

# POWERS OVER UNIVERSITIES AND OVER RESEARCH, DEVELOPMENT AND TECHNOLOGICAL INNOVATION IN THE 2006 STATUTE OF AUTONOMY OF CATALONIA

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This paper gives a brief account of the main novelties incorporated into the 2006 Statute of Autonomy of Catalonia (henceforth SAC) with regard to powers in the areas of universities (which the new Statute treats as a separate area from that of education) and research, development and technological innovation (RDI). In order to gain a proper understanding of the analysis of each of these sectors it is necessary to refer briefly to another new aspect of this Statute: the definition of the different types of powers. This definition, together with the technique known as shielding, is intended as a way of stopping central State legislators from regulating beyond the point specifically established for each sector in the SAC.

We will see that, with the exception of certain important novelties which we will discuss in due course in the text, a large part of the activities and functions set forth both in the area of universities and in that of RDI were already carried out in the framework of the 1979 SAC, or could have been carried out had it not been for interference from the central State, which has given rise to considerable conflict concerning powers. This is not surprising, considering that the ceiling of the current Statute with regard to powers continues to be set by the Spanish Constitution of 1978. Nevertheless, the new mechanisms and new techniques employed by the Statute undoubtedly make it more difficult for the central State to intervene in those areas that the Statute reserves for the Generalitat of Catalonia.

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## 1. Types of powers and their shielding

No study of the sectoral powers of the Generalitat of Catalonia can be undertaken without mentioning the redefinition made in the 2006 Statute of Autonomy of Catalonia<sup>1</sup> (henceforth SAC) of the different types of powers and their functional dimension. This is one of the main novelties and is of paramount importance, as this is where the rules of the game between the central State and the Catalan government are laid down.

### 1.1. Exclusive powers

Article 110 of the SAC, defining **exclusive powers**, establishes that “legislative power, regulatory power and the executive function correspond **fully** to the Generalitat”, and that “the exercise of these powers and functions, by means of which it may establish its own policies,” is the exclusive right of the Generalitat.

The Statute reinforces the concept of exclusivity, which had lost practically all its weight as a result of intervention by the central State through other areas of power of a cross-sectional nature, although the term *excloent* incorporated in the proposal passed by the Catalan Parliament (“*de manera íntegra i excloent*”: “fully and exclusively”) does not figure in the final text.<sup>2</sup> The ultimate intention is to enable the Generalitat to effectively establish its own policies in those areas in which it has exclusive powers.

### 1.2. Shared powers

According to the provisions of Article 111 of the SAC, in matters in which **the Statute attributes powers to the Generalitat that are shared with the State**, “legislative power, regulatory power and the executive function are the responsibility of the Generalitat, within the framework of the basic conditions established by the State as principles or lowest common legislative denominators in rules of legal rank, with the exception of those circumstances determined by the Constitution and this Estatut. The Generalitat may establish its own policies in the exercise of these powers.”

The definition of shared powers is related to the established constitutional doctrine on the formal and material concept of basic provisions, which has hitherto been interpreted expansively by the State legislator. Thus, according to this article, basic provisions are understood as a principle or lowest common legislative denominator to be fixed in the framework of a rule of legal rank, although it leaves the door open to exceptions. The Catalan government must be able to establish its own policies on matters that it shares with the State.

As regards the implementation and specification of the basic provisions, the text of the Statute presents an important novelty: it sets forth that this task corresponds to the Parliament by law.

<sup>1</sup> Organic Law 6/2006, of 19 July, on the Reform of the Statute of Autonomy of Catalonia (Spanish Official Bulletin, BOE, No. 172, of 20-7-06, in Spanish). By means of Decree 306/2006, of 20 July, it was published in Catalan Official Journal, DOGC No. 4680, of 20-07-06, in Catalan. The 2006 SAC came into force on 9 August 2006.

<sup>2</sup> The proposal for the reform of the SAC was passed by the Catalan Parliament on 30 September 2005 (Official Bulletin Parliament of Catalonia, BOPC 224, VII legislature, 3 October 2005, in Catalan).

### 1.3. Executive powers

According to the provisions of Article 112 of the SAC, in matters in which the Generalitat has **executive powers**, it has “regulatory power, which includes the power to approve provisions for execution of State rules, and also the executive function, which in all cases includes the power to organise its own administration and, in general, all the functions and activities that the system attributes to the Public Administration.”

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**If the Generalitat of Catalonia has full powers over decisions to create and recognise public and private universities based within its territory, the Spanish Organic Law on Universities should not maintain the possibility of the State also creating or recognising universities in the autonomous communities.**

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In the sphere of executive powers, the recognition of regulatory power is significant, as it enables the Catalan government to approve provisions for the execution of State regulations, thus overcoming the constitutional doctrine contrary to that possibility.

### 1.4. Shielding of powers

Just as important as defining the types of powers is guaranteeing their integrity, through what is known as the shielding of powers. To this end, the 2006 SAC enumerates within each sector a series of submatters that comprise it. This is one of the substantial differences between this text and the 1979 SAC, which only defined powers generically

and subordinated them, as far as their exercise and scope were concerned, to other constitutional titles or norms. Many of the conflicts over powers and the claims of unconstitutionality made between the State and the autonomous communities can be attributed to this fact.

Shielding is intended as a way of preventing the submatters included in a matter from being affected by State rule beyond the point specifically established for each of them by the SAC. For example, if the Generalitat of Catalonia has exclusive (i.e., full) powers over decisions to create and recognise public and private universities based within its territory, the Spanish Organic Law on Universities should not maintain the possibility of the State also creating or recognising universities in the autonomous communities. This is a fairly peaceful scenario from an interpretational point of view, but we should bear in mind that there will be others that might be more prone to conflict, such as that concerning exclusive powers over university coordination, which are to be exerted in the framework of general coordination. What the legislating State understands by general coordination, and the scope it gives it, will condition and limit the exclusive powers of the Generalitat.

The technique of shielding also presents difficulties, as there is the risk of fossilising some submatters and hindering the adaptability of the Statute to new needs arising out of social advances. We will take a look at an example of this presently.

## 2. Powers over universities

One of the main novelties of the text of the Statute is the configuration of powers over universities as a new category (Article 172 of the SAC) aside from that of education, to which they

have been assigned up to now (Article 15 of the 1979 SAC).<sup>3</sup>

This individualised treatment is, in our opinion, entirely appropriate, considering that power is tripartite in the university world: in addition to the powers held by the State and the autonomous communities, the power held by the universities themselves in virtue of their autonomy must also be borne in mind. Thus, Article 172 of the SAC divides the submatters that comprise the area of universities into three categories according to the powers and functions that belong to the Generalitat, without prejudice to university autonomy: exclusive powers, shared powers and executive powers.

### 2.1. Exclusive powers (Article 172.1)

In matters of university education, the Catalan government has exclusive power, without prejudice to university autonomy, over:

- a) Planning and coordination of the Catalan university system, in the framework of general coordination.
- b) The decision to create public universities and authorise private universities.
- c) The approval of statutes of the public universities and of rules for organisation and functioning of the private universities.
- d) Coordination of the procedures for access to the universities.
- e) The legal framework governing the university own qualifications, in accordance with the principle of university autonomy.
- f) Its own funding for universities and, where appropriate, management of State funds for university education.

- g) Regulation and management of its own grants and subsidies system for university education and, where appropriate, regulation and management of State funds in this area.
- h) The system of remuneration of teaching and research staff employed by the universities and the establishment of additional remuneration for teaching staff in permanent public employment.

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The SAC exists within the framework of the 1978 Constitution, and therefore practically the entirety of the functions we have just mentioned are already performed by the Catalan government. The most significant novelty is that of the **legal framework governing the university own qualifications, in accordance with the principle of university autonomy**, which recognises the Generalitat's right to a level of intervention in an area that the sectoral regulations have traditionally left exclusively in the hands of the universities concerned.

We would like to stress one issue which is always sensitive: that of **study grants and scholarships awarded from State funds**, which are still awaiting devolution to the Generalitat. The exact

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<sup>3</sup> Article 15 of the 1979 SAC established that "the Government of Catalonia has full powers to regulate and administer education throughout its territory, at all levels and degrees and in all forms and specialities, within its powers, without prejudice to the provisions of article 27 of the Constitution and the Acts of Parliament developed in accordance with part 1 of article 81 of this document, with the powers attributed to the Spanish government in point 30 of part 1 of article 149 of the Constitution and with the higher level inspection needed to ensure compliance with these."

wording of Letter *g* of Article 172.1 of the SAC sets forth that the Catalan government has exclusive power over the “regulation and management of its **own** grants and subsidies system for university education and, where appropriate, regulation and management of State funds in this area”. In the proposal passed by the Catalan Parliament, power over the regulation and management of grants was not limited to the Generalitat’s own system, and therefore grants awarded from State funds were taken to be included. In the definitive version of the text, regulation of State funds in this area is subject to a “where appropriate”.

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**In matters of university education, the Catalan government has exclusive power over the regulation and management of its own grants and subsidies system for university education and, where appropriate, the regulation and management of State funds in this area.**

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In order to ascertain the scope of the assignment to the Generalitat of the regulation and management of study grants and scholarships awarded from State funds, we have to complement the provisions of Letter *g* of Article 172.1 with those of Article 114.3 of the SAC, which deals with promotional activity in matters of a territorialisable nature where power is shared, as is the case with grants and scholarships for university study. The latter article tells us that the Catalan government has regulatory power enabling it to specify the purpose for which

these subsidies are used, and also to complete the regulation of the conditions for their assignment, including administration and award.

It should be mentioned for information purposes that the regulation of grants and scholarships for **non-university education** is considered as a shared power in the Statute (Article 131.3 of the SAC). *A priori* we see no reason for the function of study promotion to be divided into different types of powers on the basis of the level of education for which it is intended, considering that the call for applications for study grants and scholarships which gave rise to Constitutional Court Judgement STC 188/2001, of 20 September,<sup>4</sup> affected both university and non-university grants. The reader should be aware of this discrepancy in the text of the Statute.

Lastly, we would like to close this section on exclusive powers with an example of a **possible fossilisation of functions**, which we mentioned earlier as one of the problems that may arise as a result of the technique of shielding. This might be the case with the exclusive powers enshrined in Letter *h* of Article 172.1 of the SAC over **additional remuneration for teaching and research staff in permanent public employment**. Additional remuneration is a remunerative concept introduced through the approval and entry into force of the Spanish Organic Law 6/2001, of 21 December, on Universities (LOU). We cannot help wondering whether, in this case, this degree of specification might in the future constitute a hindrance to the adaptation of the model for the remuneration of teaching and research staff in permanent public employment to new requirements of the university system.

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<sup>4</sup> Constitutional Court Judgement, STC 188/2001, of 20 September, put an end to a long controversy between the Catalan government and the State on study grant and scholarship policy. In short, the judgement ruled that the Generalitat had authority to manage and assign calls for applications for study grants and scholarships, with the prior territorialisation to the autonomous community, according to objective criteria, of the necessary credits. With regard to the planning of grants, the Court found that the regulatory legislation must not impede the autonomous communities from adapting it to their territorial peculiarities.

## 2.2. Shared powers (Article 172.2)

In matters of university education, the Catalan government has shared power, without prejudice to university autonomy, over:

- a) Regulation of the requirements for the creation and recognition of universities and university centres, and attachment of these centres to universities.
- b) The legal system for organisation and functioning of the public universities, including the governing and representative bodies.
- c) Appointment and withdrawal of the capacity of public or private teaching centres to issue official university qualifications, and creation, modification and abolition of university centres in public universities, and also recognition of these centres in private universities and the introduction and abolition of teaching subjects.
- d) Regulation of the system of access to the universities.
- e) Regulation of the system governing contracted and permanent teaching and research personnel.
- f) Evaluating and ensuring the excellence and quality of university education, and also that of teaching and research personnel.

Most of the functions described in this section are already performed by the Generalitat, but some of them, either because of the breadth of the basic provisions or because of interference from the central State, have not been materialised to their full extent. This is the case with the function encompassed in Section d, on the regulation of the system of access to the universities, and that covered by Section f, on quality assessment and assurance.

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**In the future, in the area of additional remuneration for teaching and research personnel, the degree of specification reached by the Statute might constitute a hindrance to the adaptation of the remuneration model to new requirements of the university system.**

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With regard to the **system of access to the universities**, a conflict of powers was presented by the Catalan government against Royal Decree 1640/1999, of 22 October, regulating the university entrance examination, and is still pending resolution.<sup>5</sup> This conflict questions certain aspects relating to the determination of the contents of the examination, and also to how it is organised, since due to their exhaustive nature these aspects leave no margin for the Catalan government to implement them and adapt them to the needs of the Catalan university system.

On the issue of quality assessment, again there is a conflict of powers pending resolution by the Constitutional Court, presented by the Catalan government against certain articles of Royal Decree 1052/2002, of 11 October, regulating the procedure for obtaining evaluations from the National Quality Assessment and Accreditation Agency (ANECA) and certifying them, as regards the contracting of university teaching and research staff.<sup>6</sup> The conflict questions the ANECA's authority to perform evaluations of contracted teaching and research staff of universities based in autonomous

<sup>5</sup> The articles challenged by conflict of powers No. 1037/2000 are: 5, Section 1; 6, Sections 1 and 2; 7; 8, Sections 1, 4, 5, 6 and 7; 10; 11; 12; 14, Sections 2 to 4; 15; 16; and Final Provision 1.

<sup>6</sup> The articles challenged by conflict of powers No. 1130/2003 are: 1; 3; 5; and Final Provision 2.

communities that have their own external assessment body. With the new Statute, quality assessment, as an executive function, must correspond exclusively to the Catalan government, more specifically the Agency for the Quality of the University System of Catalonia (AQU), in compliance of the provisions of the Catalan Universities Law, 1/2003, of 19 February, (LUC). All the above is without prejudice to any collaboration agreements reached on this subject by AQU and ANECA regarding the recognition of each others' evaluations.

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**According to the new Statute, quality assessment, as an executive function, must correspond exclusively to the Catalan government, more specifically the Agency for the Quality of the University System of Catalonia (AQU).**

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Concerning contracted teaching and research staff, the legal status of the Catalan government is that of shared power (Article 172.2.d), with the exception of the system of remuneration, over which it has exclusive powers (Article 172.1.h).

We cannot close this section without placing special emphasis on the most important novelty in this area: the recognition of the Generalitat's shared power over the legal status of university

teaching and research staff in permanent public employment. Until now, constitutional doctrine has been contrary to the possibility of the Catalan government having powers over university teaching personnel, who have been regarded as being in the employment of the State. The Constitutional Court concluded, in Judgement 235/1991, of 12 December, made in settlement of the conflict of powers presented against certain precepts of Royal Decree RD 898/1985, of 30 April, on University Academic Staff, that the relationship between the basic provisions and their implementation does not come into play in the regulation of the aspects affecting the statutory situation of university academic staff in permanent public employment, considering that the interuniversity nature of this type of employment justified exclusive State powers.<sup>7</sup>

Now that this restrictive doctrine of autonomous powers has been overcome by the SAC, the possibilities open to the Catalan legislator as a result of this new attribution remain to be explored, but if we consider the definition of shared powers given in the SAC, we can deduce that the Catalan government should be able to adopt, within the framework of the basic principles, its own policies in this matter (Article 111 of the SAC).

### **2.3. Executive powers (Article 172.3)**

The Generalitat is recognised as having executive powers over **the issue of official university qualifications**, currently exerted by the rector on

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<sup>7</sup>“(…) The Autonomous Community lacks powers over the regulatory development of the basic provisions of the permanent public employment status of university professors, because civil servants on university academic staffs, as we have already stated, are not civil servants of the Basque Country or its local administration, the only civil servants referred to by Art. 10.4 of the Statute of Autonomy of the Basque Country (...) in general, and Supplementary Provision 15.10 of Law 30/1984 regarding the educational civil service in particular. To this we must add, as we stated in our STC 26/1987, that in view of the establishment of the system governing university teaching staff in permanent public employment in Art. 33 of the University Reform Law (LRU), the existence of a uniform approach to certain aspects of civil service status is inherent in that system, which ultimately imposes certain restrictions on the autonomy of both the universities and the Autonomous Communities. (...)”

behalf of the king (Article 34.2 of Organic Law 6/2001, of 21 December, on Universities). It remains to be seen how this attribution will fit into the framework of the State's regulatory legislation on the conditions for issuing qualifications, in exercise of the exclusive powers invested in it by Article 149.1.30 of the Spanish Constitution in this matter.

The executive power over **the approval of official university qualifications** which figured in the proposal for the reform of the SAC passed by the Catalan Parliament was not included in the definitive version. However, this should prove no impediment for the sectoral regulations to attribute this clearly executive function to the autonomous communities,<sup>8</sup> as the list of submatters in the Statute should not be regarded as a closed list. Professor Enoch Albertí voices this view in his paper *El blindatge de les competències i la reforma estatutària* ("The shielding of powers and the reform of the Statute of Autonomy"),<sup>9</sup> from which we take the following paragraph:

"The specification of submatters comprising the subject matter of a particular area of power is not exhaustive but merely exemplificative. Its function is not to describe in detail all the various aspects that form part of the matter in question, but to ensure that at least certain elements must be regarded as an integral part of that matter."

#### **2.4. The bill for the modification of the Organic Law on Universities**

It is not the scope of this paper to discuss the bill for the modification of the Organic Law on

Universities (LOU) currently pending before the Congress of Deputies (BOCG - Series A, 8 September 2006, No. 101-1), nor do we intend to do so, but we would like to take this opportunity to observe on the ground to what extent the provisions concerning universities of the new SAC have been taken into account by the State legislator.

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**In the bill for the modification of the Organic Law on Universities currently pending before the Congress of Deputies, the State legislator has not taken into account the new framework of the Catalan Statute on the subject of universities.**

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The conclusion we reach on an initial analysis could not be more discouraging. In its regulation, the State legislator ignores the new framework of the Catalan Statute on the subject of universities, to the extent that the bill includes aspects that, in our opinion, contradict it head-on. One example is the attribution to the State of the faculty to create and recognise universities in the autonomous communities. Let us trust that during the passage of the bill through the Congress of Deputies the necessary amendments will be passed to make the content of the LOU compatible with the new Statute.

<sup>8</sup> The Constitutional Court itself admitted, in Judgement STC 26/1987, made in settlement of the claim of unconstitutionality against the LRU, that official approval, insofar as it is an executive act attributable by Article 27.8 of the Spanish Constitution to public authorities, could be the responsibility of either the State or the autonomous communities.

<sup>9</sup> ALBERTÍ ENOCH.

### 3. Powers over research, development and technological innovation

Article 9.7 of the 1979 SAC recognised the Catalan government’s exclusive powers over research, without prejudice to the provisions of Point 15 of Part 1 of Article 149 of the Constitution, which states that the State shall have exclusive powers over the promotion and general coordination of scientific and technical research.

Article 158 of the 2006 SAC, entitled “Research, development and technological innovation” divides the submatters that comprise this area into two categories according to the powers and functions that belong to the Generalitat: exclusive powers and shared powers.

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**In matters of scientific and technical research, in contrast to its provisions on this matter in the area of power over universities, the Statute limits the function of regulation and management of grants and financial assistance to those organised and funded by the Generalitat.**

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First of all, the reader should note that the name of this matter as it stands in the title of Article 158, “Research, development and technological innovation”, does not coincide with the wording of

Section 1, describing the power, which mentions “scientific and technical research”, yet does so with that of Section 3, concerning the collaboration criteria between the State and the Generalitat in RDI. On consulting the Catalan Parliament web site, specifically the section devoted to the Drafting Committee for the Statute, it transpires that the change of terminology occurred in the definitive document proposed by the Drafting Committee (at the first reading, in May 2005, the term was RDI). We have been unable to find out the reason for this, as the debates of the Committee were not recorded.

It seems very likely that it could be an error; if this is the case, the possibility of correcting it should be investigated, considering that, in the view of the Constitutional Court, innovation is not an activity that can be placed automatically within powers over scientific and technical research, which according to the Court must be conceived in its strict sense.<sup>10</sup>

#### 3.1. Exclusive powers (Article 158.1)

**In matters concerning scientific and technical research**, the Generalitat has **exclusive power** over its own research centres and structures, and the projects it finances. This power includes, in all cases:

- a) Establishment of research areas of its own, and monitoring, control and evaluation of projects.
- b) Organisation, functioning system, control, monitoring and accreditation of centres and structures in Catalonia.

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<sup>10</sup> This is the conclusion to be drawn from Judgements STC 242/1999, of 21 December; 98/2001, of 5 April, and 175/2003, of 30 September. Furthermore, the Frascati Manual, prepared by the OECD for the purpose of standardising definitions and procedures for collecting information on RDI activities, considers that R&D is one of the stages that make up technological innovation activities. (OECD. Frascati Manual. 2003).

- c) Regulation and management of grants and financial assistance organised and funded by the Generalitat.
- d) Regulation and professional training of research and research support personnel.
- e) Dissemination of science and the transfer of results.

Exclusive power is held over **Generalitat centres and structures**, although the proposal passed by the Catalan Parliament covered all centres with Generalitat promotion or participation. It remains to be seen how “Generalitat centres and structures” will be interpreted in practice, when delimiting the exact scope of this exclusive power. Nevertheless, we understand that it should not be restricted to centres and structures owned by the Generalitat, but should include those centres in which the Catalan government is the majority promoter or participant.

With regard to **projects**, this article states that the Catalan government has exclusive power over the projects it finances, without further explanation. In order to determine the specific scope of these attributions, we have to complement this article with other provisions of the SAC, such as Article 114, regulating promotional activity, and Article 115, on the territorial scope of powers, to mention some of the more significant ones.

Lastly, we ought to mention the function of **regulation and management of grants and financial assistance**, which the Statute limits to those organised and funded by the Generalitat of Catalonia, without introducing any specific

provision on grants and financial assistance funded by the State, in contrast to its provisions on this matter in the area of power over universities, as we discussed earlier. However, we understand that Article 114 of the SAC, regulating promotional activity, is applicable in the field of State-funded grants and financial assistance. This article would empower the Catalan government to complement normatively and manage State programmes of grants and subsidies when they are of a territorialisable nature. There is a precedent in this respect, albeit limited to a strictly management sphere: the Programme of Incentives for the Incorporation and Intensification of Research Activities (Programme I3).<sup>11</sup>

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**When delimiting the exact scope of the exclusive power over research centres and structures it remains to be seen how “Generalitat centres and structures” will be interpreted in practice.**

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In short, as we understand it, the attributions specified in Section 1 are covered by Article 9.7 of the 1979 SAC, and therefore do not in themselves amount to any gain as regards powers. However, the fact that they are specified and defined as exclusive is undoubtedly an improvement over the previous situation, as it makes it more difficult for the central State to interfere through what we call horizontal areas, such as basic provisions and the

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<sup>11</sup> Programme I3 was approved by Order ECI/1520/2005, of 26 May (Spanish Official Bulletin, BOE No. 127 of 28 May 2005).

general coordination of economic policy, for example. Furthermore, it is important to stress the **function of the regulation and training of research and research support personnel**, which should enable the Generalitat to establish its own policy with regard to this personnel and shape a full research career.

### 3.2. Shared powers (Article 158.2)

The Generalitat has shared powers over the coordination of the research centres and structures of Catalonia, which means that responsibility over these centres is distributed according to their ownership. As a result, the Generalitat is in charge of coordinating the centres it owns, and the State is in charge of coordinating its centres that are located in Catalonia.

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**The function of the regulation and training of research and research support personnel, should enable the Generalitat to establish its own policy with regard to this personnel and shape a full research career.**

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### 3.3. Collaboration between the State and the Generalitat (Article 158.3)

The action of two public authorities within our territory, each with exclusive powers over RDI and implementing different policies in this field, advises collaboration between the actors involved in order to reach agreement on criteria that will lead to maximum effectiveness and efficiency in the management of the resources dedicated to it.

The SAC states that these criteria for collaboration between the State and the Generalitat in research, development and innovation policy shall be established within the framework of the provisions of Title V, on the institutional relations of the Generalitat. However, it does not specify the framework in which this collaboration should be implemented, whereas the proposal passed by the Catalan Parliament assigned this responsibility to the Generalitat-State Bilateral Commission, which constitutes the general and permanent framework for relations between the Catalan and Spanish governments.

Lastly, the article states that systems shall be established for the participation of the Generalitat in determining policies affecting these matters at European Union level, and in other international bodies and institutions.

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## References

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