be interpreted in light of the fact that there is an enormous desire of citizens to learn more about how EU policies affect their daily lives (OPTEM, 2001, 18). There seems to be a huge disconnect between EU institutions and EU policies, on the one hand, and ordinary citizens, on the other, despite all efforts at transparency and information policy. Both quantitative and qualitative studies document that information provided by EU institutions simply do not reach the citizens.[4]

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[3] We thank the European Commission's Governance Unit for making the results of this poll available to us.

[4] Most citizens use national television or radio as sources of information about the EU, while only 12,5 % mention the EU information centres (Gallup Europe, 2001, 10).

Satisfaction with National Compared to European Democracy, Spring 2000
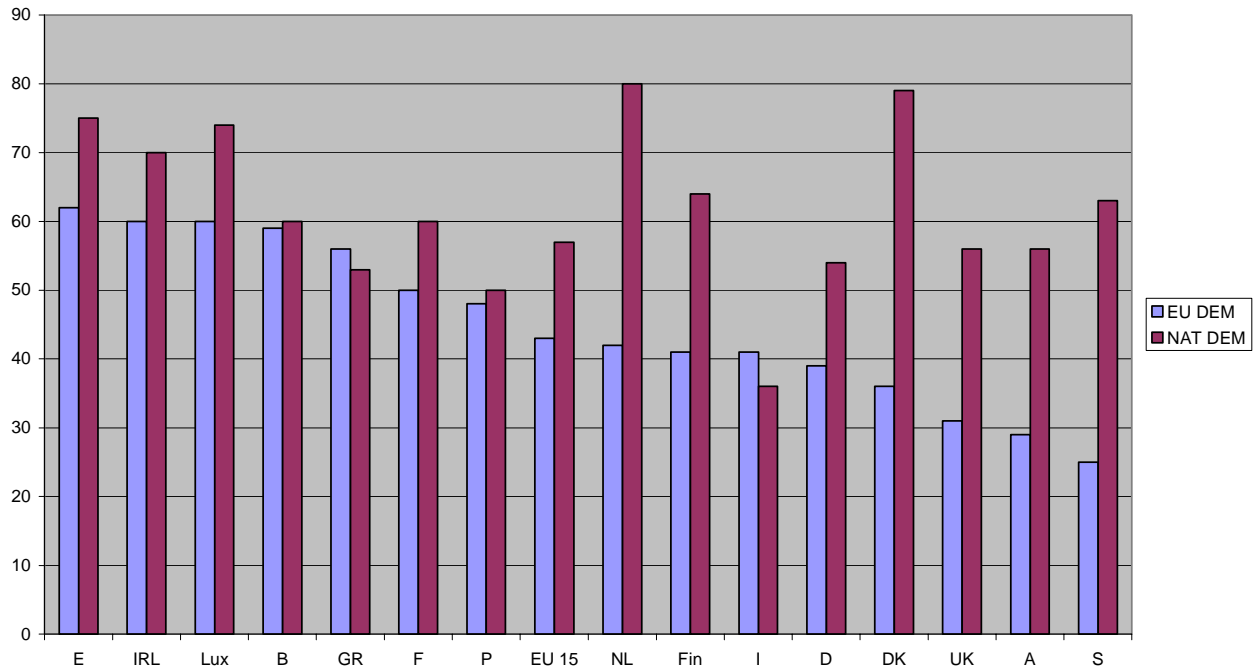
(Source: Standard Eurobarometer 53, 2000, 80-81)

The lack of knowledge about the EU institutions and EU policies is also relevant when it comes to output legitimacy, i.e., the perceived effectiveness and problem-solving capacity of the union. For the past fifteen years, Eurobarometer asked whether people perceive that their country benefits from EU membership, with the average positive evaluations oscillating around the 50 % mark (European Commission, 2000, 9). Some analysts argue that public attitudes about benefits from EU membership have little to do with EU performance, but correlate strongly with the economic cycle. In 2000, Eurobarometer also asked whether people feel personal advantages from their country's EU membership. Here, the EU average positive reply drops to 29 %, while 41 % maintain a neutral position. Again, the variation is enormous. While only few Swedes see personal advantages from EU membership, a majority of the Irish claim to have benefited personally. "Eurosceptics" who think that their country has not benefited from EU membership constitute pluralities in the UK, Sweden, Finland, and Austria, while Germans are almost equally split (European Commission, 2001, table 2; 2000, 10, 27). It should be noted here that evaluations of the output of the EU in terms of benefits and advantages is strongly correlated with support for EU membership, confirming the argument in the literature that the union's effectiveness and problem-solving capacity of the EU is particularly relevant for its overall legitimacy (Scharpf, 1999).

Concerning the issue-areas of EU policy-making, the most important accomplishment of the EU, the Single Market, has left very little mark in the perception of citizens as consumers. While three fourths of EU citizens believe that firms have benefited from the EU, there is no awareness that prices have decreased in several sectors, e.g., telecommunications (OPTEM, 2001, 5; Gallup Europe, 2001, 13). The only and undoubtedly positive impression that the single market left in the perception of citizens concerns the availability of a greater variety of products, while people are more sceptical concerning control of the quality of foodstuffs or better protection of the environment (Gallup Europe, 2001, 12-13). As to the latter two items, the variation among member states is significant, and a clear North-South gap exists.

In sum, several conclusions emerge. The EU's overall legitimacy is fairly unstable, reaches rather modest levels and is based to a large degree on output performance. However, since few people are aware of and well informed about EU policies, judgements about the benefits from EU membership appear rather arbitrary. Moreover, there seem to be at least two large cleavages concerning the level of support for the EU. The first concerns the huge gap between political, economic, and social elites, who overwhelmingly support the union, on the one hand, and ordinary citizens who appear to be more sceptical and who do not see a connection between EU policies and their daily lives, on the other. The second gap concerns the cleavage between "Europhile" and "Eurosceptic" countries. Among the predominantly "Europhiles" are citizens of all Southern European member states, the Benelux countries, and of Ireland. Stable "Eurosceptics" are British citizens, but also the citizens of the three new member countries Austria, Finland, and Sweden. Citizens of France and Denmark approximate the EU average, with German citizens becoming increasingly more critical toward the union.

The more EU policies become contested in the various domestic political systems of the member states, the more the legitimacy problems of the union will be felt. As a result, the Intergovernmental Conference as the dominant mode of reforming the EU treaties is quickly reaching its limits, as we argue in the following.

2.2   Problems of the IGC Method

Over the past fifteen years, treaty-making in the European Union resembles more and more the policy-making processes that characterize the daily business of the European Union as a non-hierar-

chical and continuous negotiating system involving (sub) national, transnational, and supranational levels of governance. From the Single European Act onwards, the IGC has become an institutionalized method of continuous treaty-making. The main difference to the daily business of the EU consists of the fact that the members states remain "Masters of the Treaties," i.e., the IGC process is primarily a negotiating system among member states governments with less pronounced roles for the Commission and the EP. Unlike other international treaty-making, however, the EU is a compulsory bargaining system in the sense that there is no credible exit option for member states (the occasional "opt-outs" not withstanding). In other words, member states are forced to agree and to achieve consensus. This is bound to produce solutions on the lowest common denominator which are likely to be both inefficient and to result in continuous "left-overs." Rather than "upgrading the common interest", member states governments strive to achieve policy outcomes that satisfy home constituencies, while minimizing their adverse consequences at the domestic level. At the same time, reforming the treaty-making process to make it more effective and legitimate also requires member states' consensus and is, therefore, unlikely to occur. This is what Fritz Scharpf has described as the "joint decision trap" in systems of interlocking politics (Scharpf, 1985).

How does the legitimacy deficit of the European Union play into this dynamics? It is bound to worsen the problem through the logic of "two-level games" (Putnam, 1988; see also Moravcsik, 1993). The increasing domestic salience of EU affairs combined with growing concerns by citizens about the involvement of "Brussels" and its anonymous powers in one's everyday lives is likely to reduce the domestic "win-sets" of governments and, thus, to decrease their margins of maneuvre at the IGCs. Since the treaties have to be ratified domestically, governments are acutely aware of the requirement to seek majorities at home. This, of course, leads to increased bickering and horse-trading in the bargaining processes of the IGCs. Nice was the perfect example.

Yet, lowest common denominator outcomes in a compulsory bargaining system are likely to exacerbate the problem of decreasing domestic consensus rather than to alleviate it. People are dissatisfied with the bargaining outcomes and, thus, less prepared to support the agreements. In functioning democracies, this inevitably decreases the likelihood that national parliaments will ratify the treaties or that citizens will agree in those countries where referenda are held. According to the "two-level games" dynamics, this in turn reduces the bargaining room for governments at the IGC level which then produces outcomes with which nobody can be happy. In other words, we have reached a situation in which the treaty-making process in the union is caught in a vicious circle of negative feedback loops. Suboptimal bargaining outcomes at the European level are bound to decrease the

domestic support for the treaties among the domestic constituencies of the member states. As a result, governments are acutely aware of their lesser margins of maneuvre ("win-sets") which is likely to result in even tougher bargaining behavior and, as a consequence, in even less satisfactory solutions. And so on. Finally, the blame-shifting attitude of many national governments ("Brussels made us do it.") only increases the problem. While providing a short-term solution for legitimacy problems at home, it ties the hands of governments at the European negotiating tables in the medium- and long-run.

A final characteristic of the IGC method is that it is dominated by executives, particularly of member state governments (and sub-national executives to the extent that they are included in the negotiating system). In other federal systems, executive dominance in the (vertical) territorial structure is balanced by strong horizontal (or functional) organizations representing societal interests and the preferences of citizens. Political parties serve as crucial transmission belts between society and state institutions. At the same time, social interests and civil society are represented at the national level by comparatively strong peak associations – trade unions, business organizations, churches, NGOs etc. However, strong interest organizations representing civil society as well as transnational political parties are missing on the EU level and, thus, there is little to balance executive dominance in EU decision-making. To the extent that transnational interest organizations exist at the EU level, they seem to have little input in the IGC process so far. This further adds to the legitimacy and accountability problems. Increasing the representation of civil society along functional and transnational (horizontal) lines is one of the most urgent tasks for improving the legitimacy of the EU both at the input and the output side of decision-making. We will come back to this point below.

3.   How To Deal With the Problems and What to Avoid

The heads of states and governments assembled in Nice were acutely aware of the problems analyzed above, hence the "Declaration on the Future of the Union." In the following, we comment on three topics on the table for the post-Nice agenda:

- reform of the IGC method;
- establishing a more precise "delimitation of powers" between the European Union and the member states;
- the role of national parliaments in the European architecture.

Our suggestions are based on the following general considerations:

1. The EU constitutes a continuous negotiating system, which characterizes both its daily policy-making and the treaty-making process. The task ahead is to improve the input legitimacy and the quality of the treaty-making process so as to allow for a continuous "constitutional conversation" (De Witte, 2001) rather than convening a one-time "constitutional assembly."

2. At the same time, the EU is a multi-level system of governance whereby the competencies and powers are shared rather than divided between the supranational, national, and subnational levels. A clear and fixed "catalogue of competencies" which ignores this institutional makeup of the EU, is either bound to fail or will wreck the EU's structure as it has been built over the past decades.

3. Tackling the legitimacy deficit of the European Union requires increasing the input legitimacy of the decision-making process. This entails that those concerned by a policy or decision should have a fair chance that their voices are being heard and their interests are being represented in the policy-making process ("stake-holder principle"); that territorial representation of citizen interests by member states governments and parliaments should be complemented by functional and transnational representation of civil society so as to avoid decision blockages ("transnational principle;" cf. Schmitter, 2000); that institutionalized arenas exist for the free exchange of views and debate on the European level without jeopardizing effectiveness ("deliberative principle;" cf. Joerges, 2000).

3.1 How To Reform the IGC Process and What To Avoid

There is a growing sense that the IGC method is in need of reform. There is less agreement on how to accomplish this. There have been several calls for convening some sort of "constitutional assembly" with the task of producing a European Constitution which settles the issues of the bill of rights, the decision-making powers, and the competencies of the various levels once and for all. The imagery behind this proposal is a somewhat idealized version of state-building whereby the peoples of a given territory and their representatives get together and give themselves a constitution establishing a political order ("Philadelphia Assembly"). Such proposals overlook at least three constitutive features of the EU. First, for better or worse, the EU already constitutes a political order including treaties regulating the division and sharing of powers among the various levels. It is one thing to propose a "Basic Treaty of the European Union" in order to simplify the current patchwork of

treaties (cf. the RSCAS proposal, Ehlermann and Meny, 2000a). It is quite different to call for a Constitutional Assembly to start the process of constitution-making from scratch.

Second, calls for a European Constitutional Assembly ignore the reality of constitutionalization as a process which have characterized the IGCs so far. While this process is in desperate need for reform, the idea to end it once and for all through a Constitutional Treaty or a European Constitution throws out the baby with the bathing water. Constitutionalization as an ongoing process – the current IGC method – at least introduces an element of flexibility in the treaty-making process, which can be adjusted to changing circumstances. The likely outcome will be that the negotiated European Constitution would then be subject to continuous further amendments. In other words, a Constitutional Convention is unlikely to settle the process of constitution-making in the EU and will only give rise to further IGCs later on.

Third, the proposal overlooks the mechanisms of the "joint decision trap." Trying to solve the problem of the *finalité politique* of the EU through a written constitution is bound to fail given the irreconcilable differences among member states about how this *finalité politique* should look like. While this debate was long overdue and has led to an ongoing transnational deliberation about the future of the union, it is unlikely to be settled in the near future, if ever. However, a European Constitutional treaty on the lowest common denominator might be the worst outcome of such a process and is unlikely to remedy the legitimacy and accountability deficits of the European Union – because of the mechanisms outlined above.

The challenge ahead is then to democratize the process of treaty-making in the union and, at the same time, to overcome the problems of the joint decision trap. In this context, the RSCAS Report on the Reform of the Treaties' Amendment Procedures (Ehlermann and Meny, 2000b) has proposed a procedure whereby representatives of each member state, of the Commission, of the EP, and delegates of each national parliament would draft the treaty amendments to be then voted on by the European Council and the EP. A similar procedure was used to draft the European Charter of Fundamental Rights. Others talk about an „Interinstitutional Convention" of similar composition which would then decide by qualified majority. The IGC would evaluate the results of the Convention and might amend them in some areas. Still others, such as apparently the British, Swedish, and Danish governments are adamantly opposed to anything that sounds like a constitutional convention.

However and irrespective of the language, most proposals point in the right direction, since they preserve the nature of constitution-making in the EU as a continuous negotiating process. The suggestions take the drafting of treaty amendments out of the hands of the IGC and its intergovernmental method and systematically include delegates from both the EP and national parliaments. The latter would be a first step toward tackling the accountability problem and reducing the executive dominance in EU treaty-making. Since the IGC would then be presented with one document, it would be much harder for individual member states to reject individual articles or proposals. As a result, there is at least the chance of achieving something more than lowest common denominator solutions and of increasing the problem-solving capacity of EU institutions through treaty reforms. At the same time, member states would still be able to pull the „emergency brake" in case of serious objections.

Yet, these and other proposals currently on the table for reforming the IGC process suffer from two problems. First, they confine the representation of European citizens' interests in the process to their elected representatives in the EP and national parliaments. While this is a step in the right direction, it overlooks interest groups and representatives from civil society. In modern pluralist democracies, special interest groups such as business and labor, but also public interest groups oriented toward the common good (NGOs etc.) routinely and legitimately participate in democratic deliberations. To exclude them from the EU treaty-making process would deprive it from an important source of input legitimacy. Since direct citizen participation is not feasible at the EU level (it largely amounts to symbolic politics), the challenge ahead is to organize stakeholder input through interest groups and to make sure that interest representation at the EU level is not confined to special interests, but encompasses those diffuse preferences of citizens which are difficult to organize. Civil society associations, for example, could be treated as transnational „second order" citizens with respective rights and duties (Benz, 2001, 5).

The second danger concerns the possibility that the „wide-ranging discussions with all interested parties" called for by the Nice Declaration on the Future of the Union are organized along territorially defined lines, i.e., predominantly in the national polities of the member states. While such a procedure might increase the participatory elements in the treaty-making process, it could well result in a further blockage of the policy-making process at the European level following the logic of „two-level games." If the debate on the future on the union is „pillarized" along national and territorial lines, it would simply lead to a further politicization of EU questions as a result of which the „win-sets" of the national governments in the subsequent IGC are further reduced. Let's assume, for

example, that the „wide-ranging discussion" in Britain results in a confirmation of the British reluctance to agree to further supranationalization, while deliberations in Germany or Italy lead to a consensus in favor of a more federalist vision or Europe with a strong European government. The subsequent IGC will probably be more paralyzed than the last one, since the preferences of the member state governments result from increased input participation thereby increasing the constraints on them even further. In federal systems, such a „pillarization" of national debates along vertical lines is usually balanced, once again, by strong party systems and/or interest organizations cutting across horizontally through the vertical division of powers in territorial structures. But so far, the EU does not have strong transnational party organizations or transnational interest organizations.

Does this mean that we should forget about introducing elements of public deliberation in the constitutionalization process and leave this to the Sunday speeches of politicians? On the contrary! But the challenge ahead is to complement the public debates within the member states by public deliberations along functional and transnational dimensions. This immediately raises the usual objection that there is neither a European public sphere nor a European demos. All we have are nation-states to organize the polities. It is certainly true that there are few European-wide media and that there is no homogeneous European public space. But this objection overlooks that our national public spheres are not unified either, but usually equally fragmented and heterogeneous. In fact, contestedness and controversies are characteristics of lively public debates rather than consensus. In that sense, the European-wide debates about the appropriateness EU diplomatic measures against the Austrian right-wing government represented an example how a European-wide public sphere could look like. Is it completely out of the question that the future of the EU sparks similar public controversies in transnationally rather than territorially defined public spaces?

The principles of deliberative supranationalism, „stakeholdership," and of transnationalism outlined above lead us to suggest a four step process of treaty-making (see graph). First, to the extent that the „deeper and wider debate about the future of the European Union" takes place in the various national public spheres, it should systematically include fellow Europeans and the input from other countries (including the accession states and further enlargement candidates). Whenever national groups debate among themselves about the future of the union, they should routinely include voices from their fellow Europeans. At the same time and at the EU level, European institutions – particularly the Commission and the EP – might organize transnational roundtables bringing together public and private stakeholders along sectoral lines including representatives from civil society. These

roundtables would cover the various areas of European policy-making including constitution-making. In the environmental sector, e.g., one could think of bringing in companies, NGOs, and representatives of European environmental „firstcomers" and „latecomers" and ask them to discuss and finetune the allocation of competencies in EU environmental policies. Analogous procedures could be used in the other policy areas such as single market, social policy, energy, etc. Both the national and the transnational debates would result in proposals and suggestions for EU treaty revisions through public deliberation.

[insert graph about here]

The second and third steps concern the drafting procedure for treaty amendments. Similarly to the process that led to the Charter of Fundamental Rights, a Steering Committee of „Wise (Wo)men" could overlook the drafting process of the treaty amendments including the actual drafting of treaty provisions. An Inter-Institutional Caucus composed of EP members, national Members of Parliament, Commission officials, and representatives of the member state governments (including sub-national authorities) would deliberate about the draft treaty amendments and discuss them with the Steering Committee. At the same time, it would organize a series of hearings with the various sectoral roundtables mentioned above so as to insure input from civil society representatives.

The final draft treaty prepared by the Steering Committee and adopted by a two third majority of the Inter-Institutional Caucus would then be submitted to the European Council for a final and unanimous decision, followed by the regular ratification procedures of the member states.

This is a rather modest proposal that does not change the ultimate treaty-making powers of the member states, but reforms the process on the input side by systematically introducing elements of transnational deliberation. While it increases the role of the EP and of national parliaments in EU treaty-making, it also provides for input by interest groups and civil society along functional and transnational rather than territorially defined lines. As a result, it is likely not only to increase the participatory elements on the input side, but also on the output side in terms of problem-solving capacity. Effectiveness is further insured through a „funneling" of the constitutionalization process which starts with rather broad and wide-ranging debates that are then focussed into a treaty amendment procedure involving mainly two institutions, the Steering Committee and the Inter-Institutional Caucus. Last not least, the member states remain "masters of the treaties," even though their capacity to amend the final draft treaty is substantially reduced.

3.2   What To Do About the „Delimitation of Powers" … And What Not To Do

The call for a clear delimitation of competencies between the different levels of government in the EU is driven by three main concerns. First, the EU has to become more transparent and accountable, which is considered as an important step to tackle the legitimacy problems of the EU. The citizens must know whom to hold responsible for public policies by which they are affected. Second, the EU ought to preserve its action capacity, particularly in light of its upcoming enlargement. With up to 25 member states having to find an agreement, the EU will have to focus on issues that are key to its functioning as an economic as well as a political community. Third, the EU must not overly intrude in the domestic affairs of the member states. It is often difficult to see why the EU issues detailed regulations, such as the distance between toys on a child play ground, to insure general goals, such as the public health and safety of products. The three concerns are certainly linked but touch upon two different dimension of the EU as a multilevel system of governance, which are often mixed up in the debate. Formalistic and overly detailed regulations are a problem of administrative style rather than a question of the delimitation of competencies. Likewise, intransparency arises as much from the way European competencies are exercised as they are assigned to the different levels of governance. Even where the EU holds exclusive competencies, as in external trade, the member states participate in the decision-making process, which blurs political responsibilities. And it is not only an overload of policy competencies but also their joint exercise between the EU and the member states, which ultimately challenges the problem-solving capacity of the EU due to the need for consensus among an ever increasing number of members in the Council of Ministers. In other words, a more precise delimitation of competencies involves two dimensions, which should be kept separate:

1. The vertical distribution of legislative competencies between the member states and the EU
2. The horizontal distribution of decision-making powers between the member states (Council) and the EU (European Parliament, Commission) in the exercise of EU legislative competencies.

The debate has so far concentrated on changes in the vertical distribution of powers. While the horizontal dimension is largely ignored, it imposes serious constraints on any modifications in the vertical distribution of competencies.

The EU is a multilevel bargaining system in which competencies are shared both vertically and horizontally. First, there are hardly any areas of exclusive EU-competencies, where the member states must not legislate. The same is true for the member states. In most areas, the competencies of the EU and the member states overlap (Pollack, 2000). Second, the member states hold co-decision powers in EU-legislation, which compensate for the loss of autonomous decision powers at the domestic level. The twofold sharing of competencies turns the EU into a multi-level system of joint decision-making and interlocking politics as we find it in cooperative federal states, such as Germany. Like cooperative federalism, the EU suffers from two major problems:

1. The policy process is dominated by executives (member state governments and the Commission). Policies are negotiated within networks of national and European experts and bureaucrats. Such interadministrative networks that span across several levels of governance can be highly exclusive and often do not equally represent the relevant interests of the citizens. They suffer from problems of transparency and accountability by blurring political responsibilities. Citizens have difficulties in identifying the political actors that are responsible for decisions.

2. Decisions are generally made by consensus rather than majority, even if the formal rules allow for (qualified) majority voting. In the absence of opting out clauses, this tends to produce policy outcomes on the lowest common denominator. Moreover, it makes it difficult if not impossible to change existing institutions to increase their problem-solving capacity (joint decision-trap)

While executive dominance poses serious problems of input legitimacy and accountability, decision-making by consensus undermines the output legitimacy of the European Union.

A clarification of competencies between the EU and the member states might be able to alleviate the twofold legitimacy problem of the EU. It could increase transparency and accountability, and improve the problem-solving capacity of the EU. Most proposals which are currently on the table suggest that the best solution would be a vertical redistribution of competencies in form of a *Kompetenzkatalog* that ultimately fixes the areas in which the EU may, and must not legislate, respectively. Such suggestions, however, ignore both the dynamics of the European integration process and the horizontal distribution of competencies in European decision-making.

First, it has been argued that the EU should focus on its core competence for market integration while the member states would retain and regain responsibilities that lie at the heart of traditional state functions, such as public health and social security, education, media, and culture. In these areas, the EU may at best complement or support member states' activities. Such a division of labour, however, presupposes a somewhat artificial distinction between market-making and market-

correcting regulations: neoliberal market policies are made at the European level, while welfare state policies are left to the member states. Yet, market integration produces negative externalities, such as "social dumping", which the member states cannot effectively address. They require some European-wide regulations on social security or health and safety issues, which also prevent the member states from using national regulations to impair the free movement of goods, services, capital or persons. Given the logic of market integration, EU-competencies are likely to be strengthened rather than weakened. The curbing and containing of EU-legislative powers would not only contradict the logics of market integration and the growing interdependence between spheres of policies, which have driven the Europeanization of national policy competencies in the first place. It is not necessarily desired by European citizens either. 90% of them make fighting against unemployment their top priority for EU actions. 87% support EU policies against poverty and social exclusion (European Commission, 2000, 43). "Eurosceptic" member states, such as the UK, Denmark, or Sweden, might support the limiting and re-nationalizing EU competencies. But particularly the Southern countries, which have benefited most from European integration, are likely to object. They wish to strengthen rather than weaken the role of the European Union.[5]

Second, even if the member states were able to agree on some formal delimitation of powers, it is questionable whether this would be able to put a hold on the Europeanization of national policy competencies. Any EU-measure requires the explicit agreement of (the majority of) the member states. In other words, national governments already have the possibility of containing the "creep-ing" loss of their autonomous competencies at the European level. Many EU-policies, which national politicians denounce now as overstepping the limits of European integration, were adopted with the consent of their governments. Likewise, the formal exclusion of EU-action in some policy areas by inserting exclusionary provisions into treaty articles (see e.g. Art. 149 (4) on education or Art. 152 (4) on public health) has not prevented the member states from adopting EU-policy meas-ures. There are several cases in which the national governments evaded and transgressed the limits on EU-regulatory powers, which they themselves had put into the treaties to protect their state juris-dictions (see for instance the famous tobacco directive, which was revoked by the European Court of Justice, cf. de Burca, 2001). The co-decision rights of the member states in European legislation (horizontal distribution of power) run counter to the logic of a more precise delimitation of compe-tencies between different levels of government (vertical distribution of power). To be effective, it

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[5] 72% of the Italians, 68% of the Portugese, 65% of the Greeks, and 52% of the Spaniards desire a stronger role for the EU in the future (European Commission, 2000, 39) as compared to 22% of the British, 28% of the Danes, 35% of the Germans, and 36% of the Swedes.

would have to go hand in hand with a disentanglement of decision-making competencies. This could only be achieved if the powers of member state governments at the European level were reduced, e.g. by replacing the Council of Ministers through a directly elected Senate as the second chamber of the European Parliament. Given the logic of the joint decision-trap, the member state governments are unlikely to decide their own disempowerment (see below).

In sum, if we accept the reality of the EU as a multilevel system of joint decision-making and interlocking politics, where the vast majority of competencies overlap and are jointly exercised rather than divided up, a strict delimitation of competencies that grants the member states a "watertight" sphere of autonomous competencies is neither realistic nor necessarily desirable. Does this mean we have to give up the idea of a *Kompetenzkatalog* as a means to increase the legitimacy of the EU?

We should not throw the baby out with the bathing water. Rather than abolishing the project of a more precise delimitation of competencies altogether, we should think of alternatives to the imposition of rigid limits of competence. Instead of proposing yet another list of competencies, we will therefore outline a two-step procedure for drawing and re-drawing boundaries between the appropriate tasks of the EU and the member states, which accommodates the political dimension of the issue and provides for the necessary flexibility to deal with it.

1. Step: What Should the EU (Not) Do?

Given the gap between growing EU-competencies on the one hand, and its declining support among European citizens, on the other, clarifying the vertical division of policy competencies between the EU and the member states appears more than appropriate. Current proposals for a more precise delimitation of competencies point into two different directions. Some favour the returning of EU-powers to the state or sub-state level and the need to define autonomous spheres of state competencies in which the EU must not act. Others emphasize the need to clarify the scope of existing EU-powers and the conditions for their exercise. The two are not necessarily exclusive, although agreement among member states on the former is less likely than on the latter. But even if member states can define a core area of exclusive national competencies, they should not rule out EU-activities categorically, since these may develop informally, outside the legal framework of the EU, where they would not be subject to any political control. Moreover, an exclusive delimitation of competencies ignores that all policy areas entail aspects that are better regulated at the European level, while others may require regulations at the state or regional level. To retain flexibility, exclu-

sionary provisions for EU activities could include an opening clause, which allows for European regulations in individual cases and under certain conditions to be specified. Since these opening clauses provide for "punctual" expansions of EU competencies, their invoking by the Council should be controlled by a third political body such as the "Competence Committee" suggested below.

The clarification of the vertical distribution of legislative competencies is complex and involves many technicalities. Still, it must not be left to lawyers and bureaucrats. Which level takes responsibility for what is an inherently political question. What is needed is a broad public debate, which could be organized within the Constitutionalization model suggested above.

2. Step: How Much Should the EU Do?

Exclusive EU-powers are likely to be the exception. The large bulk of competencies will remain shared and jointly exercised with the member states. Therefore, the question is not so much whether and what the EU should legislate, but *how* the EU and the member states should exercise their shared competencies. In order to achieve more transparency and effectiveness in this system of shared powers and joint decision-making, we suggest that the relationship between the legislative activities of the two levels should be guided by two principles, which Fritz Scharpf derived from the principle of federal comity (*Bundestreue*, Scharpf, 1993): while European action should not overly intrude with the autonomy of the member states (autonomy-preserving in the sense of the subsidiarity principle), national measures must be compatible with the Community (Community-friendly). In areas of shared competencies, the European Union would essentially constrain itself to setting framework legislation, which defines the goals to be achieved but leaves it largely to the member states how to achieve them. Framework legislation would enjoy supremacy over national law and have a direct effect at the domestic level if it is not implemented by the member states. Given the limited capacities of the Commission, the enforcement of EU-Law strongly relies on citizens who litigate before national courts against their governments for not implementing European legislation. But the member states would have enough room for legal development and differentiated implementation, e.g. by setting stricter standards. At the same time, they would have to ensure that their legislative and administrative measures do not infringe either European norms and rules or create negative externalities for other member states. Needless to say that the principle of Community-friendliness should also apply to the exercise of any exclusive competencies of the

member states. The consequent application of the two principles would also help changing the administrative style in the EU preventing overly detailed and formalistic regulations.

Instead of delineating areas of substantive competencies for the EU and the member states, the major purpose of a *Kompetenzkatalog* would then be to specify procedures, which ensure that both levels adhere to the two principles of federal comity. One idea could be to install a "Competence Committee", which would be comprised of an equal number of representatives of the European Parliament, the Committee of the Regions, and of national parliaments. Modifying a proposal by Tony Blair and not withstanding the jurisdiction of the European Court of Justice, this joint committee would review the EU's work in light of the "autonomy-preserving" principle making sure that EU-decisions do not regulate issues that may fall within its legislative competence but are better dealt with at the domestic level. Although the statements of the committee would be non-binding, they would function as a political mandate for the member states, the Commission, and the European Court of Justice, if it has to rule over issues of competencies.

The European Affairs Committees (EACs) of the national parliaments could fulfill a similar function in the member states, monitoring the Community-friendliness of national legislation. The EACs should comprise members of the national parliament as well as national representatives from the European Parliament, which is already the case in some member states (see below). Their "European Impact Assessments" would evaluate the consequences of national policies and interests for other member states and for European policy-making and certify that the former does not negatively inflict on the latter.

3.3   Increasing the Role of National Parliaments in the European Architecture … Without Creating Additional European Institutions

The Nice Declaration on the Future of the Union maintains that the post-Nice process should address the question of the "role of national parliaments in the European architecture." It is unclear what this means. Some have proposed to institute a second chamber of the EP composed of members of national parliaments. There is also the suggestion that such a second chamber's tasks would be confined to regularly reviewing a "charter of competencies" (see our proposal above). Whatever the intentions behind these proposals, the implications remain unclear and could result in an even messier and less transparent European institutional architecture as is already the case. At least, the

proposals in their present form would either make the EU institutional setup even more complex than it is now or, if the second chamber is presented as an alternative to currently existing institutions, would radically alter the EU's institutional structure. None of these proposals is likely to tackle the legitimacy problem or to bring the EU closer to its citizens.

First, the idea to institute a second chamber of the EP composed of national MPs only makes sense if it follows a sort of "senate" model according to which each member state sends the same numbers of deputies to Strasbourg. Otherwise, we would simply duplicate the current EP in which deputies are elected on national or regional lists, where the nominations to these lists are under the control of national party organizations, and where the more populous states elect relatively more MEPs than the less populous states. If the second chamber of the EP were organized according to the same principles, the only difference between the first and the second chamber would be that the deputies of the latter hold two jobs, one in their national parliaments, the other in the EP. In fact, we would institute the pre-1979 EP (prior to the first direct European elections) together with the post-1979 EP. Why would one want to do this?

Second and as a result, a second chamber of the EP would only make sense if it followed the logic of a "senate" model. The rationale behind such proposals for federal systems such as the U.S. is that one wants to create legislatures which follow the principles of democratic representation, on the one hand, without jeopardizing the protection of the interests of smaller states against the big ones, on the other. However, in contrast to the German *Bundesrat*, which is composed of representatives of state executives, U.S. senators are directly elected by popular vote as a result of which they tend to be more representatives of functional (and, in a European context, partisan) and citizens' interests than territorially defined state interests. The problem is that an institutional architecture of the EU, which adds a second chamber of the EP following a senate model, would in fact combine the American with the German model. The Council of Ministers already constitutes a legislative body representing member states' interests on the EU level.[6] In other words, an EP Senate would compete with the Council of Ministers over the representation of territorially defined interests in the EU. The resulting conflicts are bound to paralyze the EU even more as is already the case, thereby exacerbating the problems of joint decision traps and of "two level games" identified above.

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[6] Of course, the Council of Ministers currently has executive functions, too.

It follows that the only stable solution which would not weaken the EU's institutional setup and increase the possibilities for decision blockage, consists of replacing the Council of Ministers by a European Senate composed of national MPs as a second chamber of the EP. At this point, member states governments would no longer be formally represented at the EU level. Since member states governments are still "masters of the treaties," they would have to agree (by consensus!) to abolish themselves on the European level. Is this a realistic option for the reform of the union? And even if it were, is it desirable? "Americanizing" the EU political structure would profoundly transform it from a system based on shared and cooperatively exercised competencies to one in which powers are strictly divided. We have already commented on the shortcomings of this proposal above (see also Börzel and Risse, 2000).

Given the current institutional structure of the EU, we reckon that it is much easier and would also make more sense to transform the Council of Ministers into a second chamber of the European parliament. This implies that the Council restricts itself to legislative functions, while the Commission would evolve into a European government, with or without a directly elected president. It is interesting to note that this seems to be the emerging German position, which is shared by both the Social Democrats and the Christian Democratic opposition. Yet, there are two implications of this proposal which need to be discussed:

1. What happens to those areas of European policy-making, which are currently not Communitarized, and under the Council's sole responsibility, such as the emerging European Security and Defense Policy and parts of Justice and Home Affairs?
2. The current EP and the Council of Ministers would have to be put on equal footing when it comes to legislative powers. E.g., the EP would need to acquire co-decision powers in all areas, which have moved toward Qualified Majority Voting (QMV) in the Council. In other words, the trend to disentangle the two in the Treaty of Nice would have to be reversed.

Does this imply that there is no role for national parliaments in the European institutional architecture? On the contrary. However, their role in European decision-making should be strengthened on the level of governance for which national MPs have been elected, i.e., the national levels. Today, all member states have instituted European Affairs Committees (EACs) in their national parliaments (overview in Raunio and Hix, 2000, 156). In some cases, namely Belgium, Germany, and Greece, MEPs are represented in these committees, sometimes with full voting rights. However, the powers of the national EACs vary drastically. They are particularly strong in Austria (only *Nationalrat*), Denmark, and Germany (only *Bundesrat*), moderate in Finland, the German *Bundestag*, Sweden,

and the British House of Commons, while they are rather weak in the remaining nine member states. One way to strengthen national parliaments in European decision-making would be to enhance their mandates vis-à-vis national governments in all member states. Details would have to conform to national traditions and legislative cultures.

Strengthening national parliaments in European affairs against their governments could exacerbate the logic of two-level games identified above by tying the hands of national executives in the Council of Ministers. Two remedies are possible which have already been discussed in this paper: First, MEPs should be represented in the EACs across the board. Second, the institution of "European Impact Statements" would lead to a requirement to consider the consequences of national policies and interests for fellow Europeans and European policy-making.
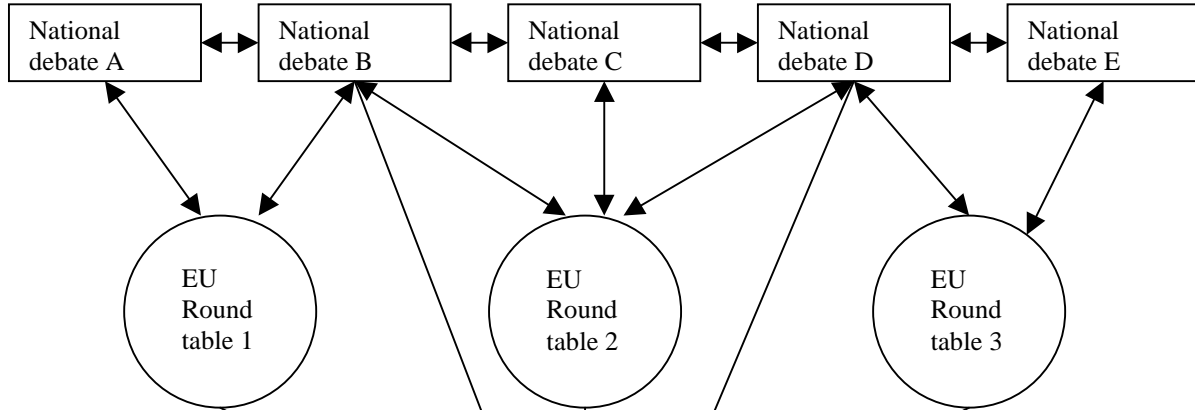
However, reality shows that the national EACs are often overburdened by the sheer amount of information from the EU and by a lack of capacity to handle it. Moreover, "European affairs" no longer constitute issues that can be neatly separated from "domestic affairs." European affairs have become "domesticated" in so many issue-areas that one can no longer discuss, e.g., environmental policies without taking the European dimension into account. As a result, national parliaments need to adjust to the reality of Europeanization. It is not enough to enhance the powers of the European Affairs Committees. Rather, the various special committees of national parliaments could be given similar powers with regard to their national government's position in the Council of Ministers as the EACs enjoy. This means, for example, that the parliamentary committees on the environment would have input in their government's position in the Council of Environmental Ministers, and so on. While the EACs including some EP representatives would retain an oversight including responsibility for constitutional issues and for the "European Impact Statements" on national legislation, the various special committees would be in charge of national parliamentary input in EU sectoral policies.
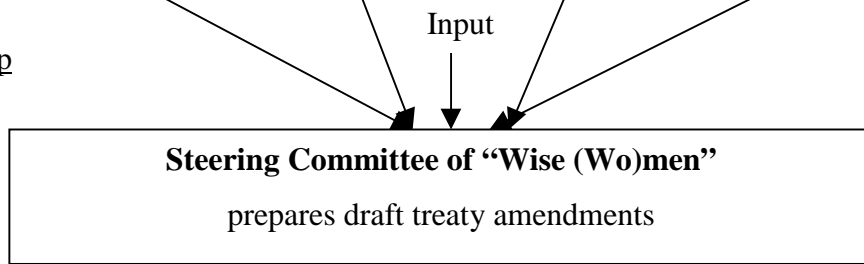
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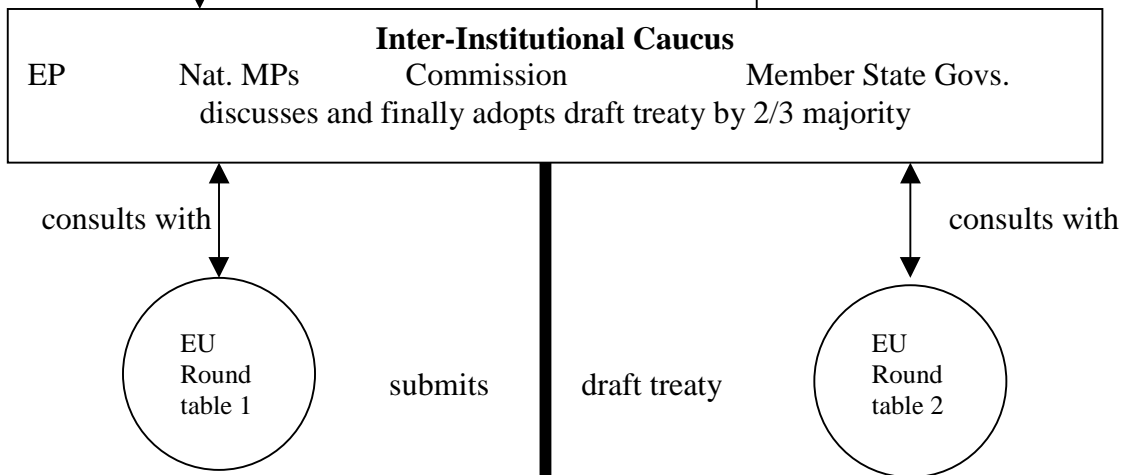
Graph: Organizing the Post-Nice Process

First Step

| National debate A | ↔ | National debate B | ↔ | National debate C | ↔ | National debate D | ↔ | National debate E |

EU Round table 1   EU Round table 2   EU Round table 3

Input

Second Step

Steering Committee of "Wise (Wo)men"

prepares draft treaty amendments

deliberation of draft treaty amendments

Third Step

Inter-Institutional Caucus

EP   Nat. MPs   Commission   Member State Govs.

discusses and finally adopts draft treaty by 2/3 majority

consults with   consults with

EU Round table 1   submits   draft treaty   EU Round table 2

Fourth Step

European Council

decides, followed by ratification through national parliaments