

**THE GERMAN LÄNDER AND THE EUROPEAN COMMUNITY
- TOWARDS A REAL FEDERALISM?**

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I. The problem

The Federal Republic of Germany is the only EC member country with a federal system. It was evident from the very beginning that EC membership might affect basic components of West German federalism: the quality of the Länder as state entities at subnational level, endowed with genuine powers in certain policy fields; the balance between federation (Bund) and Länder, according to constitutional law and political needs, requiring the right of the Länder to autonomous action following their own political priorities; and their right to participate in federal legislation and administration via the Bundesrat. On the other hand it could not be excluded that West Germany's federal system might have a negative impact on the integration process in the EC, if the Länder would impose restrictions on the Federal Government's freedom of manoeuvre in Community institutions (esp. the Council) and the Government would become, in this context, the "prisoner" of the Länder. The problem was, therefore, how to meet adequately and satisfy both the requirements resulting from the federal system of the Federal Republic of Germany and at the same time the functional and political needs of EC integration. The Länder have demanded from the outset a greater and more substantial share in decision-making on EC matters at national level. The Federal Government, however, has responded restrictively by pointing to Articles 24 and 32 of the Basic Law and to needs resulting from the political conditions of decision-making in the Council.

Ways and means have been developed for establishing Länder participation in EC decision-making at national (= domestic) level. But the Länder did complain that all these arrange-

merits and practices had proved inadequate. They viewed the ratification of the Single European Act as the opportunity to push through the demands they had been making for long namely to establish a legal basis for their rights to participation. The Federal Government complied with these demands in so far as it agreed to include a supplementary provision (Article 2) to the Ratification Act which would regulate the extent and procedure of future Länder participation.

The following paragraphs will first explain why and how the Länder feel directly affected by EC legislation or other legal instruments of the Community. This is followed by an overview on previous forms of participation, on direct EC-related activities which the Länder have been pursuing autonomously, and on the new arrangements agreed upon in the Ratification Act. Then the paper deals with problems which still exist or could result from the new constellation. In conclusion the paper will outline perspectives for both the FRG's federal system as well as the future development of the EC and the integration process.

II. The impact of EC policies on the Länder

The activities of the Community are based on the treaties establishing the EC. There are provisions specifying genuine Community powers and responsibilities (this applies to agricultural, tariff, competition major fields); there is Article 100 of the EEC Treaty which relates to and envisages the harmonization of legal provision, in fields which are important for the formation and functioning of a Common Market; and, last but not least, there is Article 235 giving a kind of general legislative authorization ("Kompetenz-Kompetenz"). The application of all these powers does not only touch on Länder interests, but can also interfere with genuine Länder competences in specific fields into which the federation, according to constitutional law at national level, would not be allowed to intervene.

Examples are:

- education and vocational training;
- transport policy (esp. port traffic and business);
- environmental protection;
- budgetary and structural policy.

During the debate on the ratification of the SEA in 1986 the Länder presented a whole list of cases in which, as they argued, the Community had interfered in Länder affairs without a corresponding need in terms of problem-solving or integration policy necessities, sometimes even without proper legal basis. In the Bundesrat session on May 16, 1986, the Bavarian Minister of State, Schmidhuber, expressively criticized what he called "Kompetenzanmaßungen" ("power presumptuousness") of the EC and gave the following examples for cases in which the Community either lacks responsibilities or in which unnecessary regulations have been effected:

"Quality demands on freshwater, the preservation of bird species, toy safety, environmental programme, consumer education in primary and secondary schools, the Community's action programme for the prevention of cancer, the European administrative court, cultural activities". Schmidhuber added: "The regulation zeal of the Community has not spared key areas of Länder responsibilities such as media matters, higher education laws and the regional promotion of economic development. It is high time to oppose this centralist-cumbureaucratic way of thinking."

With respect to the SEA the Länder - irrespective of the party political composition of their governments - feared and were deeply concerned that many of its provisions might lead to even deeper and further going interference in fundamental Länder responsibilities. The Bundesrat Opinion on the SEA Ratification Act, which was unanimously adopted on May 16, 1986, summarized their concerns and criticism as follows:

When seeking to create an internal Community market via the harmonisation of legal and administrative provisions in member states, efforts must be made to ensure that "the high standard of protection in the Federal Republic of Germany in

the fields of health, safety, environmental protection and consumer protection are not lowered to a generally poorer European level". As regards plans to alter the principles of vocational training and job entry it must be taken into account that the responsibilities for these fields in the Federal Republic of Germany lie entirely or partly in the Länder.

Referring to SEA provisions on research and technology policy the Länder complained about a twofold danger: interference in their exclusive legal powers in cultural and education matters and violations of the "Subsidiaritätsprinzip", the principle according to which superior social units (e.g. the European Community) should not be entrusted with tasks which can be better performed by smaller social units (e.g. the Länder). There must be a continued guarantee for policy measures at Länder level.

This principle must also be observed in the field of environmental policy. The transfer of powers to the European Community, insofar as this is necessary, must be clearly delimited and the high environmental protection standards already achieved in the Federal Republic of Germany retained. Furthermore, Community measures should not result in unjustifiable distortions of competition for business within the EC.

In the case of projects aimed at strengthening economic and social cohesion in the Community the stipulations of Article 91a Basic Law must be observed. The Resolution of the Bundesrat expressly states: "The regional promotion of economic development is a Länder task and this responsibility should not be eroded via reference to Article 10 of the SEA". In this context the Länder also criticised the "activity of the Commission against the fundamentally tried and tested regional structural policy in the Federal Republic of Germany, which - in accordance with the constitutional delegation of responsibilities - is a Länder task". As this policy sets out to offset specific locational disadvantages in the Federal Republic of Germany and not to achieve national competitive advantages, the application of the competition policy instruments of the EEC Treaty, it is claimed, is not justified.

The planned transfer of powers of implementation to the Community Commission was regarded by the Länder as an infringement of their administrative responsibilities.

The Länder accused the Federal Government of not having consulted and included them, at least to an adequate degree, **in** the discussion on the SEA. The neglect of Länder interests, the Länder complained, is incompatible with the principle of federative loyalty ("Bundestreue"). The Länder also regarded this as a contravention of arrangements between the Federal Government and the Länder regarding their participation in matters relating to the European Community. The Länder categorically demanded that extended rights of participation be firmly established in the Ratification Act in order to enable an articulation of their own interests during future decisions, especially during the implementation of the reform programme set out in the SEA. They made their support for the Ratification Act contingent upon the fulfilment of these demands. This raises the question of previous possibilities of Länder participation in decisions relating to the European Community.

III. Forms and patterns of Länder participation in EC related decision-making

1. Previous Länder participation (1958-1986)

Since the Länder expected the membership of the FRG in the EC to have considerable effects on their status as state entities and on the balance between the federation (represented in EC institutions by the Federal Government) and the Länder within the federalist system, they tried to adapt to the new situation as early as possible by establishing special institutions and procedures as means to bring about proper participation.

a) The "Bundesrats-Verfahren", also called "Zuleitungsverfahren"

The basis of this procedure has been laid down in the Ratification Act to the Treaties of Rome in 1957. The provisions say, that the Federal Government has to inform the Bundesrat (and Bundestag) on proposals as soon as the EC Commission has forwarded them to the Council. The Bundesrat then has the opportunity to discuss what has been proposed and give the Federal Government its opinion (= a recommendation). Although the Federal Government is not legally bound by such recommendations it has to take them into consideration in accordance with the principle of federative loyalty ("Bundestreue"). At the request of the Bundesrat the Federal Government must provide information on decisions adopted by the Council and on any deviations from the Bundesrat recommendations.

The procedure gave the Länder possibilities to influencing decision-making, since the simple informing of the Bundesrat has developed into a regular and intensive exchange of views with the Federal Government. This communication process proved to be useful for the Federal Government as well, since the Länder did provide expertise and administrative experience which was especially valuable with respect to the implementation of EC legislation, a task which lies within the responsibility of the Länder. The procedure has been regarded as positive and useful but, from the Länder point of view, not enough to satisfy their demands for more efficient participation.

b) The institution of the "Länder Observer at the EC"
("Länder-Beobachter")

This institution, established as early as 1956 (during the treaty negotiations), has the function of collecting information and passing it to the Bundesrat, to conferences of Länder ministers and to the Länder governments. The observer attends the meetings in the Federal Ministry of Economics in which guidelines for the German delegates (e.g. the Permanent Representative in Brussels) are being elaborated, the meetings of the Council and its Committees, and meetings of the

Bundesrat and its Committees dealing with EC affairs. Together with a variety of contacts in Brussels all this makes the observer a useful institution. Its effectiveness, however, is limited due to very modest material and personnel resources.

c) De facto-participation of Lander Representatives in EC institutions.

This form of Länder participation has been developing without legal basis and has been applied pragmatically. It means "membership" of Länder representatives (in most cases: civil servants) in the FRG-delegation in EC institutions. There they provide their expertise and have at the same time the opportunity to articulate specific interests of the Länder.

d) The "Länderbeteiligungsverfahren" of 1979

The introduction of this procedure was a compromise between the Federal Government and the Länder governments, laid down in an exchange of letters between the Federal Chancellor and the chairman of the conference of the Prime Ministers of the Länder. The Länder had demanded an arrangement for their participation based on legal norms whereas the Federal Government was only ready to agree to a voluntary commitment on its part to involve the Länder in EC related decision-making at national level.

The new arrangement did underline the obligation of the Federal Government and the Länder to seek close and trustful cooperation on European Community projects which come under the exclusive legislative responsibility of the Länder or which fundamentally affect Länder interests. In comparison with the "Bundesrats-Verfahren" (cf. "a") the duty to inform was extended to cover the initiatives and proposals of the EC Commission before these are formally forwarded to the Council. In accordance with this arrangement the Federal Government expected the Länder to reach agreement on a concerted position to notify the Federal Government of this position within a reasonable space of time and to take into account the foreign and integration policy objectives and necessities

of the Federal Government. The Federal Government is only allowed to deviate from the Länder position "for compelling foreign and integration policy reasons" and must give an explanation for its deviation. At the request of the Länder the Federal Government agreed, wherever possible, to allow two Länder representatives to attend negotiations in the advisory bodies of the Council of Ministers and the Commission. A new section (Section 85a) was added to the Joint Standing Orders of the Federal Ministries (GGO II) with provisions for the new procedure. The Länder established so-called Joint Offices for the various policy fields as contact points for the corresponding departments of the Federal Government.

As opposed to the "Bundesrats-Verfahren" each Land in this procedure has equal rights. Instead of the majority vote system in the Bundesrat this procedure requires the unanimous agreement of all Länder. The degree of coordination and consensus required is one of the reasons for the overwhelmingly negative response to this new procedure. Other reasons are the juxtaposition of two procedures, and, above all, the de facto superiority of the "Bundesrats-Verfahren" due to the fact that the Bundesrat is an established institution with an extensive and efficient infrastructure and a broad spectrum of reliable contacts.

e) Channels of influence in the framework of normal federal-Länder-relations

Apart from the above mentioned special institutions and procedures the Länder could (and still can) use other channels for influencing decision-making in EC affairs at national level. Since EC policies have an impact on policies dealt with in the nation state, they are subject to consideration and discussion in the complex coordination and cooperation network which exists in a fully established federative system.

2. The Länder participation according to SEA Ratification Act of 1986

The supplementary provision to the SEA Ratification Act called for by all Länder should contain the following obligations for the Federal Government:

- to inform "the Bundesrat in detail and at the earliest possible opportunity about all projects within the European Community framework which might be of interest to the Länder" ;

"to obtain the Opinion of the Bundesrat before approving European Community resolutions on Community projects in which all or individual provisions come under the exclusive legislative responsibility of the Länder or fundamentally affect their interests" and "to take these into account in negotiations" and "in projects in which all or individual provisions come under the exclusive responsibility of the Länder"; only to deviate from this opinion "for compelling foreign and integration policy reasons" and "in the case of deviation ... to inform the Bundesrat of the primary reasons" for this deviation ;

"upon request to invite representatives of the Länder to attend negotiations in the advisory bodies of the Commission and the Council of Ministers" in cases in which a Bundesrat Opinion is required.

Article 2, as it finally had been agreed upon, contains the following provisions.

The Federal Government's duty to inform is extended; more specifically, there are plans to assign Länder representatives (in particular, the Länder Observer) to the Permanent Mission.

- Contrary to the original Bundesrat demand and in the interests of its political manoeuvrability in EC institutions the Federal Government shall not be obliged to await the Bundesrat Opinion, "but will give the Bundesrat the opportunity to state its opinion within a reasonable period of time before it approves EC resolutions in which all or individual provi-

sions come under the exclusive legislative responsibility of the Länder or fundamentally affect their interests".

The Federal Government shall not be made dependent on Bundesrat directives, but shall "take its opinion into account during negotiations. Insofar as the Opinion relates to exclusive legislative matters of the Länder the Federal Government shall only be allowed to deviate from this Opinion for irrefutable foreign and integration policy reasons. Furthermore, it shall take the Länder interests articulated by the Bundesrat into account in its considerations".

- In the case of deviations the Bundesrat shall be informed of the primary reasons.

The Federal Government shall, wherever possible, invite "upon request representatives of the Länder to attend the negotiations in the advisory bodies of the Commission and the Council of Ministers".

The specific details of the new information and participation procedure should be regulated in a special agreement between the Federal Government and the Länder.

3. Direct and independent Länder activities

Parallel to the steadily growing functional scope of the EC and as a reaction to what the Länder perceived to be unsatisfactory and inefficient institutions and procedures of participation in EC related decision-making, the Länder have started to launch direct activities vis-a-vis EC institutions, independent of the Federal Government.

Such activities include political contacts of Land authorities and Länder politicians with EC institutions in Brussels. This form of communication takes place in different ways: mutual visits or exchanging letters, memoranda etc.

- With the establishment of so-called "Information Bureaus" ("Informationsbüros") the Länder opened a new channel for increasing their influence and added a new element to the EC related communication network. The first information bureaus were set up in 1985 (Hamburg and Saarland) and since fall

1987 all Länder - with the exception of Berlin (which will probably follow soon) - have such a bureau.

The information bureaus are not formal representative institutions since such a claim would be incompatible with the exclusive right of the Federal Government to pursue foreign policy and represent the country's interests abroad. The Länder were eager to avoid creating the impression they were going to interfere with this competence of the Federal Government. They understand and describe the functions of their information bureaus as listening posts, lobby centres and service institutions for all those (organizations, companies, etc.) from the respective Land seeking to establish contacts with EC institutions and their departments/divisions.

- Each Land has a Permanent Delegation in Bonn, representing the interests of the Land - and the Land as state entity itself - towards the federation (Bund), primarily the Federal Government. All these Delegations have been officially attributed the function of dealing with EC-related affairs.

- One should not forget in this contacts the efforts of the Land parliaments to participate in EC-related discussions and decisions where interests of the respective Land is at stake. There have been debates on EC policies in Land parliaments or quasi-formal meetings between members of a Land parliament and members of the European Parliament coming from the respective Land.

IV. Actual problems

1. Implementation of Art. 2 SEA Ratification Act:
the agreement between Federal Government and Länder

In accordance with the provisions laid down in Art. 2 SEA Ratification Act, the Federal Government and the Länder are trying to regulate details of the new information and participation procedure in a formal agreement. By the end of October 1987 they were not yet capable of bridging the gap between their respective positions. Whereas the Länder claim regulations which would allow them a maximum of participation, the

Federal Government takes a restrictive stand, the following points seem to be controversial.

- Size and quality of what has to be subject of information.

With respect to the Bundesrat-Opinions: who decides which cases fall into this category; will the Bundesrat be able to consider the time factor and avoid an undue delay; which Bundesrat institution should decide on the Opinion, if debates and decisions in open plenary session are inadequate; shall the Bundesrat have the possibility to add a supplement to its Opinion if during negotiations a new situation has emerged.

- Inclusion of Länder representatives in the German delegation for EC institutions: which institutions fall into this category, what will be the precise functions of Länder representatives (to issues a statement?) and which role shall be given to the Observer of the Länder.

- Status and working conditions of Länder civil servants in the Permanent Mission in Brussels.

The Information Bureaus: shall their function and activities be made subject to this agreement.

Perhaps there are good reasons not to overrate the fact that the negotiations on these points have not yet come to an end and to expect that in practice Federal Government and Länder (via Bundesrat) will cooperate in a constructive way and develop pragmatically rules and modes of behaviour. Other observers are less optimistic and foresee even more intense conflicts.

2. Demands for amending the Basic Law (Article 24)

Although Article 2 of the Ratification Act introduces a legal basis for the participation of the Länder in EC related decision making, which means a substantial improvement for them, there are still voices demanding the amendment of Article 24 Basic Law.

They take up demands already forwarded by the Enquete-Commis-

sion of the Bundestag on Reform of the Basic Law in the mid-1970s, according to which the transfer of sovereign powers to international institutions should only be possible "via law which would require the consent of the Bundesrat". The Federal Government refuses to accept such a clause, since this provision would limit its freedom of manoeuvre in EC institutions considerably. Whereas all Länder had supported the demand for a solution which had been formulated in Art. 2 Ratification Act, it is doubtful that a sufficient majority would be backing a much further going initiative towards amending the constitution.

3. Claims of Länder parliaments for more participation in EC related decision-making.

Greater, better and more efficient participation of the Länder in decision-making on EC matters according to the new formula of Article 2 SEA Ratification Act will in practice mean participation of Länder governments via the Bundesrat. The Länder parliaments are anxious not to lose additional ground towards their respective governments and have proposed in November 1986 the following arrangements:

a duty on the part of the Land government to inform the Land parliament about Community projects "which might be of interest to the Land";

"before stating its Opinion in the Bundesrat on Community projects in which all or individual provisions come under the exclusive legislative responsibility of the Länder or fundamentally affect their interests the Land government shall give the Land parliament an opportunity within a reasonable period of time to state its opinion. A special procedure should be created to deal with urgent cases;" - in the case of deviations the Land government shall inform the Land parliament of the primary reasons.

If such a procedure would be introduced, the national decision-making process in EC affairs would become necessarily more complicated and time-consuming which might worsen the

negotiation position of the Federal Government if she were responsible for delaying the work of Community institutions.

4. The "Europe-ability" of the Länder

The new Länder rights of participation imply a greater workload for them. They are not only expected to contribute to the formulation of Bundesrat Opinions but also to observe certain deadlines. If the Länder intend to make proper use of their new and extended rights of participation, they will have to invest in personnel resources and organizational capabilities. They need more expert knowledge in EC affairs including the "rules" of the (bargaining) game in EC institutions.

This would apply to Länder parliaments as well. The Länder (governments) must develop ways and procedures for coordinating their positions within due time since the Bundesrat Opinion expresses a majority point of view. Each government will be confronted with the task of coordinating adequately interests and positions of different ministries - a complicated task as can be seen from the performance within the Federal Government in Bonn.

5. The EC policy-making manoeuvrability of the Federal Government

The primary concern of the Federal Government in all discussions on Länder participation has been and still is to ensure a maximum of manoeuvrability in EC decision-making.

The before mentioned 4 points indicate where there might be dangers. In accordance with the principle of federal loyalty ("Bundestreue") both sides - Federal Government and the Länder - will have to make efforts to avoid difficulties. Demands towards the Länder have already been mentioned under the heading "Europe-ability" ("Europafähigkeit"). As concerns the Federal Government there are good reasons to repeat the recommendation or even demand for the appointment of one of its members - with cabinet status - who should have the

responsibility for better coordinating between the different ministries and, in addition, between the Federal Government and the Bundesrat.

V. Conclusion and outlook

The new form of Länder participation in the EC related decision-making process is another challenge and test to the federalist system of the FRG. Against the previous experience since 1949 with the actual behaviour of Federal Government and Lander one may expect that the future practice will correspond to the needs of trustful mutual cooperation, the determinant and feature of a sound and working federal structure. If so, this could have a positive effect on the future development of the EC. Integration progress will be increasingly more dependent on principles which belong to the very substance of a federalist system (which has nothing to do with the formal acceptance of a federal structure in constitutional terms); mutual trust and loyalty, the "Subsidiaritätsprinzip", cooperation and the willingness to seek a balance of interests.

Greater engagement of the Länder in EC affairs might complicate the decision-making process; it offers, on the other hand, the chance for EC policies and the EC integration process to be more firmly rooted in the "grassroots" and to generate and receive more positive response and acceptance amongst the public.

Finally, one should not forget the slogan "Europe of the Regions" which points - from a functional point of view - to the need and demand that territorial units at subnational level deserve greater attention and that their potential be better exploited. This does apply to the nation state (cf. processes of decentralization and regionalist tendencies) but it should be carefully considered within the EC system as well.

References

This article is based on the following publications of the author and parts of the article are taken from these publications:

Hrbek, R., Doppelte Politikverflechtung: Deutscher Föderalismus und europäische Integration. Die deutschen Länder im EG-Entscheidungsprozeß. In R. Hrbek/U. Thaysen (Hrsg.) Die deutschen Länder und die Europäischen Gemeinschaften. Baden-Baden 1986, pp. 17-36.

Hrbek, R., Die deutschen Länder in der EG-Politik. In Außenpolitik 2/1987, pp. 120-132. (An English version "The German Länder and the European Community" has been publ. in Außenpolitik. German Foreign Affairs Review 2/87, pp. 120- 133).

The following titles give the reader further and deepened information and arguments:

Hrbek, R./Thaysen, U. (Hrsg.), Die deutschen Länder und die Europäischen Gemeinschaften. Baden-Baden 1986.

This volume contains contributions and discussions at a symposium of the Deutsche Vereinigung für Parlamentsfragen in June 1986 in Stuttgart. Representatives of the Federal Government and the Bundestag, of the Länder and of EC-institutions present their positions. The volume includes a collection of documents related to the problem covering the period till the end of 1986.

Ress, G, Die Europäischen Gemeinschaften und der deutsche Föderalismus. In Europäische Grundrechte-Zeitschrift 1986, pp. 549-558.

Ress, G., Das deutsche Zustimmungsgesetz zur Einheitlichen Europäischen Akte - ein Schritt zur "Föderalisierung" der Europa-Politik. In Europäische Grundrechte-Zeitschrift 1987, pp. 361-367.

These two articles do comment on the problem from a European Law-point of view.

Schmidt-Meinecke, S., Bundesländer und Europäische Gemeinschaft. Entwicklung und Stand der Länderbeteiligung im Europäischen Einigungsprozeß. Speyerer Forschungsberichte 59. Forschungsinstitut für Öffentliche Verwaltung bei der Hochschule für Verwaltungswissenschaften Speyer, 1987. This seems to be the most recent publication giving, besides a descriptive analysis, some detailed information on the information bureaus of the Länder.