

Decision
of the Bundesrat

Bundesrat Resolution Having Regard to the Themes of the Convention
on the Future of the European Union

In its 778th session on 12 July 2002, the Bundesrat adopted the annexed resolution.

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Annex

Bundesrat Resolution Having Regard to the Themes of the Convention on the Future of the European Union

After the Bundesrat had already expressed its views on the general matters regarding the division of competence between the EU and its Member States (BR-Drs. 1081/01 resolution), it now delivers its opinion on further subjects that will have to be dealt with in the debate on the future of the Union at the Convention and at the ensuing intergovernmental conference in 2004. The questions concerning the status of the EU Charter of Fundamental Rights, the reorganisation of competences in each policy area, the position of regions in the EU, the democratic legitimacy of EU decisions and the simplification of Treaties will only be dealt with to the extent they are relevant for primary legislation.

A.

I Simplification of the Treaties / European Constitutional Treaty

1. The prior task of the Convention on the Future of the European Union is to draw up a European Constitutional Treaty on the basis of the existing Treaties and the Fundamental Rights Charter. The new, consolidated text of the treaty should be clearly and comprehensibly structured and bring together the constituent principles, institutions, decision-making procedures and responsibilities of the European Union.
2. By way of the European Constitutional Treaty, the European Union is to be

shaped as a political union that is close to the citizen. Citizens must be able to clearly discern the benefits of the European Union – its importance as a community of interests and values. The European Constitutional Treaty should aim to preserve the EU's capacity to act beyond its enlargement, to improve the democratic legitimacy of EU decisions, to focus EU tasks on areas of a European dimension, and to unequivocally allocate political responsibility. Besides concentrating existing competences, this includes the conferment of new responsibilities, e.g. in the fields of external, security and defence policies as well as internal security, to enable the Union to continue finding strategic solutions for problems of a European or international dimensions.

3. The future Treaty should consolidate the European Union and the Communities and give them a single legal personality. Different forms of cooperation in the European Union can be kept up under this Treaty.
4. The European Union must remain open to development and capable to act. With a view to amendments to the Constitutional Treaty, it has to be taken into account that the approval and ratification by all Member States in compliance with the respective constitutional order will continue to be necessary. To accelerate amendment of the Treaty, however, preparations for adjustment of the Treaty should be facilitated. In particular where individual adjustments are concerned, a formal intergovernmental conference does no longer appear necessary. Such Treaty amendments might, for example, be based on a unanimous Council decision, followed by ratification pursuant to regulations of the respective Member State.

Provisions in the Treaty which are of a “technical nature”, in particular provisions not regarding the conferment of Member States' sovereign rights to the EU, should either be transferred to secondary legislation, or - inside the Treaty – subjected, to a greater extent than previously, to a simplified adjustment procedure without any ratification.

5. The procedure for preparation of a general reform of the Constitutional Treaty should be modified with an EU in view that has democratic legitimacy and is nevertheless effective and capable to act. As questions regarding the division of

competence are usually touched upon when constitutional amendments are impending at European level, it should be stipulated that the parliaments of Member States and the European Parliament participate in a procedure preceding the constitutional amendment. This will ensure close coupling and feedback between the European and national parliamentary levels and prevent potential problems surfacing during ratification.

6. The structure of the future Treaty should be based on a clear-cut pattern. Here is a proposal how it might be configured:
 - a) Preamble and basis of the European Union
 - b) Fundamental rights and Union citizenship
 - c) Fundamental principles of the Union and of its relations to Member States
 - d) Organisation of competences
 - e) Institutional organisation (institutions and procedures)
 - f) Budget and finance
 - g) Intensified cooperation
 - h) Transitional and final provisions

II Fundamental principles

The existing fundamental principles of the European Union have to be taken over into the new instrument and worded with the necessary clarity. Special importance should be attached to the principles of freedom, democracy (including the vertical and horizontal division of powers), respect of human rights and basic freedoms, and the civil rights of Union citizens, the rule of law, proximity to the citizen, mutual loyalty and considerateness between members states and the EU, respect of the national identity of Member States, solidarity, preservation of cultural diversity, limited individual authorisation, subsidiarity and the proportionality of action.

III The status of the Fundamental Rights Charter

1. The Convention convened by virtue of the Laeken declaration will answer the question “whether the Charter of Fundamental Rights should be included in the basic treaty”. The Bundesrat regards the Charter of Fundamental Rights proclaimed in Nice on 7 December 2000 as “core to a European Constitutional Treaty” and in so far supports the demand to integrate the Charter in its present version in conjunction with the constitutionally relevant elements of democratic participation rights and the division of competences between the European Union and its Member States into a European Constitutional Treaty.
2. The Bundesrat objects to merely including a reference to the Charter in Article 6, paragraph 2 of the EU Treaty. This would not do justice to the singular rank and the general normative and integrative impact of the Fundamental Rights Charter.
3. The Bundesrat points out that the additional individual fundamental rights protection resulting from the Fundamental Rights Charter must be guaranteed by the courts of the Member States and of the EU.
After an adequate period of legally binding validity of the Fundamental Rights Charter, it should be reviewed whether there are any gaps in individual rights protection.

IV Organisation of competences between the EU and Member States

1. In its decision of 20 December 2001, the Bundesrat earlier formulated the basic principles and criteria which should guide a clear and precise distribution of responsibilities in Europe. That decision is embodied in this opinion, and was conveyed to the Convention by the convention member appointed by the Bundesrat and his alternate. In formulating the future instrument, the legislative

competences of the Council and EP should accordingly be measured against these principles in future. In addition, the Bundesrat now submits recommendations (see B.) for a reorganisation of EU competences in the policy areas.

2. In the light of these recommendations, the forms in which the EU pursues its objectives (to be limited to a few in future, such as harmonisation, mutual recognition, financial incentives, complementarity and coordination) should accordingly be differentiated and stated separately for each competence. This applies equally to the types of the Community's legal instruments (regulation, directive, decision).
3. Finally, the Bundesrat also aspires to have individual authorisations allocated to competence categories in a differentiated way. Exclusive EU competence needs to be stipulated for cases where only the EU has powers to act. Where a competence in regard to principles has been defined, the EU would use its competence as a framework legislator subject to strict respect of the principle of subsidiarity. Although the Member States will have to respect the higher ranking of these provisions, they will otherwise keep their legislative responsibilities. Some competences have to be classified as complementary. They are supposed to enable the EU to act where the necessity arises to complete the Member States' legislation by provisions for transnational matters. In this area, European law, rather than replacing the Member States' regulations, is complementary.

V Democracy, transparency and efficiency

1. For the citizens to accept European integration, it is pivotal that the democratic legitimacy of EU decisions and the transparency and efficiency in the European decision-making process are improved. The upcoming reform of the Treaties must serve this purpose.

2. The EU as a union of states is built on two sources of legitimacy, i.e. Member States and the community, with a general rule being that the national parliaments democratically legitimate and control the national level, while the European Parliament – and, via the national parliaments, also the Council – assumes this role for the European level. Democratic participation of several levels must not be allowed to entail a blending of existing political responsibilities and thereby increasing opaqueness. The right to participate in elections embodies a claim on the side of the citizens to have clarity about who takes which decisions and bears the responsibility for them. A clear division of competence between the EU and its Member States therefore makes an important contribution to democratic legitimacy. It is not in contradiction with the EU's capacity to act.
3. Transparency and comprehensibility of the EU decision-making processes are prerequisite to democratic participation of the citizens of the Union in these. The number and complexity of decision-making procedures must therefore be further reduced. In legislation, the right of co-decision of the European Parliament should be installed as a procedure with the character of a general rule. In determining the EU budget, the European Parliament should in future have comprehensive responsibility regardless of the distinction between compulsory and non-compulsory expenditure.
4. When the Council acts in its legislative capacity, it should in future sit publicly. Based on a clear division of competence, it should become the rule that resolutions of the Council, with the exception of certain constitutional decisions, are adopted at a qualified majority. Decisions should accordingly be taken by a majority of States and of the inhabitants they represent. Longer-term arrangements for the chair of Council formations should be reviewed. In addition, closer coordination of work on the various councils should be contemplated.
5. Another longer-term option to be reviewed by the Convention is the further development of the Council, in its legislative capacity, into a chamber of states.

6. With a view to the political responsibility of the European Commission, new arrangements should be identified for the election of the President of the European Commission which should further enhance the democratic legitimacy of the latter. The preferred option would be election of the President of the European Commission by the European Parliament that would have to be confirmed by the Council.
7. What is crucial to the legitimacy of the parliamentary representation of the Union's citizens is its level of representation. The standardisation of voting rights for the European Parliament is therefore a priority task. In addition, an improved level of representation should be achieved, working from the results of Nice, with a view to the counting value of votes for the composition of the European Parliament.
8. The legislative institutions themselves are currently largely devoid of any rights to take the initiative. In principle, it is on the EU Commission to safeguard the coherence of law by way of its monopoly on initiative.

It should however be reviewed whether the European Parliament and the Council should in future be conceded initiative rights in appropriate policy areas within a framework of clear-cut rules for competence and participation, and subject to obtaining the opinion of the EU Commission. Furthermore, it should be scrutinised whether – and if so, at what terms – the European Parliament and the Council might be enabled to more easily amend initiative proposals of the Commission.

9. The Council and Parliament should continue to be able to vest the Commission with the authority to issue generally applicable implementing regulations in regard to legal instruments. Decisions taken under such powers of the Commission have important repercussions on the concrete application of European law. In the interest of efficiency and effectiveness, it is therefore imperative to ensure coordination with the Member States which are affected in many respects, and to take the concerns and experience of administrative enforcement sufficiently into account. Involvement of the Member States and granting them a sufficient time lag, and transparency of the respective

procedure (the so-called comitology procedure), must be ensured in this context. Otherwise, it should be reviewed to what extent an amendment to the basis of this procedure as laid down in the Treaty may be required for this purpose and in the light of institutional reform, for example with a view to the participation of Member States. It should be put into clear terms here that the act of vesting must be clearly defined in its scope. Decisions with essential importance for fundamental rights of citizens of the Union, for respect of the principle of subsidiarity, or which entail considerable burdens to national enforcement, cannot be conferred upon the Commission.

VI The position of regions in the European Union

1. The Bundesrat holds the view that greater attention must be paid to the regions on the way “to a constitution for the European citizens” envisioned by the European Council in Laeken.
2. The Bundesrat emphasises that an improved organisation of competences between the European Union and the Member States also lies in the interest of the regions whose national capacities to act will thereby be protected. Where European action interferes with regional competences, involvement of the regions in European decisions has to be regulated on a national basis. This may include a participation of regional ministers in the EU Council of Ministers under Article 203 of the Treaty establishing the European Community, if appropriate.
3. The Bundesrat evokes the demand to improve the level of political representation in the Committee of the Regions by having the allotment of seats according to Article 263 of the EC Treaty be governed to a greater extent by the number of inhabitants of each Member State. This appears indispensable in particular with a view to strengthening the democratic legitimacy of this body.
4. The Bundesrat advocates continued active participation of states and regions

vested with legislative powers in the Committee of the Regions. In this context, it emphasises the necessity of advancing this institution by way of the following measures:

- Giving it the explicit status of an institution within the meaning of Article 7, paragraph 1 EC Treaty;
 - Granting the Committee a right of action to enable it to safeguard its rights, and to respect the principle of subsidiarity by supplementing Article 230 of the EC Treaty;
 - Granting the Committee a right of interrogation towards the Commission;
 - Regular reporting by the EU Commission on consideration of the Committee's opinions, and an obligation to indicate reasons in the event of any non-consideration of an opinion in cases where a hearing of the Committee is obligatory.
5. Also with a view to the deliberations of the Convention, the Bundesrat pronounces itself in favour of admitting the regions to the European Treaties and the future European Constitutional Treaty.
- It should, for example, be stated that – similar to what has been said in the culture article of the EC Treaty – respect of the “national identity of its Member States” as laid down in Article 6, paragraph 3 EC Treaty also covers their respective state structure – in particular the domestic distribution of competences –, their regional division, local government and the legal position of the churches.
 - A note should be included in the definition of the principle of subsidiarity in Article 5, paragraph 2 of the EC Treaty that prior to EC regulations being adopted, the possibilities of the Member States including their regions and municipalities must be taken into account.
 - Furthermore, the Bundesrat advocates a right of action for the regions so that these can safeguard their rights and responsibilities.

B.

Recommendations for a reform of the policy areas

I Policy areas regulated by the EC Treaty in a separate title

Title II - Agriculture (Article 32 et seqq. EC Treaty)

A common agricultural policy has to be maintained in its substance with a view to advancement of the European agriculture model and the societies' expectations pinned on it. It must however been clearly formulated that the general objectives of agricultural policy expressed in Article 33 of the EC Treaty alone cannot substantiate any involvement of the Community. Instead of the present – potentially all-encompassing – responsibility at Community level, competences in the defined segments of agricultural policy have to be fixed in detail and definitively:

The agricultural market policy, i.e. state interventions in agricultural markets and in matters of external agricultural trade (WTO, OECD, bilateral commercial conventions), should be assigned to the exclusive competence of the Community. The Community bears the full financial burden for this area of exclusive competence.

For the area of rural development policy, policies on the structure of agriculture and agri-environment policies, shared responsibility of the Community and the Member States has to be laid down in the Treaty. With reference to the contents of policies, the competence of the Community should be limited to setting the framework. Interventions in administrative and organisation powers have to be precluded.

In the above-mentioned areas, the Community should continue to have complementary funding competence. For the area of direct transfer payments supported by the market organisation, obligatory national co-funding should be anchored in the Treaty. The Bundesrat holds the view that in Germany, such co-funding must be fully provided by the central German government.

With a view to a European-wide improvement of the protection of animals, a provision should be included in the agriculture title according to which a harmonisation competence is assigned to the Community in the field of protection of animals, in order to secure the high national standards of animal protection and eliminate the mounting distortions of competition caused by the variations in legal provisions about the protection of animals in the respective Member States.

Title III - Free movement of persons, services and capital (Article 39 et seqq. EC Treaty), and Title IV : Visa, asylum, immigration and other policies relating to free movement of persons (Article 61 et seqq. EC Treaty)

In the field of private law, harmonisation competences should be created for concrete sectors of law with a typically cross-border importance (contractual law, commercial and company law, Community-wide protection of industrial property, copyright).

International law with regard to employment contracts, and international procedural law in the field of labour, which contains typical cross-border aspects should be regulated on a standard basis by the Community.

In the remaining individual labour law, EU standards should be concentrated to minimum standards defining fundamental rules of employee protection.

The preservation of employees' interests must be changed to match the increasingly transnationally organised forms of entrepreneurial activity.

Accordingly, the Community needs – limited to transnational issues – to have competence with regard to information, consultation and co-determination.

The primary legislation should clearly state that a framework competence of setting no more than minimum standards is due to the European level in the field of asylum, refugees and immigration. Decisions going beyond this shall remain within the Member States' discretion.

Primary legislation should expressly exclude any competence of the Community to regulate access of third-country nationals to labour markets of the Member States.

Title VI - Common rules on competition, taxation and approximation of laws
(Article 81 et seqq. EC Treaty)

Chapter 1 - Rules on competition (Article 81 et seqq. EC Treaty)

The detailed shape of competition law has so far been predominantly determined by the Commission. In future, a more consistent distinction should be made between its executive role (supervision of aid) and the legislative tasks of the Council and Parliament in this field. This can be handled by way of a clarification in the Treaty and relevant passages in secondary legislation.

An independent European cartel authority should be created and charged with sole responsibility for enforcement of European antitrust law. At the same time, the legislative and administrative EC competence in matters of antitrust law should be restricted to important transnational matters.

As far as aid granted by States is concerned, the existing scope of aid control should be clearly stated in the Treaty. In particular, the term "aid" should be defined in the EC Treaty, and, among other things, the term "aid" should be specified such that, to constitute a case of impermissible aid, competition and commerce in the EU must be noticeably affected.

In addition, aid supervision in the field of culture, for example, should be limited to aid aimed at the promotion of cultural industries.

The rules for EU aid supervision (Article 87 et seqq. EC Treaty) should clearly state that unfair tax practices such as an individual exemption of companies or company segments are impermissible under competition law; if appropriate, a legal basis for assessing tax aid should be created.

It must be ensured that the Member States and regions have enough latitude for more independent regional policies.

Should the current process in the field of services for the public not result in sufficient legal security within the meaning of the guarantees listed below, respective adjustments of the Treaty will be required.

In the field of services for the public, the provisions of the Treaty should guarantee the following:

- State services aimed to offset the additional costs incurred by a company entrusted with operation of services of general economic interest in fulfilling

the welfare-oriented tasks assigned to it, should be permissible.

- Provisions regarding aid should not be applicable to “non-economic” activities.
- The Member States’ definition of services for the public, and the means they use to perform their tasks, should only be subjected to control of abusive practices.

Chapter 2 - Taxation (Article 90 et seqq. EC Treaty)

A harmonisation of tax law should only be carried out to the extent this is necessary for completion of the single market or to prevent distortions of competition.

A harmonisation of tax law, however, must not lead to a situation where the common goal of reaching a fiscal burden rate that is as low as possible is missed.

Chapter 3 - Approximation of laws (Article 94 et seqq. EC Treaty)

In the interest of focussed concentration of the single market competence, the scope of application of Articles 94, 95 EC Treaty should be restricted to projects which are “primarily and directly” directed at the establishment or operation of the Common Market or single market and indispensable for it.

Additionally, a collision clause should be included in the Treaty in order to preserve the priority of special authorisations to act. This clause should make clear that any opening of a scope of application for special standards precludes any resorting to general clauses. In addition, the scope of application of single market competence should, besides the reformed general clauses of Articles 94, 95 EC Treaty, be specified by further supplementary special individual authorisations to act, as stated in the proposals in regard to policy areas.

Title VIII - Employment (Article 125 et seqq. EC Treaty)

The cycle for drawing up the employment-policy guidelines and national action plans should be extended to at least two years in order to increase the effectiveness of the European employment strategy.

Title IX - Social policy, education, vocational training and youth (Article 136 et seqq. EC Treaty)

Chapter 1 - Social provisions

Closer cooperation in social policies at European level should focus on increasing transparency, comparing well-proven and innovative practices, initiating learning processes and contributing the performance capability of the social security system to the comparison between States.

It should be clarified that the general responsibility for organisation, financing and services in the field of social protection, in particular in health, pension, accident, unemployment and nursing care insurance as well as social assistance, is incumbent on the Member States.

The fields concerned in social policy (in particular of Article 137 EC Treaty) should be defined and definitively enumerated. Article 140 EC Treaty should be deleted as its scope of application has now been embodied in the scope of the new Article 137 EC Treaty.

Chapter 3 - Education, vocational training and youth

As many actions of the Community going beyond the framework of rules set by Articles 149 and 150 EC Treaty, and intervening in the responsibilities of States in the field of education, training and youth, are based on individual authorisations in other policy areas or on actions not substantiated by primary legislation, the Treaty has to stipulate, in an appropriate passage, that the Community's competences in the field of education, training and youth have been definitively provided for by Articles 149 and 150 EC Treaty, and that relevant measures are therefore only permissible on the basis of these standards. Article 47 EC Treaty should remain unaffected hereof.

Title XIII - Public health (Article 152 EC Treaty)

The regularisation of the object, rendering and funding of public health services should continue to come under the exclusive responsibility of the Member States. In the field of health policies, an approximation of public health systems by the EU must remain excluded.

In the context of a more specific formulation of the general clause on the single market, it is regarded as necessary that the competences covered by it and by Article 40 et seq. EC Treaty in the field of public health policy (drugs and medical products, medical professions) will in future be transferred to the public health title of the EC Treaty.

Title XIV – Consumer protection (Article 153 EC Treaty)

The Community's harmonisation competence in the field of consumer health protection must be maintained. In this regard, application of the principle of prevention must be laid down in Article 153 EC Treaty.

Any competences of the Community going beyond this on the basis of Article 153, paragraph 3b EC Treaty have to be put into more specific terms, in particular with a view to supervisory powers, and explicitly limited to supervising that EU legal instruments by the Member States are adequately implemented.

Title XVII – Economic and social cohesion (Article 158 et seqq. EC Treaty)

Against the backdrop of considerably larger regional and social disparities in an enlarged Union, policies towards strengthening economic and social cohesion will gain importance in a qualitative sense after 2006.

In primary legislation, the objective of an effective policy of cohesion should be formulated more clearly than before. It must be ensured here that promotional measures in the framework of cohesion policy must not be used to substantiate new EU responsibilities or to extend the existing competence to other policy areas, e.g. urban and spatial development. In implementation, application of the principle of subsidiarity must in future be enhanced, and sufficient scope for in-situ action must

be allowed.

With a view to the targeted simplification of Treaties, the provisions of the Treaty focussing on the instruments of cohesion policy should, as far as possible, be transferred into secondary law.

Title XVIII – Research and technological development (Article 163 et seqq. EC Treaty)

The objective of EU research policy must continue to be oriented towards the criterion of excellence, and has to be differentiated from the objectives of cohesion policy.

The regulations on research and technological development in Article 163 et seqq. EC Treaty should in future incorporate the complete basis of EC research promotion. For this purpose, the provisions of the Treaty establishing the European Atomic Energy Community that have regard to research will be transferred to the EC Treaty.

With respect to the increased importance of the regions as independent partners in establishing the European research area, cooperation with the regions should be mentioned in the context of coordination of research policies envisaged by Article 165 EC Treaty.

Title XIX – Environment (Article 174 et seqq. EC Treaty)

Environmental policy must be advanced in order to preserve the natural means of livelihood and promote sustainable development. In this context, it has to be more clearly delimited, in the interest of the future transition to qualified majority decisions, which areas of environmental policy should be regulated at Community level, and which ones at Member States' level.

However, the EU should have the possibility to adopt procedural provisions only to the extent these are indispensable for the application of, and compliance with, Community environmental law in all Member States.

II Recommendations for the areas of tourism, justice/criminal law/EUROPOL and sports

1. Tourism

Tourism policies should remain a sole responsibility of the Member States. This is why the term “tourism” should be deleted in Article 3, paragraph I, lit. u EC Treaty.

2. Judiciary policy / criminal law / EUROPOL

In the field of criminal law, the EU should have effective competences in order to

- protect its financial interests, and
- make a contribution to combating organised and international crime, in particular internationally operating terrorism (if appropriate, extension of existing competences under Articles 29, 31, 34 EU Treaty and clarification in Article 280 EC Treaty).

For EUROPOL, European-wide authorisations to act are still outstanding as an element in a context of judicature law and law of criminal procedure, and should then be subject to parliamentary control at European level.

The possibility to involve EUROPOL in common investigation teams under national direction and on the basis of national law should be stipulated immediately.

It will have to be reviewed which measures are appropriate to ensure the necessary judicial power to control the subject matter of investigations and the supervision of institutions and offices under administrative law and of the police at European level, i.e. of EUROPOL and OLAF, provided their competences in the field of criminal investigation procedures are extended. It appears imaginable that EUROJUST might assume these functions in the further course of development, and thereby form the basic unit of a European prosecution service.

3. Sports

The sport policy does not come under the jurisdiction of the EU presently, and the EU should neither in future be entrusted with such responsibilities. There are however some provisions of economic or cultural policy which do have regard to sports, although sports cannot be fully assigned to either of these policy areas considering its independent position. As EU policies necessarily have an impact on sport, its independent position and importance must be respected by the EU. In this context, the social importance of sports – as acknowledged by the declarations of Amsterdam and Nice on sports –, in particular its role in people's identity finding and meeting others, and the specifics of amateur sports have to be taken into account.

III Policy areas not requiring any amendments

In the policy areas "Education, vocational training and youth (Article 149, 150 EC Treaty), Culture (Article 151 EC Treaty), Public health (Article 152, paragraph 1-4 EC Treaty), Tax harmonisation, Traffic, Industry, Energy", the Bundesrat in addition explicitly advocates maintaining the current scope of EU competences in order to work against any further expansion of the Community's powers to act. In the policy area of "Equal opportunities", too, the previous distribution of competences should be kept up.

The policy areas of "Public health / delivery of health services (Article 152, paragraph 5 EC Treaty), Building and housing policy, Urban development, Spatial development, Crime prevention" where the Community has so far not had any competence should, according to the intention of the Bundesrat, remain subject to the sole regulatory power of the Member States.

C.**Conduct of negotiations at the Convention**

The Bundesrat requests the Convention member appointed by it and his deputy to use this resolution and the Bundesrat resolution of 20 December 2001 (BR-Drs. 1081 /01 resolution) as an orientation when conducting the negotiations at the Convention.