

Germany: fragmented structures in a complex system

Introduction: preferences of a tamed power²

Germany's political class is marked by a positive and constructive attitude towards European integration. The main objective of European policy was and still is to achieve effective and democratic European co-operation and integration.³ All governments and the vast majority of political parties contrive their general European policy agenda around the fundamental aim of far-reaching integration towards some kind of political union. Although the diplomatic class does not follow any kind of altruistic or 'naive' European policy geared to achieve a European federation, the majority of political actors are reluctant to explicitly play a leading role within the evolving European Union. That is not to say that they are immune from searching ways to influence the European agenda. But German initiatives regarding 'great bargain' decisions (IGCs, CAP reforms, decisions on the Union's financial resources)⁴ are generally pre-arranged jointly with other Member State governments. Until 1989, this 'leadership avoidance reflex'⁵ was a typical feature of Germany acting under the paradigm of a 'semi-sovereign' state.⁶ 'Deutschlands Interessen liegen in Europa' (Germany's interests lie in Europe) – this paradigm reflects the political elites' view of Germany's potential leadership in Europe, the mediation of its power within the EC and its institutional arrangements.⁷ With its large industrial sector and dependence on foreign trade, Germany is largely linked to the Common Market. Establishing close economic links within the EC is therefore politically advantageous as it demonstrates the FRG's commitment to economic and political integration.⁸

Time is another country: the impact of the Maastricht Treaty and German re-unification

The end of the Cold War decisively changed the fundamental parameters for the European Union and its Member States. Given the objective

changes for Germany – its size and population, its ‘geo-political centrality’ between West and East Europe and its economic power – one could have suggested that the re-unified Republic would act as a dominant leader in the Union.⁹ However, as the Maastricht and the more recent Amsterdam IGC process of 1996–97 revealed,¹⁰ Germany did not aspire to use its potential to engage in unilateral power politics. Despite domestic concerns especially on EMU, neither the federal government nor the parliamentary opposition parties attempted to exploit Germany’s potential against its traditional role of an important but ‘tamed power’.¹¹ The political class is associated with the ‘traditional’ set of priorities in EU politics: achieving and consolidating EMU and political union in institutional as well as in substantive terms, i.e. economic policy co-ordination at the EC level and a coherent and effective CFSP; the continuation of Franco-German co-operation; and a strengthening of the military capacities of the Union through the integration of the WEU into the EU ambit.¹² The basic perception of European integration remains unchanged, particularly with regard to the role of the EC institutions. The German political elite continues to aim at the phased creation of a legally independent, state-like political entity with some kind of a structured multi-levelled – ‘two-chamber’ system whose members shall – on the basis of equal rights and obligations – co-operate through the adoption of binding law. The Social-Democrat/Green government does not depart from this conception of European integration. On the contrary, compared with the Kohl era, the coalition additionally focuses on social and employment policy, and the formalisation of citizen rights within the corpus of the EU Treaty.¹³

Until 1991–92 public opinion in Germany appeared to conform to the so-called ‘permissive consensus’.¹⁴ However, during the 1991–92 IGC, public opinion became somewhat more critical¹⁵ – a development in line with the broader trend towards ‘Euroscepticism’ which can be observed in all member-states.¹⁶ The negotiations on EMU and the critique of this process articulated by the Bundesbank (during the IGC process), the Social Democratic Party and the Christian Social Union (CSU) (during the ratification process) and a wide range of academics (during ratification and after the Maastricht decision of the Constitutional Court) affected the way in which the ‘finalité politique’ of European integration was presented. Hence, Chancellor Kohl repeatedly made clear that German European policy had changed since 1990 by admitting that his previous calls for establishing a ‘United States of Europe’ were a mistake and that he implicitly no longer supported this idea.¹⁷ Although a favourable attitude towards European integration remains, the political parties are gradually adopting more controversial positions with regard to the method of integration and the competencies to be conferred on the European institutions in specific policy areas, especially on those which are also debated at the national level. Hence, one can identify some kind

of ‘Europeanised’ party cleavages which have developed along the path of European treaty reforms in the areas of social and employment policy, equal opportunities policy, environment policy and home and judicial co-operation.¹⁸

This change in tone reflects a more pragmatic and less ‘idealistic’ approach towards European integration. German political players try to increase their influence on the implementation and the execution of policy fields and programmes, especially with regard to their financial implications.¹⁹ Given the political environment of the Union after Maastricht (Agenda 2000, reform of the Union’s own resources), the economic recession of 1992–93, high and persistent unemployment rates and the extensive transfers to the Eastern Länder, cost-benefit analysis becomes more important and – with view to the interaction between government and the citizenry – also more relevant for German EC/EU policy-making (Figure 5.1).²⁰

The national policy-cycle: multi-level complexity and segmentation

Our study of the participation of German institutions in EC/EU decision-making concentrates on the country’s political system and institutional design. In that respect the following question has to be addressed: if the relationship between the FRG and the Union can be described as a ‘complex interdependence’,²¹ is this exclusively due to the history of Germany and the institutions involved or did the path of European integration as well as the institutional set-up of the Union also contribute to this interdependence? Moreover, do changes in the basic perceptions of European integration impact on the relationship between Germany and the Union?

The interinstitutional set-up of German EU policy-making features a hierarchy of policy-making powers and functions according to the institutions involved as well as to the different phases of the EC/EU policy-making cycle. Evidently there are ‘winners’ and ‘losers’ in terms of participation in EC/EU decision-making.²² How has this setting evolved over time?

Germany is a federal state. Owing to this constitutionalised structure collective players intervene at different levels in the political process. The Basic Law (Grundgesetz) attributes specific competencies and functions to these levels. The vertical division of powers between the federal level and that of the ‘federated states’ – the Länder – leads to a complex system of ‘political interwovenness’ or ‘interconnectedness’ (Politikverflechtung).²³ Basically, there is no single decision-making centre but different levels interact in the decision-making process and compete for access and participation. In addition to this vertical distribution of ‘openings’, there is a horizontal division of influence between the different ministries and

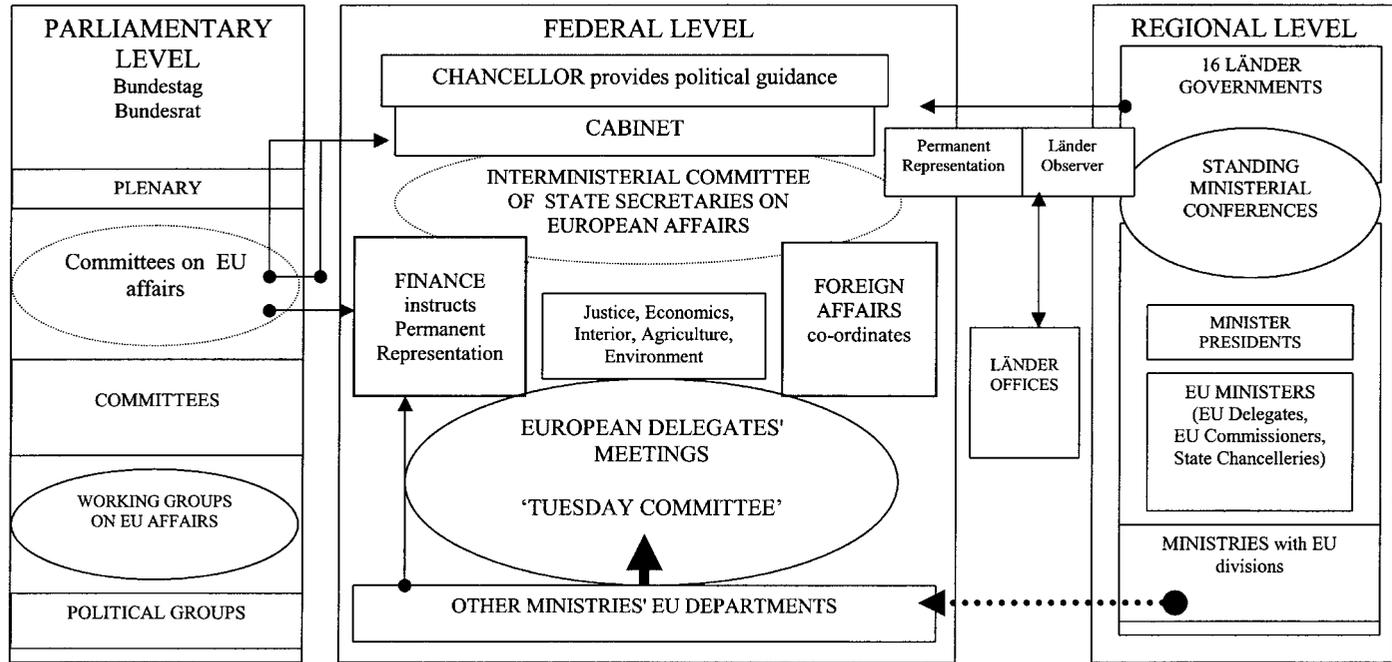


Figure 5.1 The national level of European decision-making – Germany

institutions on each level. Three constitutional rules govern this framework of joint decision-making. The first is the principle of ministerial responsibility ('*Ressortprinzip*'), according to which ministries at the federal level are independent and competing actors. Unlike the situation in France or the United Kingdom, this principle hinders the different branches of the German government in their attempts to develop coherent approaches to EC policy-making.²⁴ Secondly, the framework of joint decision-making is influenced by the chancellor principle ('*Kanzlerprinzip*'), which empowers the Chancellor to guide the government and to define the ministerial portfolios, and which can be mobilised when serious challenges and interministerial bottlenecks occur. However, the Chancellor is not entitled finally to decide on matters where ministers battle for different views or positions. Hence the collective government principle ('*Kabinettsprinzip*') ensures that open conflicts between ministries are decided by the whole cabinet of the federal government.

Interest groups are involved only in the preparatory and implementation phases of the EU's policy-cycle. Playing a decisive role during the decision-making phase is the exception rather than the rule. Finally the German political parties have very limited institutionalised functions in the policy-cycle.

The federal bureaucracy

Germany's EU administrators have a poor reputation. A growing literature focusing on the efficiency of Germany's European policy-making has detected structural handicaps and 'failures' owing to the institutional design. The conventional wisdom²⁵ identifies a comparatively low degree of effectiveness and competitiveness. Compared to its French and British counterparts, the performance of the German interadministrative process suffers from horizontal and vertical fragmentation,²⁶ old-fashioned and cumbersome procedures, 'negative co-ordination',²⁷ 'institutional pluralism',²⁸ and 'institutional cannibalism'.²⁹ Hence, the powers conferred to the different levels of policy-making are not co-ordinated by a central agency responsible for formulating a coherent European policy. These features highlight a lack of clear strategy and of rapid position taking-leading which can leave the German delegation in a minority position in the Council of Ministers. On the other hand, this politico-administrative system features flexible working and co-ordination structures. One of the persistent advantages of the German political system is the decentralised and departmentalised scheme of administrative interaction. Decision-making is filtered from the lowest level towards the highest administrative and political levels.³⁰ In a manner which resembles the hidden logic behind the decision-making in the EU Council of Ministers, the bureaucracy tries to solve conflicts at the earliest and lowest level possible.

The federal government is composed of the Chancellor, ministers,

ministers of state and the ministerial bureaucracy which are directly involved in the EU's Council of Ministers, its subordinate working mechanisms, but also in the Commission's comitology committees. The Chancellor claims a certain 'domaine réservé' within the European Council. He disposes of a so-called 'guidance competence' ('Richtlinienkompetenz'),³¹ which can be defined as a capability to set the strategic guidelines of the federal government in general, to resolve inter-ministerial disputes (decisions of the Chancellor in this regard are binding for ministers), and to determine the final governmental approach on a given issue.³² The guidance competence on European affairs was only rarely used until the formalisation of the European Council in 1974. However, since then German Chancellors have made use of this power on several occasions (EMS, Schengen co-operation, IGCs, enlargement). The European Council's tendency towards 'de facto intrusion' into the competencies of the Council of Ministers under the EC Treaty has reinforced the Chancellor's potential to influence the broad but decisive outlines of EU policy-making.

On the other hand, the ministers of the cabinet and the ministerial bureaucracy are highly involved in the preparatory drafting of EC legislation within the working groups of the Council of Ministers and the European Commission as well as within COREPER. The principle of ministerial responsibility would suggest that all ministers are equal in the face of the Union. However, some are more equal than others. This is due to the evolution of EC/EU policy fields, but also results from the historical evolution of the ministries in the FRG. With the exception of the Ministry for Defence, every German ministry contains at least one special division for European Affairs (Table 5.1).

The information provided by Table 5.1 has to be understood as a snapshot taken from the ongoing 'EC/EU reality show' of scope enlargement and institutional as well as procedural differentiation.³³ In comparing the 2001 picture with the institutional design of the German federal government in earlier periods of European integration (our reference period here is 1982–88),³⁴ we can see that EC/EU membership has had a considerable impact upon the institutional and procedural aspects of German politics and policies. Moreover, by taking the overall number of national administrative units which deal more or less exclusively with European affairs as an indicator for the dynamic 'Europeanisation' of Member States,³⁵ we can assume that some ministries seem to be more closely involved in EC/EU policy-making than others. Owing to the original ECSC and EEC treaties with their concentration on a few – economic – policy areas, only the Ministry for Economics had established a European affairs division. In the absence of a foreign minister until 1955,³⁶ the Federal Ministry for Economics took on the lead-role in the day-to-day policy management for the ECSC.³⁷ These original arrangements established the Ministry of

Table 5.1 The Chancellery, the Ministries and their European Affairs Units, March 2001

<i>Chancellery</i>	<i>Department 2 Department 4</i>	<i>Group 21 (Foreign Affairs) Group 41 (Economic Affairs)</i>	<i>Division 211 Divisions 411 and 412</i>
<i>Ministries</i>	<i>EU related Departments</i>	<i>EU-related directorates</i>	<i>EU-related divisions</i>
<i>Foreign Affairs</i> Provides chairman of the Committee of State Secretaries for European affairs	Department E Political Department (CFSP-COREU)	2 Directorates	4 Divisions each and Task Force (1995–97) on the IGC and (since 1997) on Enlargement. In July 1998, the Political Affairs department's Divisions dealing with EU Member States shifted towards the E Department. Since October 1998 the E Department also provides for the Secretariat of the Committee of State Secretaries on EC Affairs.
<i>Interior</i>	Department V Department P (Police) Department A (Asylum and Foreign Nationals)	–	Working group V I 4 (EC law), Division V I 5 (EP election law), Division V II 4 (German Internal Affairs Unit to the Permanent Representative), Division P6 (Police co-operation), Division A6 (EC-Harmonisation of Treatment of Foreign Nationals)
<i>Justice</i>	Department E	2 Directorates	6 Divisions each
<i>Finance</i> Provides deputy chairman of the committee of state secretaries on European affairs since 10/1998	Department E on European Policy	3 Directorates + Task Force EMU + Task Force on Enlargement	16 Divisions directly linked to Department E since October 1998 representation of the FRG towards the ECJ
<i>Economics</i> Provided deputy chairman of the Committee of State Secretaries on European affairs until October 1998	Department V on Foreign Trade and European Policy (former E department)	1 Directorate on European Policy	5 Divisions directly related to the Directorate on E policy + 2 Divisions substantially related to the Directorate on E policy.
<i>Agriculture</i>	Department 6	2 Directorates	13 Divisions and Project Group 33 (BSE)
<i>Labour and Social Affairs</i>	Department VII	1 Directorate	5 Divisions
<i>Family Affairs, Senior Citizens, Women and Youth</i>	–	–	Divisions for European and International Women and Family Affairs, Politics for Senior Citizens, and Youth Policy
<i>Health</i>	–	1 Directorate	
<i>Transport</i>	–	–	1 Division (EU, OECD, Council of Europe, ECE and OSCE)
<i>Environment</i>	–	–	1 Division (EU, Council of Europe, OSCE, Bilateral Co-Operation with EC Member States)
<i>Education, Science and Technology</i>	–	Directorate 12 Directorate 31 Directorate 42	5 Divisions dealing with EC affairs 1 Division on Higher Education and EC affairs 1 Division on European Science co-operation
<i>Economic Co-operation</i>	Department 4	Directorate 40	2 Divisions
<i>Regional Planning, Building and Urban Development</i>	–	–	Division on Harmonisation of technical norms and Working Group on European Co-Operation

Sources: Organisation plans of the Federal ministries and the Federal Chancellery (December 1997–March 1999) and Auswärtiges Amt/Bundesministerium der Finanzen; Verfahren der Koordination der innerstaatlichen Willensbildung in der Europapolitik (Berlin, 1 December 2000).

Economics in a strong position on matters of functional – economic integration, although there was no formal agreement on the division of labour with the Chancellor's Office. The entry into force of the Rome Treaties pushed the Ministries of Economics and Foreign Affairs into an agreement on European policy responsibilities, reached in 1958.³⁸ The Ministries for Agriculture, Finance and Foreign Affairs created European departments and directorates during the 1960s. In 1993 – after the entry into force of the Maastricht Treaty – the Ministry of Foreign Affairs established a separate European Affairs division. In addition, the Ministries of Justice and of the Interior provide legal expertise to the so-called 'Four Musketeers'. The involvement of other ministries became relevant only within the context of the SEA and – with regard to the creation of divisions dealing with substantial aspects of co-operation in the JHA field – with the entry into force of the Maastricht Treaty.

Reflecting one of the main characteristics of the EC/EU integration process over time – the incremental enlargement of the substantive scope of policy-making and the institutional as well as procedural growth – German ministerial involvement in European Affairs can be characterised as a process of horizontal differentiation and segmentation. This process becomes perceptible in comparing the division of the workload among the national ministries during EC/EU presidencies. Table 5.2 indicates that the number of working group meetings involving federal ministries outside the club of the 'Four Musketeers' has considerably increased over time. Neither the Ministry for Foreign Affairs nor the Ministry of Economics nor – since October 1998 the Ministry of Finance – has a monopoly in giving Germany a 'voice' in the Brussels arena.

These figures not only mirror the policy preferences of the European Commission and the Council of Ministers at a given time,³⁹ but also indicate a shift in the competencies of the ministries within the German government. Interestingly, a comparison between the Presidency's draft plans of August 1998 (Kohl government) and of December 1998 (Schröder government) demonstrates the shift in the relative importance of the Ministry of Finance at the expense of the Ministry of Economics to only a very limited extent. The organisational changes of the new government (reallocation of European affairs co-ordination competencies between the Ministries of Economics, Finance and Foreign Affairs) did not spill over into their activity with regard to the Council's working groups. My conclusion would be that ups and downs in the activity of some ministries are mainly rooted in the rolling policy agenda of the Commission and the Council and are not exclusively a result of the policy preferences of the German government. The role occupied by the Ministry for Labour in 1999 confirms this argument, since the Presidency foresaw only one working group dealing with social affairs. Thus, the policy priorities of the Schröder government with regard to employment policy in

Table 5.2 Division of labour among presidents and representatives of the FRG in the working groups of the Council of Ministers during German presidencies, 1988–99

Ministry	1988		1994		1999	
	PRE	SGD	PRE	SGD	PRE	SGD
Foreign Affairs	2	1	22	22	30	25
Economics	29	48	23	49	38	46
Agriculture	18	23	42	51	63	64
Finance	13	30	2	30	19	48
Justice	24	25	20	22	33	31
Interior	3	3	18	21	33	33
Labour	3	4	4	5	1	1
Transport	4	4	3	8	1	6
Youth, Family, Health	3	13	23	28	35	28
Education, Science, Technology	1	2	4	6	2	0
Environment	2	3	2	6	8	8
Economic Co-Operation	0	5	0	4	1	1
Regional Planning	2	4	1	2	1	2
Permanent Representation	91	26	96	30	84	49
Others	2	3	4	13	2	1
Sum	197	194	264	297	351	343

Sources: For 1988 and 1994: Rometsch and Wessels (1996); for 1999: Draft minutes of the European Delegates' meeting of 15 December 1998, Auswärtiges Amt, Bonn (18 December 1998).

Notes: PRE = Presidency of the Council. SGD = Speaker of the German delegation in the Council.

general (Luxembourg process) and the European Employment Pact (Cologne process) are not reflected in a strengthened role for the relevant ministry. On the contrary, the Pact was, together with the whole policy agenda on employment, one of the areas which Chancellor Schröder reserved for the Chancellery.

Near to the problem – far from the centre: the co-ordination of policy-making

The roles and functions of the different levels within the federal government vary according to the phases of the EC policy-cycle. During the preparation phase, the bulk of activities are carried out by the heads of department, who are involved in long-term policy planning and co-ordination, and by the heads of division, who focus on the technical details of EC/EU legislation. In this phase, ministers of state and parliamentary state secretaries trade political issues whereas in general, the ministers themselves do not intervene. As far as the decision-taking phase is concerned, it is up to the relevant minister to decide on a given issue. However, each

ministry's representative from the working groups in Council of Ministers has the task of closing as many dossiers as possible before transferring them to the rather political COREPER and to the Council of Ministers' level.⁴⁰

Horizontal policy co-ordination overarching the different policy fields plays an important role in EC/EU affairs. The principle of ministerial responsibility can account for the fact that the Ministry of Foreign Affairs does not play a preponderant role in EC affairs. However, as far as participation in CFSP is concerned, it is the Foreign Ministry's European Affairs Division which together with the Political Division that shapes Germany's position. Moreover, one of the two Parliamentary State Secretaries of the Foreign Affairs Ministry acts as the Chairman of the Committee of State Secretaries on European Affairs and as the main interlocutor in dealings with the Cabinet of the federal government. For historical reasons – the Ministry for Foreign Affairs was established only in 1955, after the Ministry of Economics⁴¹ – and because of the fact that the main focus of European integration until 1993 was economic rather than political, the Foreign Minister, when acting as a co-ordinator, has always been assisted by the Minister of Economics. Until the end of the Kohl government, it was the latter ministry which was mainly responsible for representing the FRG at the ECJ as well as for the distribution of EC/EU documents to the other actors involved in the German European policy process. Of greater importance to the co-ordination of German European policy-making is the fact that the European Department in the Ministry of Economics chaired the inter-ministerial committees on EC affairs, formulated and transmitted the negotiation instructions to the diplomats in the Permanent Representation of Germany in Brussels, and finally, disposed of the Secretariat of the Committee of State Secretaries on European Affairs.

How did the evolution of the EC/EU influence the powers and responsibilities of these two ministries? The Ministry of Economics developed its role as the central interface between Brussels and Bonn from the time of the founding European Treaties through to the SEA. The Ministry for Agriculture established its 'own' contacts with the relevant players on the national and European levels. In this phase, the Ministry for Foreign Affairs was mainly responsible for macro-political issues such as institutional reform, European Political Co-Operation etc. There was thus a sector-specific partnership between the two ministries. This changed when the Maastricht Treaty entered German politics. The new policy agenda of the Union included many issues which were not exclusively related to the traditional role of the Ministry for Economics. Consequently, the Ministry for Foreign Affairs and other ministries restructured their administrations according to their new tasks in the field of European policy-making. As a result, the trend of 'sectorised policy making'⁴² in German European affairs considerably increased.

The ongoing dynamics of segmentation, institutional pluralism and the potential for conflict between the governmental actors dealing with EC/EU affairs suggest that co-ordination mechanisms and institutions across the different phases of the Brussels policy-cycle are highly important. Seen from a French or a British perspective the lack of a central agency which regularly co-ordinates the German European policy may be interpreted as one of the most considerable weaknesses in the political system. Even prior to the first fundamental reform of the EEC, Regelsberger and Wessels described the German co-ordination mechanisms as indicators of 'negative co-ordination': each ministerial actor tries to protect his or her sphere of competence instead of choosing an empathetic approach aimed at adopting coherent German policy preferences across the different EC/EU policy fields.⁴³ However, one should not jump to conclusions and assume a chaotic regime in European affairs.

The co-ordination of EC/EU policy-making in the Federal Republic is ensured at different levels of government by a set of institutions in the broad meaning of the term,⁴⁴ that is, formalised conferences, committees and informal but regular contacts on the administrative level. In the absence of a central interface between Brussels and Bonn/Berlin, channels of information, instruction and communication have been established at each level of the administration. Commission drafts of proposals for new or amended EC legislation are transmitted from the Permanent Representation to the Ministry of Economics and, since October 1998, to the Ministry of Finance.⁴⁵ The proposals are then advanced to the lead-department ('federführende Ressort'). The re-transmission of proposals and amendments as well as the instructions for German delegations to the Council of Ministers and its subsequent bodies is therefore the outcome of a complex co-ordination mechanism.

The most political institution is the Cabinet Committee on European Affairs, established in January 1973.⁴⁶ Until the Schröder government came into office, the Cabinet Committee had met only twice – at its inaugural session and at the beginning of Helmut Kohl's Chancellorship. Given that since January 1973 the Cabinet of the federal government discussed EU business (under the topics of 'European Questions' and 'International Affairs') on a weekly basis, the Cabinet Committee became a rather artificial instrument. As a consequence, Chancellor Schröder and his government abolished it.⁴⁷ In the absence of a formalised and efficient co-ordination structure at the ministerial level, the bulk of the political co-ordination is carried out by the Inter-ministerial Committee of State Secretaries on European Affairs. This committee was set up in 1963 in order to deal with controversies in relation to European affairs.⁴⁸ Meeting approximately on a bi-monthly basis, it brings together the State Ministers and State Secretaries of the 'Four Musketeers' in European affairs as well as the State Minister dealing with European Affairs in the

Chancellery and the Permanent Representative of the FRG in Brussels. Other ministries participate in the meetings when the chair (Foreign Affairs) considers it as appropriate. Although the structure of this committee is rather flexible, becoming a permanent member is of political importance.⁴⁹ In October 1998 the secretariat shifted from the Ministry of Economics to the Ministry for Foreign Affairs, underlining the latter's strengthened role in co-ordinating German EC/EU policy.⁵⁰ The committee's main task is to settle controversial questions and to prepare dossiers of a political and strategic nature with regard to the Council of Ministers' meetings. Decisions of the committee are taken by common accord and are politically binding for the ministries;⁵¹ it does not adopt a pro-active policy approach on the basis of the Council of Ministers' agenda.⁵² Besides co-ordinating the internal agenda of European policy-making, determining the German representatives in Brussels is another area of complexity and incoherence. The German Permanent Representation cannot act on its own account. Instead, the Bonn/Berlin-based institutional pluralism and segmentation in European affairs is mirrored in the Permanent Representation in Brussels. Ministries send their civil servants to the Permanent Representation (in 1998 the two core ministries occupied 57 per cent of the posts).⁵³ The total number of civil servants working in the Permanent Representation indicates an intensive involvement of the German ministerial administration (Table 5.3).

Table 5.3 Evolution of German personnel in the Permanent Representation in comparison to the number of days spent in the Council and its preparatory bodies, 1958–2000

<i>Policy area</i>	1958	1960	1969	1975	1988	1995	1998	2000
Germany's Permanent Representation staff	5	19	28	39	42	59	87	107
Council meetings	21	44	69	76.5	117.5	98	94	91
Council Meetings/Permanent Representation staff	4.2	2.3	2.5	1.9	2.8	1.7	1.1	1.08
COREPER meetings	39	97	129	118	104	112	116	130
COREPER Meeting/Permanent Representation staff	7.8	5.1	4.6	3.02	2.5	1.9	1.3	1.2
Working group meetings	302	505	1412.5	2079.5	2000.5	2364.5	3140	3537
Meetings/Permanent Representation staff	60.4	26.6	50.4	53.3	47.6	40.1	36.1	33.05

Source: Web site of the Council; *43rd Review of the Council's Work* (Brussels, 1995); *European Commission: General Report of Activities of the EU 1998* (Brussels/Luxembourg, 2001).

With a view to instructing the Permanent Representation of the German position in Brussels, the Ministry of Finance – until October 1998 the Ministry of Economics – co-ordinates the meetings in relation to COREPER I, whereas the Ministry of Foreign Affairs is responsible for the management of the Bonn/Berlin-based work in relation to COREPER II.⁵⁴ In order to give instructions to COREPER I and its subsequent working units, every ministry has a European Delegate ('Europa-Bauftragter'). They meet on virtually a monthly basis; since October 1998 the location and the chairmanship have been transferred from the Ministry of Economics to the Ministry of Foreign Affairs. Below this level, there are regular contacts between the heads of division ('Ressortleiter') in order to settle disputes between the ministries concerned on issues related to the Council's working group meetings. The so-called 'Tuesday Committee', which meets on a weekly basis, focuses on the technical aspects of a given issue. The co-ordination of the European Delegates and the Tuesday Committee, and the informal contacts between civil servants, are aimed at settling disputes of a technical rather than political nature. As regards timing, these bodies focus on the working groups of the Council of Ministers and COREPER I. As far as the meetings of the European Delegates are concerned, the deputy permanent representative for COREPER I is always involved. The relative autonomy of the actors indicates the problem of achieving coherent policy approaches; although the Europe Delegates and the Tuesday Committee give each ministry an opportunity to discuss its position on the COREPER agenda, it remains up to each responsible ministerial administration to formulate the instructions for the working group level.

Although the different co-ordination mechanisms have not been officially established by law, they have a long tradition and have influenced the structure of the federal government's decision-making process to a considerable extent. Ministerial self-interest prevails but given the Chancellor's 'Sword of Damocles', i.e. the 'guidance competence', the competition between the ministries does not lead to anarchy. Autonomy and segmentation are counterbalanced by the possibility that the Chancellery may intervene in order to dispel conflict. Nevertheless, as the working group level is the 'most vital'⁵⁵ of all the Council's component parts⁵⁶ and given that between 70⁵⁷ and 90 per cent⁵⁸ of the Council's agenda is dealt with at this level,⁵⁹ the fact that there is apparently no effective co-ordination mechanism between the relevant ministerial bodies indicates clearly the problem for European policy-making in the FRG.

The parliamentary dimension

Unlike in the United Kingdom and France, the overall mentality of members in the German two-chamber parliament – Bundestag and Bundesrat – is characterised by co-operation and less by partisan

structures and conflict between loyalty and discipline. Co-operation between government and parliament leads to what is classically identified as the German ‘working parliament’ (Arbeitsparlament), in which the opposition tries to influence the government’s decisions by a wide range of technical–concrete rather than political–general instruments.⁶⁰ This ‘working parliament’ function has considerable implications for the organisation of parliamentary activities. For instance, decision-making shifts from the plenary towards the huge range of committees, sub-committees and various working groups within the parliament, all of which are subject oriented. Decision-making has also moved towards parliamentary groups (organised according to subject and cutting across committee spheres), working parties (also cutting across committees) and coalition groups (which themselves are established according to subjects and committee duties). This process of shifting the parliamentary legislative and control functions towards a multitude of sub-structures leads to an ‘atomisation’⁶¹ of the Bundestag, with serious implications for the handling of European affairs. Given that the committee structure of the German Bundestag follows the differentiation of the executive branch, one can suggest that the co-ordination mechanisms at the federal government level amplify the process of atomisation at the parliamentary level.

Originally, the Bundestag disposed of very limited scrutiny powers; the federal government had to inform the two parliamentary chambers before any decision that would become binding law in Germany. These general rules were never applied effectively for three reasons: first the ‘Article 2 [of the EEC ratification act] procedure’ focused on informing parliament about European affairs but did not foresee a right of consultation. Consequently the parliament could not affect the federal government’s stance in the Council of Ministers. Secondly both houses were informed about relevant EC documents only at a rather late stage. About 65 per cent of EC documents debated on the Bundestag’s floor between 1980 and 1986 were already in force at the time of debate.⁶² Consequently, scrutinising the government in EC affairs was limited to some kind of ‘*ex post*’ control and did not provide parliamentarians with an effective involvement in EC policy-making. Thirdly, the Bundestag had shown little interest in scrutinising European affairs. Instead, the overall majority of its members supported the EP’s claims for more powers and considered the Bundestag as a temporary substitute for the EP in the treatment of EC documents.⁶³ Furthermore the first fully-fledged and regular parliamentary institution for dealing exclusively with EC affairs – the so-called EC Committee (EG-Ausschuß, set up in 1991) – faced almost the same structural problems as its predecessors,⁶⁴ since it was not empowered to give the Bundestag a central voice *vis-à-vis* the government. Owing to the reluctance of other committees (especially Economics and Foreign Affairs) to share their powers with another body, the EC Committee was only

rarely nominated as committee-in-charge ('federführender Ausschuß').⁶⁵ A major change in these mechanisms took place with the ratification of the Maastricht Treaty. The amended Article 23 of the Basic Law calls 'the federal Government [to] inform the Bundestag and the Bundesrat comprehensively and as quickly as possible'. Moreover, it obliges the government for the first time since 1957 to 'take account of the opinion of the Bundestag in the negotiations' (of the Council and its subsequent operative structures). In other words, Article 23 opens the door for some kind of a 'parliamentary scrutiny reserve mechanism' similar to that which operates in Denmark and the United Kingdom. But the need to take the Bundestag's view 'into account' is ambiguous and could mean anything between accepting the institution's view, incorporating elements of it or ignoring it altogether with an explanation as to why the government has decided to take a different course of action. Thus, the amendment to the Basic Law had to be combined with several reforms which sought to adapt the relevant institutions to the new situation. First, the government and the Bundestag agreed on a so-called 'co-operation law'. Secondly, both houses of the German Parliament amended Article 45 of the Basic Law to provide a constitutional basis for setting up a Committee on European Union Affairs (CEUA) in the Bundestag. The latter amended its Rules of Procedure in order to define the operational framework for the CEUA as well as the rules for the movement of documents between the different bodies of the house.

Given these shortcomings of the 1992 constitutional reform, it took the Bundestag two years to officially establish the CEUA on 14 December 1994. With fifty full members (thirty-nine members of the Bundestag and eleven German Members of the European Parliament), it is one of the largest committees in the House.⁶⁶ The prominent role of the committee is also underlined by the fact that – deviating from the general principle according to which committees shall only prepare decisions of the plenary – the CEUA can be empowered to exercise the Bundestag's rights in relation to the federal government or address its recommendations directly to the government unless another committee opposes. The CEUA acts as a specialist 'clearing house' of parliament. The government has no influence either over the selection of topics for deliberation in the committees or on the way in which the committees organise their work. If the EU Committee is designated as the committee-in-charge, it may submit a draft resolution to the Bundestag.⁶⁷ It is responsible for the receipt of all EU documents from the government and for filtering them into the other specialist committees. At first glance this innovation may suggest a major step towards a unified parliamentary position *vis-à-vis* the government. In this regard it was argued that, until 1992, the government 'operated as a unified actor *vis-à-vis* the Bundestag which was divided along departmental lines. Each departmental standing committee could only communicate

its views with, and obtain information from, “its” department. Integrating departmental considerations into a broader European policy was difficult.’ Now, since the establishment of the CEUA, the argument was that the Bundestag had a body which ‘– like the federal government, the Chancellor’s Office and the Foreign Office – is able to deal with German policy comprehensively’.⁶⁸ Of course, comparing the CEUA’s powers with its predecessors from a government perspective, one could presume that the committee is identified as ‘the’ central hub between the Bundestag and the government. However, given our findings on the characteristics and operation of the federal government in European affairs, one might have serious doubts concerning the view of the government as a ‘unified actor’, since the organisational segmentation and sectorisation of European politics in Germany was reinforced in the post-Maastricht period.

The implications of parliamentary scrutiny differ in every parliament of the Union. Following the Co-Operation Law of 12 March 1993, the German government is obliged to give the Bundestag full information on all EU documents in advance of the preparation for meetings of the Council of Ministers.⁶⁹ Unlike in most of the other parliaments of the Union, this rule applies to all three pillars of the Maastricht Treaty. Moreover, once the Bundestag has adopted a position on an EU document, the government has to base its position in the Council of Ministers on the Bundestag’s decision. The Bundestag may ask the government to postpone the adoption of a common position in the Council of Ministers. In this case, the government is required to table a ‘parliamentary scrutiny reserve’ in the Council. In addition to this general rule, the Bundestag’s Act of Ratification of the TEU obliged the government to consult the parliament prior to any decision by the Council of Ministers with regard to entry into the third phase of EMU.⁷⁰

The EU Committee has succeeded in broadening the instrumental scope of its scrutiny mechanisms. During the 13th legislative term, it held eighty-four meetings and considered 903 of 2,955 EU documents forwarded to the Bundestag (30.6 per cent). In 174 cases the committee acted as committee-in-charge. This function was not limited to the deliberation of EP documents but extended to some of the most important items of the Union’s rolling agenda – the EU Committee took up the lead for the IGC leading to the Amsterdam Treaty and for its ratification, for Agenda 2000, employment policy, the enlargement of the Union as well as for other institutional changes (the European Investment Bank (EIB), establishment of EU agencies, etc.). Even on monetary integration where it acted only as a joint-deliberative committee (*‘mitberatender Ausschuß’*), it contributed significantly to the Bundestag’s decision of 23 April 1998 on the approval of Germany’s entry into the third stage of EMU. The committee chose the option of directly addressing the German government on three occasions:

on the proposal for a Council regulation on combating fraud, on the creation of an agency for the surveillance of racism and xenophobia and – together with the Committee on the Rules of Procedure – on the resolution of the XVth meeting of COSAC.⁷¹ This last case is particularly illustrative since the vast majority of the Bundestag strongly opposed any upgrading of COSAC in order to control the Council of Ministers collectively. The roots of this critical posture *vis-à-vis* more formalised arrangements for inter-parliamentary scrutiny are to be found in both the positive attitude of German parliamentarians *vis-à-vis* the EP and in the fear that COSAC or similar institutions may aggravate the complex structure of European decision-making at the ‘Brussels’ and at the ‘Bonn/Berlin’ level.

The Bundestag arranged a rather timely management of the scrutiny process. Unlike its predecessors, the EU Committee became politically recognised by its ‘competing committees’ as a useful instrument for holding the government to account. Although the segmented structure of parliamentary activities still dominates the operation of the Bundestag in EU affairs, the EU Committee and its activities have helped to provide a broader range of the Bundestag’s members with an understanding of the long-term and horizontal issues in European affairs. The activities of the EU Committee spilled over into other committees insofar as the latter began to invent new mechanisms of scrutiny only after the EU Committee started to work. For example, while the Committee of the Interior did not participate actively in supervising the government’s stance in the implementation of the Schengen agreement,⁷² it did oblige the government to report on each meeting of the relevant EU Council of Ministers’ groups including the K4 Committee.⁷³ This change of approach occurred after the Bundestag’s EU Committee had submitted, for the first time in the Bundestag’s history, a ‘parliamentary scrutiny reserve’ on the signature of the Europol Convention.

The federal state: European policy-making down to earth

As federal states, the sixteen Länder have the quality of ‘autonomous statehood’ (*Eigenstaatlichkeit*). Two factors define the prominent character of the Länder as entities with an autonomous statehood: first, they possess their own competencies and are thus able to structure politics and policies autonomously within their territory. Secondly, they participate in the legislative and administrative process of the federation and thus play an important role in the decision-making system of the ‘whole state’ (*Gesamtstaat*). However, the ‘process of European integration has posed a persistent challenge to the legal status of the Länder and their political quality as constituent states, and therefore also to the fundamental federal structure of the Federal Republic’.⁷⁴ Thus, whereas federal statehood is still guaranteed as a central and irrevocable structural principle of the Basic Law, the question has repeatedly been posed as to how far the

balance between federation and Länder may shift without undermining the essence of federal statehood.

Whereas the Act of Ratification of the Treaty of Rome was combined with an obligation of the federal government to inform the Bundesrat only on legislative proposals issued by the European Commission, the establishment of the European Regional Development Fund (ERDF) resulted in the 'Länder participation procedure'.⁷⁵ The federal government declared itself prepared to follow the Länder views strictly if their competencies were affected by a draft legislative act of the EEC. During the negotiations on the Rome Treaties, the Länder and the federal government also agreed on the institution of a 'Länder-Observator' (Länderbeobachter), who is located in Bonn/Berlin as well as in Brussels, to provide information to the Bundesrat and the Länder.⁷⁶ The Länder-Observator is entitled to participate at each meeting of the Council of Ministers and to report on the latter's proceedings to the Länder and the Bundesrat.⁷⁷ However, owing to its rather modest administrative support – until 1998 there were only two full-time and one part-time civil servants working in its Bonn/Berlin and Brussels offices⁷⁸ – the Länder-Observator did not become a key position in the decision-making process between Brussels and the Länder governments.

Considering the complex structure that characterises European policy-making at the 'Brussels' and the 'Bonn/Berlin' levels, it came as no surprise that the primary strategic response of the Länder to the SEA was the establishment of some kind of co-ordination mechanism with regard to the federal state level as well as to the wider arena of policy-making in Brussels. Apart from the different participation procedures in EC/EU affairs, the Länder developed various activities to entrench their rights and to generate an independent capacity in the making of European law and politics.

The Länder established a dense network between Bonn and their respective capitals in order to manage the growing input from the Brussels arena. The most important developments occurred at the ministerial level. During the 1980s the first European policy divisions were created in those ministries which were indirectly affected by EC regulations or directives; this evolution followed the growing scope and differentiation of EC competencies. Both the SEA and the Maastricht Treaty induced a new momentum in this development insofar as every ministry nominated its own desk officers for European affairs ('Europareferent'). In August 1998 the 'Ministry' (Senator) for the Interior of Bremen was the only Länder ministry without a European policy desk officer.⁷⁹ The main activities of such officers are centred around the distribution among ministers of the European documentation which enters their ministry from either the Bundesrat's administration or the liaison offices of the Länder in Brussels. As regards the co-operation

between the ministries (interministerial co-ordination), the European Affairs desk officers meet on an irregular basis in order to settle disputes and to prepare the draft positions of their Land government at the upper decision-making levels.

To co-ordinate European policy-making between the federal state and the Länder more efficiently, every Land government nominated its own European Affairs Commissioner (Europabeauftragter) or European Affairs Delegate (Europabevollmächtigter), occupying a post either as a minister or as a state-secretary. Such delegates act as a 'bridge' between their Land and the other levels of European policy-making by representing their Land in the 'Europe-Chamber' of the Bundesrat (a special institution for the co-ordination of the Bundesrat's European policy) and *vis-à-vis* the federal government. For this reason, most of these posts have been located at the Representation of the Länder at the federal state level in Bonn/Berlin.

As a response to the growing amount of EC legislation after the entry into force of the SEA, the Länder opened information or liaison offices in Brussels between 1985 and 1987; initially criticised by the federal government as instruments of an 'auxiliary' or 'competitive foreign policy' ('Nebenaußenpolitik'),⁸⁰ they quickly became a useful tool for the Länder to secure and pass on information from the European Commission and the German Permanent Representation during the decision-preparation phase. The liaison offices have also proved useful as a tool for advancing the specific interests of each individual Land *vis-à-vis* the European Commission, especially with regard to the management of the ERDF and to the settlement of disputes on state aid and the granting of subsidies with the European Commission's DG for Competition. Compared with the Länder-Observers, the Länder offices have far more administrative staff. In autumn 1997, there were 141 civil servants working in the offices of which 90 belonged to the higher service.⁸¹ Finally, the creation of the CoR also prompted the offices to assist their Länder representatives in the preparation of the committee's meetings.⁸²

Based on the Act of Ratification of the SEA, the federal government and the Länder agreed on a co-operation agreement which gradually extended Länder rights of participation in terms of the extent to which their powers and interests were affected by proposed EC legislation. The agreement also officially allowed the participation of Länder representatives in the working groups of the Council of Ministers and the European Commission. Building on these procedures at the Maastricht IGC, the Länder went a step further and successfully sought entrance into the core of the Council of Ministers as equal partners with the other Member States. With the amendment of Article 203 (ex Article 146) ECT and the revision of Article 23 of the German Basic Law, the Länder and the Bundesrat achieved new and important instruments for a more effective

and direct interest mediation in the Union. In fact, the new provisions of the Basic Law opened the door of the Council of Ministers to the Länder insofar as it allowed for the appointment of a Länder minister (or another representative of equal rank) to represent the Federal Republic in the Council in cases where the exclusive competencies of the Länder were involved.

In clear contrast to the Bundestag, the Bundesrat adapted its institutional structure and instruments at a rather early stage of the European integration process. The European Union Affairs Committee – EUAC (Ausschuß für Fragen der Europäischen Union) – was established on 1 November 1993, though its general tasks and structure date back to 20 December 1957 when the Bundesrat created the first parliamentary Committee for European Issues in the then EEC. Unlike in the Bundestag, the members of the committee can be replaced by civil servants.⁸³ The EUAC normally holds a meeting every three weeks to prepare the decisions of the Bundesrat; if a decision must be made on an EU document before the next Bundesrat plenary session is scheduled then the so-called ‘European or EU Chamber’ (Europa- or EU-Kammer) will be convened. If operating, the chamber replaces and acts on behalf of the Bundesrat’s plenary. As a general rule, the EUAC is always nominated as committee-in-charge. It consequently exercises much more power in setting the Bundesrat’s EC/EU agenda than its counterpart in the Bundestag. As regards the scope of scrutiny, the federal government adopts a broad interpretation of the concept of ‘EU proposals’ to be forwarded to the Bundesrat. The latter receives virtually all documents concerning the European Council and the Council of Ministers.⁸⁴ Within the framework of the third pillar (JHA) where the Länder have considerable legislative, executive and operative powers, not only the proposals and documents of the Council of Ministers, but also unofficial papers drawn up by other Member States are transmitted to the Bundesrat.⁸⁵

The obligations of the government *vis-à-vis* the Bundesrat are graded depending on the matter and the competencies of the Länder. Where EC or EU legislative proposals fall within the sole jurisdiction of the Federation but where the interests of the Länder are also affected, the federal government is required to take account of the opinion of the Bundesrat when adopting its negotiating position. Where a proposal is concerned essentially with the competencies of the Länder and their administrations, the federal government is obliged to respect the views of the Bundesrat. Concerning EC legislative proposals based on Article 308 (ex Article 235) ECT, the government must come to an agreement (Einvernehmen) with the Bundesrat in instances where the latter’s approval is required by domestic law. Consequently the government cannot vote in favour of a proposal before the Bundesrat has given the green light. Where exclusive competencies of the Länder are involved, the

FRG is represented in the Council of Ministers by a minister of the Länder nominated by the Bundesrat. Finally, Article 23 of the Basic Law rules that laws transferring sovereign powers always require the consent of both houses of parliament. More importantly and especially with regard to EU action under the third pillar, Article 23 states that for 'the establishment of the EU as well as amendments to its statutory foundations and comparable regulations which amend or supplement the content of this Basic Law or make such amendments or supplements possible' a two-thirds majority is needed in both houses.

What has been the experience with these innovations so far? As far as the participation of Länder civil servants in the Council of Ministers' and the Commission's working groups is concerned, Weber-Panariello reported that in April 1994 250 Länder civil servants were nominated for the Brussels-based working groups.⁸⁶ This number steadily grew from 354 in 1995⁸⁷ to 450 in 1996. Since then, Knodt notes that the internal workload of the Länder has led to a reduction in the number of Länder representatives.⁸⁸ Hence, for the 1999 presidency, the Länder appointed officials for 314 working groups, of which 189 are attached to the Commission and its comitology network, and the remaining 125 to the Council of Ministers' working groups. Accordingly, the Länder are present in 38 per cent of the Council's working groups. As regards the implementation of the Co-operation Law of 1993,⁸⁹ it seems to have functioned quite efficiently. During the 13th electoral term of the German Bundestag (1994–98), the Bundesrat considered 746 EU documents of which 124 were subject to resolutions covering qualified participation rights of the Bundesrat.⁹⁰ The latter asked the federal government to take its view into account in the case of sixty-three EU proposals. In twenty-three of these documents, the Bundesrat also called for the conduct of negotiations to be transferred to a representative of the Länder. Interestingly, the federal government accepted a decision of the Bundesrat in 1995 which called for the transfer of responsibility for negotiations in connection with all discussions surrounding 'audio-visual media', although no specific EU proposal was under consideration by the Bundesrat at the time. The wording of the Basic Law and its list of competencies would suggest a clear-cut distinction between 'federal government-related' and 'Länder-related' policy areas. However, apart from media policy where the federal government always transferred to the Bundesrat the responsibility for negotiations in the Council of Ministers, we cannot identify any other areas where a general rule is applicable. Hence, the transfer of negotiation powers remains a matter of dispute on a case-by-case basis. On the other hand, it should be noted that of the twenty-six decisions where the federal government initially doubted the Bundesrat's view of the applicability of §5–2 and §6–2 of the Co-operation Law, in most of these cases it proved possible to reach agreement either through

mutual compromise or by offering the Länder joint membership of the German delegation to the Council of Ministers. With regard to EU legislative acts based on Article 306 (ex Article 235) ECT, the Bundesrat issued twenty-two resolutions. One could have suggested that the Bundesrat would adopt a rather restrictive view on the application of this article, since it always appears to extend the EC's scope of activity without amending the Treaty. In fact, in the vast majority of its '235-resolutions', the Bundesrat agreed on the federal government's line to adopt the legislative act under consideration. Conflict between the Bundesrat and the federal government generally occurred on the application of Article 23(1) of the Basic Law, i.e. on the transfer of sovereign powers. However, in three of the four cases from 1994 to 1998 the dispute mainly focused on the question of whether a simple or a two-thirds' majority was necessary to approve the ratification laws. Since the Bundesrat agreed on all of these laws by unanimity, the matter was always solved without involving a legal dispute.

Complying with European law: the challenge of bananas

The observed trends of institutional differentiation, specialisation and segmentation spill over into the implementation area. Institutional proliferation from the preparation, making and implementation of decisions stems from the fact that the decisive actors involved are the same in the three phases of the EC/EU policy-cycle. A civil servant responsible for the preparation and negotiation of a draft legislative act is also likely to draft the implementation measure ('Referentenentwurf'). These actors tend to be oriented towards the first two stages of European decision-making and are less sensitive to what comes after a given decision⁹¹: Civil servants would rather act in political than judicial frameworks. However, as the majority of them have studied law, they are aware that a potential dispute between Germany and the Union can be settled in the Courts. Accordingly, their orientation is focused on the early stages of the policy-cycle where they try to avoid conflicts which might later occur owing to their own failure.

More than 90 per cent of all EC measures requiring further transposition into national law fall within the competence of the federal State.⁹² In these cases, implementation measures are adopted by a law of the Bundestag and the Bundesrat. In most of these cases, the legislator first creates the legal basis for implementing measures through a special law on the policy field concerned. Only after this law has entered into force can special regulations be passed in order to fulfil the substantive terms of the directive concerned. This process may involve considerable time lags, especially when the Bundestag and the Bundesrat – when there are specific Länder concerns – have to settle their dispute in the conciliation committee between the two chambers. As the EU moved beyond the peak of the

‘internal market programme’ legislation,⁹³ one could also assume that the implementation problem became less serious than it had been in previous periods.⁹⁴ Obviously, it makes a difference whether the actors concerned have to transpose 123 directives (as in 1992) or seventy-one (in 1995). Moreover, given that the Länder are more deeply involved in decision-making on EC directives and recommendations than any other regional entity in the Union, one could also assume a gradual evolution towards a better implementation record in those areas where the Länder have to transpose EC directives.

Table 5.4 Implementation record for Germany, 1991–2000

Year	EU average implementation record %	Germany: Article 226 ECT Letters of Formal Notice	Germany: Reasoned Opinions	Germany: Cases referred to the Court	Judgements against Germany	Article 234 ECT: Germany	Article 234 ECT: EU 12
1991	68.13	60	13	1	5	50	186
1992	82.27	97	18	5	6	62	162
1993	85.00	120	35	4	3	57	204
1994	88.59	90	66	5	7	44	203
1995	89.88	92	25	10	0	51	243
1996	93.45	62	37	8	0	66	243
1997	93.53	116	35	19	0	46	191
1998	96.71	88	46	5	6	49	240
1999	95.70	84	30	9	9	49	190
2000	93.81	92	40	11	12	47	184

Sources: European Commission, *Annual Reports on Monitoring the Application of Community Law* (1992–2001).

The information provided by Table 5.4 seems to confirm this line of argument. Germany’s implementation rate steadily grew from 68 per cent in 1991 towards nearly 97 per cent in 1998.⁹⁵ However, implementing a directive – notifying the Commission that the legal transposition of a piece of EC legislation has been completed – does not automatically mean adequate execution. Furthermore, it does not prevent the national courts from clarifying whether and how far national case law has to be cleared according to EC law: problems with EC compliance arise in Germany where any law can be reviewed against the Constitution. German case law has gradually accepted the ECJ’s theory of direct effect, the supremacy of EC law and therefore the capacity of a norm of Community law to be applied in domestic court proceedings and to overrule inconsistent norms of national law in these events.⁹⁶ However, the Constitutional Court regards itself as having the right to review EC law against the fundamental rights laid down in the Basic Law.⁹⁷ In this regard, the Constitutional Court’s Maastricht judgement had a considerable impact, since it stressed the court’s intention to review the respect, by EU institutions, of the limits to their powers, and that this examination may also apply to individual

EC acts. Hence, the ongoing litigation on the compatibility of parts of the EC Banana Regulation⁹⁸ with the Basic Law seems to indicate an attempt by German courts to challenge the supremacy of EC law. It remains to be seen if the Constitutional Court will decide against the general principles of the Union which serve as one of most important tools for establishing mutual trust between the Member States.

Conclusion: failing successfully?

In sum, both the constitutional patterns and the evolution of Germany's institutions dealing with European policy indicate an increasingly complex system which is characterised by an ongoing trend towards institutional and political pluralism. This process goes hand in hand with a segmentation of policy-making. Each ministry – both at the federal and the Länder level – shapes European dossiers in its own way and on its own account. The multi-level and multi-actor system clearly testifies a lack of long-term-based policy approaches and strategic policy planning, projection and policy-making. The broader involvement of the federal parliamentary chambers in EC/EU decision-making reflects the fundamental patterns of the governmental level (elements of segmentation and fragmentation) without 'parliamentarising' German EU politics in a way comparable to the Danish Folketing's approach (see Chapter 4 in this volume). In contrasting some of these characteristics, we can also observe a recovery of the 'Kanzlerdemokratie'⁹⁹ marked by a high strategic planning input from the Chancellery in European affairs. Especially during the IGCs, the power of the Chancellor to determine policy guidelines prevails over the principle of ministerial responsibility. Hence, the moves towards EMU and Political Union at Maastricht as well as the initiatives on flexibility and the partial communitarisation of the third pillar at Amsterdam were strongly influenced by the Chancellor, acting closely with the French President.

Major institutional and constitutional decisions significantly mobilise the German political system. In this regard, the last two IGCs were also stirred up by the German Länder which successfully asked for a firm recognition of the subsidiarity principle in the EC Treaty, the creation of the CoR and for direct participation of representatives of the Bundesrat in the Council of Ministers when it deals with matters concerning exclusive Länder competencies in Germany.

Apart from these developments which have amplified the complexity of the German EU policy structure, party politics and coalition dynamics have exacerbated the European policy-making style since the introduction of the Maastricht Treaty. In this regard, the trend towards 'institutional pluralism' in particular can also be explained by the fact that coalition governments do not adopt a coherent approach in day-to-day policy-

making during their term of office. Instead, they aim to define the broad guidelines for the envisaged legislative term. But during this period, ministers have to balance the objectives of their political party on the one hand and the need to find compromise positions with their coalition partners on the other. Thus in the daily life of EC law-making, a minister may sometimes prefer to adopt a policy approach which corresponds to his or her party position and which may differ from that of the coalition partner and vice-versa. The patterns of decentralisation and segmentation may lead scholars to characterise the German system as unsuitable and as one of the main causes of the relatively weak German stance in the daily life of the Union.¹⁰⁰ Some therefore propose the creation of a Ministry for European Affairs or the assignment of a minister or state minister from within the Chancellery to deal specifically with European matters. The puzzle of German incongruity in the EU system begins, however, when looking at the outcome of German EC/EU policy-making. In spite of all the apparent competitive disadvantages, German politicians and civil servants show a comparatively high success rate in defining the fundamentals of the Union in most treaty amendments and revisions. Not only the principles of a social market economy and monetary stability but also subsidiarity, the ‘parliamentarisation’ and the ‘regio-institutionalisation’ of the EU’s institutional–procedural system have been ‘exported’ into the Union.

Any attempt to concentrate European policy planning and policy-making within the federal government and/or between the government and its interlocutors (parliament, Länder, etc.) would interfere with the basic feature of the German politico-institutional system, namely its federal and decentralised structure, in institutional as well as in party political terms. Moreover, given the flourishing of network-building in European affairs across Brussels and Bonn/Berlin, it is far from clear that a central policy-planning and co-ordination agency would automatically lead to more consistent European strategies. Hence, one of the astonishing facts of the development of the Brussels-based and the German problem-solving arenas is the growing movement towards decentralised policy making at both levels of governance.

German EU politics face persistent patterns of interdependence – politically as well as economically. The institutional penetration of the German political system by European integration is considerably high. In exchange, the EU’s institutional structure and mechanisms correspond to a considerable extent to the German arrangements. Bulmer defined this process as an emerging congruency between the Union and Germany – congruence with regard to the constitutional macro-structures, the normative rules which shape the decision-making processes (package-dealing, decentralised decision-making, coalition-building), the long-term policy programme (segmented, sectorised and sometimes even fragmented

policy processes) and the substantive level (high-ranking policies and policy contexts at the two governance levels),¹⁰¹ patterns of congruency developed over time. Germany's institutions have adapted to the multi-hierarchical and multi-centred structure in a rather effective way: they have not merely reacted to European integration as one of its 'subjects', rather they were and still are an important component of this structure.

Perspectives for the future: the shortcomings of centrality

What would be the consequences of creating a French-like central co-ordinating structure within the German system? The new body wherever it was located (Chancellery, Foreign Ministry or in a separate ministry) would be torn in two directions. One would be the improvement of mutual information and of horizontal co-operation without any ambitions of shaping a single German position and a coherent strategy. Hence, as in all collective organisations, internal communication could always be improved, but the competition among the actors of the German administration would set clear limits, at least in most policy areas. Moreover, there is no obvious, clear national interest which overarches sector-specific policy ambitions. Furthermore, the very process of European integration indicates that preference-building is not simply a matter of unilateral power politics, but is in itself a substantial part of the cyclical processes concerning politics and policies which move beyond the logic of the nation state.

The alternative role of a central body would be that of achieving a stronger vertical co-ordination backed by the highest political authority – the Chancellery. Such an approach would open a new way of dealing with EU affairs. However, given the deep-rooted features of the German administration, it is likely that such a step would lead to interbureaucratic fights – between and within ministries – which would spill over into the political realm of coalition governments. The battles would presumably reduce the mobilisation of civil servants and their day-to-day effectiveness in dealing with the Union's rolling agenda. Competition in political and administrative terms would become endemic, and with substantial authority, the Minister for European Affairs could become a 'threat' to the key ministries. Consequently, the specific legitimising power of the Chancellor would be needed in everyday life, according to her/his own will, and not only on major bargaining occasions. Besides the issue of internal competition for access to the Union, any conceivable permanent hierarchy could not be more successful given the complexity of the EU system. Whatever the abstract charm of organisational simplicity, such a solution may simply not fit in the complex system that has evolved to steer European integration.

Notes

- 1 I would like to thank Simon Bulmer, Beate Kohler-Koch, Carl Lankowski, Klaus Suchanek and Albert Statz and the members of the Friedrich-Ebert-Foundation's working group on European integration for their valuable comments on the chapter.
- 2 See Peter J. Katzenstein (ed.), *Tamed Power. Germany in Europe* (Ithaca: Cornell University Press, 1997).
- 3 See Simon Bulmer and William E. Paterson, 'Germany in the European Union: Gentle Giant or Emergent Leader?', in: *International Affairs*, No. 1/1996, p. 10.
- 4 See Andrew Moravcsik, *The Choice for Europe, Social Purpose and State Power from Messina to Maastricht* (London: UCL Press, 1998).
- 5 William E. Paterson, 'Muß Europa Angst vor Deutschland haben?', in: Rudolf Hrbek (ed.), *Der Vertrag von Maastricht in der wissenschaftlichen Kontroverse* (Baden-Baden: Nomos, 1993), p. 10.
- 6 See William E. Paterson, 'Beyond Semi-Sovereignty: The New Germany in the New Europe', in: *German Politics*, No. 2/1996, p. 170.
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- 45 See Organisationserlaß des Bundeskanzlers, Bonn, 27 October 1998; and the 'Vereinbarung zwischen dem Auswärtigen Amt und dem Bundesministerium für Finanzen', Bonn, 20 October 1998.
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- 65 See Sekretariat des Ausschusses für die Angelegenheiten der Europäischen Union: *Der Ausschuß für die Angelegenheiten der EU* (Bonn: Europa Union Verlag, 1998), p. 6.
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- 67 The plenary concerns itself solely with Commission proposals which are submitted to it by the committee responsible together with a report and a recommendation for a decision.
- 68 See Thomas Saalfeld, ‘The German Houses of Parliament and European Integration’, in: Philip Norton (ed.): *National Parliaments and the European Union*, Special Issue of the *Journal of Legislative Studies*, Vol. 1, No. 3/1995.
- 69 See Gesetz über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union, 12 March 1993, *Bundesgesetzblatt*, 1993, I, p. 311.
- 70 By the Minister of Finance’s reference made to the resolution, the German Constitutional Court, in its Maastricht ruling, ‘constitutionalised’ this special parliamentary scrutiny reserve.

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- 81 See Hahn, 1986, *op. cit.*, pp. 105–110.
- 82 See Lorenza Badiello, 'Regional Offices in Brussels: Lobbying from the Inside', in: Paul-Henry Claey's *et al.* (eds), *Lobbying, Pluralism and European Integration* (Brussels: Editions Interuniversitaires, 1998), p. 333.
- 83 The chairman of the Committee is elected for one year (in general from 1 November to 31 October) by the Bundesrat's plenary, after consulting the EUAC.
- 84 See the full list in section I of the Agreement between the Federation and the Länder of 29 October 1993.
- 85 In practice, the Secretary-General instructs the office of the EUAC to prepare the relevant dossiers. The office therefore selects the proposals which might be of interest to the Länder and prepares them for deliberation in the Bundesrat. Each Land and each specialised Committee can request the exam-

ination of further documents. When the EUAC or another committee recommends an opinion on a given proposal, the issue is put on the plenary's agenda for consideration. In practice, the plenary votes on the recommendations for an opinion prepared by the committee concerned. Debates on a recommendation are rather unusual.

- 86 See Weber-Panariello, 1995, *op. cit.*, p. 288.
- 87 See Rometsch, 1996, *op. cit.*, p. 90; for July 1995 see Rometsch and Wessels, 1996, *op. cit.*, p. 85, see also Rudolf Hrbek in Charlie Jeffery, (eds), *Recasting German Federalism: The Legacies of Unification* (London: Pinter, 1999), p. 224.
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- 89 See Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union, 12 March 1993, *Bundesgesetzblatt 1993 I*, p. 313.
- 90 See Sekretariat des Bundesrates, Qualifizierte Mitwirkung des Bundesrates in Angelegenheiten der Europäischen Union, Bonn, 31 December 1998.
- 91 See Klaus Winkel, 'Die Umsetzung von EG-Richtlinien in deutsches Recht unter besonderer Berücksichtigung der Erfahrungen in der Praxis', in: *Zeitschrift für Gesetzgebung*, No. 2/1997, p. 118.
- 92 *Ibid.*, p. 116.
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- 94 See Winkel, 1997, *op. cit.*; and Martin Gellermann, 'Beeinflussung des bundesdeutschen Rechts durch Richtlinien der EG', in: *Deutsches Verwaltungsblatt*, No. 9/1995, pp. 482–493.
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- 97 See the so-called 'Solange'- ('As long as') – judgements of 1974, BVerfGE 37, 271; BVerfGE 73, 339.
- 98 See European Community Regulation No. 404/93, 13 February 1993 on the common organisation of the market in bananas, *Official Journal of the European Communities*, 1993, No. L 47. There is a vast amount of literature on the pending case. See, for example, Reich, 'Judge-made "Europe à la carte", Some Remarks on Recent Conflicts between European and German Constitutional Law provoked by the Banana Litigation', in: *European Journal of International Law*, No. 2/1996, p. 103; Manfred Zuleeg, 'Bananen und Grundrechte – Anlaß zum Konflikt zwischen europäischer und deutscher Gerichtsbarkeit', in: *Neue Juristische Wochenschrift*, No. 11/1997, pp. 1201–1210.
- 99 For the term, see Karlheinz Niclauss, *Kanzlerdemokratie. Bonner*

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- 101 See Simon Bulmer, 'Shaping the Rules? The Constitutive Politics of the European Union and German Power', in: Peter J. Katzenstein (ed.), *Tamed Power. Germany in Europe* (Ithaca: Cornell University Press, 1997), pp. 49–79.

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