

Decision of the Bundesrat

Bundesrat Resolution on division of competencies in the context of discussions on the future of the European Union

In its 771st session on 20th December 2001 the Bundesrat adopted the appended Resolution.

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A. Initial comments on a new approach to the division of competencies in the EU

I. Political framework of the debate on the future

Globalisation has led to far-reaching changes in the relationship between the European Union, the Member States and the regions over the past few years.

The last few decades have, on the one hand, seen more and more powers to regulate the legislative framework for the economy and other central policy spheres transferred to the European Union. There is a European dimension to an increasing number of domains and an adequate response to many issues cannot be provided purely at the national level.

On the other hand, regional economic areas have acquired greater status due to globalisation of the economy, the realisation of the European Single Market, Economic and Monetary Union and the move towards the information society. The Federal states and regions are faced with increasingly vigorous competition within Europe for growth and employment and play an ever more important role in attracting investment to particular locations, as well as in industrial and employment policy. Regional structures are needed in addition to those at the European level when adapting and modernising the economy and developing transport and communication infrastructure.

Europe's political and economic success in a global economy also depends on the Federal states and regions being able not only to preserve but also to extend their room for manoeuvre. Furthermore, the economic, social and cultural disparities within the European Union are also set to increase dramatically with enlargement and the imminent doubling of the number of

member states, posing much greater challenges for cohesion within the EU.

The European Union developed as a project for peace after the Second World War. It is based on shared values. The European Communities' unique political system must adapt to shifting social and political realities if it is to survive. The European Union needs to take an approach that reflects changing realities and which citizens feel able to support. The European Union is in need of reform and simplification of the Treaties to allow Europe's citizens to clearly identify political responsibility for decisions. Particular attention must be paid to reviewing the European Union's objectives and the way in which tasks are divided between the EU and its Member States. A clear structure is required for the entire institutional architecture of the EU, including the decision-making process.

The European "constitutional debate", launched by the European Council in Nice, should seek to put the following goals and principles into practice:

- increasing democratic legitimacy of the EU,
- making an EU with more than 20 member states better able to act and more efficient,
- ensuring that the EU is capable of developing,
- guaranteeing that the EU can be financed, with fair burden-sharing for Member States,
- transparent decision-making processes and structures,
- clear responsibility for political decisions,
- subsidiarity, proportionality and proximity to citizens,
- respect for national and regional particularities.

Further issues for EU reform include integrating the Charter of Fundamental Rights, the role of national parliaments and simplification of the Treaties. These topics are also linked to improved division of competencies. The Bundesrat's position on individual clusters of issues must therefore be seen in this broader context. That means the Bundesrat's positions may have to be adjusted as discussions unfold. The results of the reforms should be summarised in a constitutional Treaty.

II. Premises for the division of competencies

The way in which competencies are divided between the European Union on the one hand and the Member States with their regions on the other hand needs to be reviewed.

The way in which particular powers are assigned to the EU, Member States and regions is intimately related to the EU's objectives and tasks. After reviewing the responsibilities of each level and the division of competencies, it may prove necessary for current EU competencies to be transferred from EU level to the Member States, but this process may equally lead to further spheres of competence being transferred to the EU. The emphasis should be on enabling the EU to find strategic solutions to problems with a European and global dimension. The Bundesrat considers that it is of the utmost importance to secure and extend Europe's scope to act, in addition to ensuring competition between various models for political and social orders, whilst maintaining Europe's diversity and cohesion. More scope to shape policy implementation is needed when putting European policies into action to devise more appropriate responses to challenges on the spot.

Considerations on reforms aimed at improving the division of competencies should be based on the following principles:

- limited specific authorisations empowering the EU,
- subsidiarity,
- proportionality and
- the obligation to respect Member States' national identity.

Furthermore, consideration should also be given to the general question of whether the spheres in which Member States can act should be protected by introducing additional general principles to limit the exercise of EU competencies, and to details of how this should be done.

Current reflections on reform at the European level start from the assumption that in the future the right to determine the EU's powers must still be reserved to Member States. Considerations on reform also assume that the provisions laid down in the Treaties govern the powers to be transferred to the EU and do not govern the Member States' spheres of competence. References to Member States' responsibilities in particular cases serve exclusively to restrict specific competencies of the EU (residual

competencies).

The Bundesrat seeks to make a substantive contribution to the European discussion through these considerations. The Bundesrat will express its positions in more specific terms as the discussion process unfolds.

III. Issues relevant to improved division of competencies within the EU

1. Pursuit of the EU's goals should take a limited number of forms, such as harmonisation, mutual recognition, financial support, supplementary measures and co-ordination. A list of these modes of operation should be included in the Treaty, together with a definition of their content and an indication of how they relate to each other. The consequences of the EU's actions for Member States' scope to act depends on the ways and means in which the Community acts, e.g. "harmonising", co-ordinating" or simply "supporting".

As the "open co-ordination method" is spreading, it should be made clear at an appropriate point that, in areas not within the sphere of responsibility of the EU bodies, this instrument may only be employed for exchange of information and experience between Member States. This shall not prejudice any agreement between Member States.

A sharper distinction should be made between the various types of Community legal acts (Regulation, Directive, Decision), so that provisions in legislation are not excessively detailed and, above all, to return the directive to its original role as framework legislation. Moreover, precise provisions should be drawn up stipulating the cases in which, exceptionally, the Community may enforce legislation. A differentiated indication of the admissible legal instruments and the ways in which the Community may pursue its objectives should be given if specific authorisations to act are granted.

It should be stated clearly that the Member States may act, in line with existing Community law, if the EU has not fully exercised its powers and if exclusive competence of the EU does not pertain in that instance.

2. The European Union may only act on the basis of clearly defined spheres of competence and not on the basis of general indications that it

will be responsible for particular activities.

3. The distribution of competencies in the EU must be made more systematic and more transparent.
 - A better systematic approach can be achieved by dividing spheres of competencies into categories, for example, exclusive EU competence, basis competencies of the EU and supplementary competencies.
 - Thought should be given to the question of whether, over and above this categorisation, the various spheres of competence should be listed in an inventory. This is particularly relevant when considering the questions of whether a systematically organised list of the EU's spheres of competence, divided into various categories, could create greater transparency and how to ensure that the principle of limited specific authorisations to act is maintained.
 - With a view to simplifying the Treaty, discussions should reflect on whether the text of the consolidated Treaty should be divided into an initial section containing fundamental principles and a second section comprising individual provisions, and if so, how this should be done. Possible consequences for the division of competencies should also be taken into account in this respect. Treaty amendments require the agreement of national parliaments. It would also be advisable when seeking to simplify legislation for technical provisions that are not part of substantive EU constitutional law to be expressed in standard Community law (secondary law).
4. The principle of limited specific authorisation to act must be reinforced rather than being undermined by general or broadly-worded Treaty provisions when striving to make provisions on spheres of competence more precise:
 - Current general provisions on objectives, e.g. the description of the Community's activities in Articles 2 and 3, paragraph 1, EC Treaty are not clear about the scope of various spheres of competence. Provisions on objectives should give a specific indication of the

content of authorisations to act and should not extend or create such authorisations to act i.e. such provisions are merely to direct the exercise of powers that have already been transferred. These provisions serve to steer policy within the context of the respective authorisations to act.

- The transverse clauses (e.g. Article 3 paragraph 2, Article 6, Article 152 paragraph 1 p. 1 and Article 151 paragraph. 4, EC Treaty) lead to a lack of clarity about how the various provisions on competencies are inter-related. For that reason it should be stated clearly that these transverse clauses only guide the exercise of particular powers, but should not serve as a basis for independent or supplementary authorisations to act.
- The general clause on the Single Market (Article 94, 95, EC Treaty) should be made more precise, whilst safeguarding the Single Market freedoms, making clear that the subsidiarity principle also applies to the Single Market. When making this clause more precise, it should be stipulated that measures deriving from this legal basis must be directly and primarily linked to the Single Market.
- A new clause on conflict between provisions should be included in the Treaty. This would serve to clarify how various provisions on spheres of competence relate and, in particular, to clarify that general clauses shall not be applied where special provisions have been stipulated.
- Article 308, EC Treaty (competence in cases not envisaged by the Treaty) has become indispensable. In future specific and definitive authorisations should be included in the Treaty for cases where there is an urgent need for the EU to act, which to date could only be dealt with on the basis of Article 308.

5. Improved division of competencies requires procedural guarantees:

- On the basis of a clear division of competencies, to be developed in the framework of the next Inter-governmental Conference, the Council should in principle switch to majority voting; only in a few exceptional cases should decisions require a unanimous vote in

Council. At the same time, thought should be given to the option of granting a right of initiative to the Council and the European Parliament, in addition to the Commission's right of initiative.

- The Commission should be obliged to consult with Member States at the drafting stage to ensure it concentrates more on the division of competencies when devising proposals than has been the case to date. This consultation should above all examine to what extent the objective pursued could be achieved through legislation by Member States. The results of the consultation should be presented in the justification of the Commission's proposal.
- EU legal provisions should in the future be subject to internal but independent and formal (cross-institutional) scrutiny before being submitted to the legislative bodies; the results of this examination shall be appended to the proposals.
- The Committee of the Regions and those regions that exercise legislative powers should be granted a right of appeal in order to safeguard their rights and powers. Additional provisions to this end should be added to Article 230, EC Treaty.
- Discussions should consider the idea of convening a joint arbitration or decision-making body in particular cases, in addition to existing jurisdiction, to provide procedural guarantees in respect of the division of competencies. This body, which would be composed in an appropriately representative manner, would be able to take decisions reflecting national constitutions and the EU Treaties. As far as possible this should not mean that legal proceedings become longer than at present.

6. Improved division of competencies in the European Union requires additional flanking measures:

- Further progress on integration must also be guaranteed despite clear provisions assigning powers. This should be guaranteed by a simplified procedure for amending the Treaties. The Inter-governmental Conference's role should be reconsidered. It could, for example, suffice to have a unanimous decision by the Council, together with the agreement of national parliaments, in order to

amend the Treaties.

- With reference to the exercise of EU powers, the Treaty should state that the duty of loyalty to the Union applies not just in favour of the EU but, conversely, also in favour of Member States. This signifies that the national and regional identities of the members of the Union must be respected when EU powers are exercised. The forthcoming Inter-governmental Conference should also consider which Treaty provisions could enhance implementation of the principles of subsidiarity and proportionality in the exercise of EU powers.
- Enforcement of EU law must in the future remain in principle a matter for Member States. Express authorisation shall be required for enforcement by the EU.
- EU legal instruments should be simplified and the number of such instruments reduced. Appropriate procedures should be developed, establishing the validity of legal instruments for a specific period, after which they would be subject to review.

B. Further procedure

1. These initial considerations constitute the Bundesrat's preliminary contribution to the European debate on the question raised by the European Council in Nice in the Declaration on the Future of the Union, namely how "to establish and monitor a more precise delimitation of competencies between the European Union and the Member States, reflecting the principle of subsidiarity."
2. The Bundesrat's representative (to be appointed) to the body established by the European Council in Laeken on 14th/15th December 2001, implementing the declaration of the European Council in Nice on 9th to 11th December 2000 on the future of the Union, is requested to negotiate on the basis of these considerations.