



Subsidiarity and competencies

Suggestions from the Bavarian State government for strengthening the individual responsibility of the Member States

The Principle of a limited distribution of competencies under full reserve of the Principle of subsidiarity is one of the bearing principles of the European Union (EU), embodied on a constitutional level in Article 5 of the EU-Treaty (TFEU) and in Article 23 of the German Constitution. A straightforward and explicit distribution of competencies ensures that the EU as well as the Member States are able to best perform their duties.

Under President Juncker's leadership, the EU Commission has focused more attention on exercising its competencies with greater restraint in recent years. The Bavarian State Government welcomes this commitment. Expanded room to manoeuvre and increased individual responsibility of the Member States are the best ways to ensure that membership in the EU is not perceived as heteronomy, but rather as a powerful reinforcement of their own possibilities for asserting themselves. That is why the Bavarian State Government advocates that the EU should courageously and consistently continue on the path that has been chosen.

The Bavarian State Government believes that the following six supportive measures can contribute to correcting erroneous developments having grown in the past and to enhancing the room to manoeuvre of the Member States:

- » **Reduce the enabling provisions back to their original function**
- » **Limit "soft" coordination of politics**
- » **Exercise restraint in performing and delegating legal acts**
- » **Reduce the requirements for administrative execution**
- » **Eliminate superfluous reporting and notification obligations**
- » **Guarantee an institutional control**

First suggestion: Reduce the enabling provisions back to their original function

The most serious restrictions of the room to manoeuvre of the Member States can regularly be attributed to the excessively use of law-making competencies by organs of the EU. These cases are usually due to an extremely broad interpretation of existing enabling provisions:

- » The most striking example of this is the so-called “single market competence” (Art. 114 TFEU), which – notwithstanding conflicting jurisdiction of the ECJ – is often utilised to justify any market regulation, irrespective of whether it promotes the internal market at all or has any relevance to it. This leads to EU specifications in fields in which the EU has no competence.

For example, Art. 114 TFEU has already been cited for measures aimed at stabilising the Economic and Monetary Union (creation of a Deposit Guarantee Scheme for the Eurozone states only) and for the suggestion to introduce an ad referendum agreement for the activities of national parliaments.

- » Criminal law (Art. 82, 83, 86 TFEU) constitutes another area where the Bavarian State Government has observed excessive legislative activities with concern. This is an especially sensitive area for the sovereignty of the Member States. Law-making initiatives must be weighed up carefully in view of this background. Therefore, the narrowly defined competencies in this area should be used with extreme caution. Cross-border aspects cannot justify any far-reaching harmonisation of the criminal law systems of the Member States by the EU.

In particular, the implementation of the European Public Prosecutor will result in significant losses of sovereignty for the Member States in the area of criminal prosecution. This is critical, because criminal prosecution is of particular importance to national security and highly relevant for fundamental rights. Therefore, efforts to expand sovereign rights in the field of criminal prosecution at the expense of the Member States, particularly by expanding its responsibility for the prosecution of cross-border terrorist crimes, must be firmly rejected.

A list of those enabling provisions which are particularly suited for excessive utilisation and must therefore be limited with regard to competence aspects is attached to this paper (Page 9 ff.).

Second suggestion: Limit “soft” coordination of politics

In many areas, the EU only has a coordinating or advisory function, such as

- » in general education and professional training (Article 165(1) subparagraph 1, 165(2) bullet points 1-6, 166, 167 TFEU),
- » in the main in social protection and the systems of social security (Articles 152 and 153 TFEU) and
- » in culture and tourism (Article 195 TFEU).

As a result, many of the texts adopted in these areas are not binding for the Member States. Nevertheless, EU organs have been trying to get around this requirement by “underlying measures” for many years, in order to provide the EU with a “quasi competence”:

- » By “up-zoning” specialist subjects to the level of the European Council, specialist responsibilities are bypassed and adherence to principle of conferral of powers, which provides different tasks and forms of action for individual Community policies, is made difficult.

The European Council formulated conclusions regarding education and culture on 14.12.2017 as the first application of the so-called “Leaders’ Agenda”. Among other things, these demand promotion of collaboration in the reciprocal recognition of secondary education and higher education qualifications, improvement of foreign language learning, so that more young people will speak at least two European languages in addition to their native tongue, establishment of a “European Student ID” and promotion of “European institutes of higher learning”.

- » The “Open Method of Coordination” is a variant for achieving greater control and monitoring of the Member States in the area of education. Political pressure, at least, is also built up in connection with legally binding texts, because they are adopted by the ministers in the Council.

Only recently, the European Commission tried to establish a minimum educational level at the EU level in the context of a so-called “competence guarantee”, which was supposed to exhibit the character of a legally non-binding recommendation. However, it was possible to prevent that in negotiations in the Council.

The European Commission is also endeavouring to further develop benchmarks as an instrument of indirect policy control. Measurement of the educational performance of Member States contradicts the principle of strict observation of the responsibility of Member States for management of their education systems in Article 165 TFEU.

- » Furthermore, there are also attempts to lend instruments that are actually non-binding (such as recommendations) indirect legally binding force by making reference to them in legally binding texts. This kind of law-making

practise does not agree with the principle of transparency and undermines the distribution of competencies.

For example, the European Qualification Framework (which is based on a recommendation) was supposed to become binding in the context of the resolution on the Europass.

- » Moreover, acts that are non-binding as such can give rise to factual obligations, in turn leading to expanded competencies.

Notwithstanding the severely limited competencies in the area of social law (Article 153 (2a) TFEU), 20 principles or laws, according to which the EU and the Member States were supposed to orient their employment and social policies, were adopted at the EU Social Summit in Goteborg on 17 NOV 2017. Some of these rights or principles extend far into the competencies of Member States with regard to management of their national social protection. Even if according to the preamble of the European Pillar of Social Rights we cannot assume individual enforceable rights, this increases the degree of binding force for the Member States.

- » The option of establishing preconditions for the use of EU support programmes is also used as an opportunity for exceeding existing limits of competencies.

In a work programme of the European Commission in 2018 prior to the Joint Declaration on the EU's legislative priorities for 2018 (FC Doc No RESOL-VI/R27), an attempt was made to create a dedicated budget line for financing European tourism projects after 2020, thereby violating the prohibition of substitution (cf. Article 2(5) TFEU).

Third suggestion: Exercise restraint in performing and delegating legal acts

The Lisbon Treaty fundamentally reformed the Commission's options for adopting legal acts independently (without the Council's and Parliament's approval):

- » According to Article 290 TFEU, the power to independently firm up legal acts and to take care of non-essential elements of a legal act itself (delegated act) may be conferred upon the Commission.
- » According to Article Art. 291 TFEU, powers of execution may be assigned to the Commission if uniform conditions for the implementation of the binding acts of the EU are required (implementing acts).

These options are increasingly and excessively provided for in the legal acts and, in some cases, also concern areas extending beyond mere ancillary provisions or procedural measures. The Commission not only uses the options made available to it to speed up decisions, but also uses them as a means of acquiring additional competencies in areas where it actually has no authority. Delegated acts and implementing acts are occasionally also used to subsequently undermine decisions which were intentionally made differently in terms of politics.

EXAMPLES

There are several delegated acts in the area of agricultural policies, in reference to greening among others, where the Commission has tried to restrict politically adopted resolutions in the Council and European Parliament beyond the basic legislative act in essential points and to narrow national leeway for implementation that was deliberately enshrined in the basic legislative act.

In the area of cultural policies, the Commission was given the option of introducing new indicators independently and outside of the designated legislative procedure in the framework programme "Creative Europe". The way was thereby cleared for the long-term control of national culture policies by the Commission.

In the area of legally required official economic statistics, there is the risk of the statistic obligations being expanded by delegated acts, thereby leading to additional costs for the compilation of statistics by the authorities and an additional bureaucratic burden for companies.

In order to counter excessive use of the options provided by Articles 290 and 291 TFEU, the authorisations already present should only be used in urgent cases which cannot be delayed. In all other cases, the measures should be undertaken in the basic legislative act itself, provided that they are needed at the EU level. In the long term, recourse to Articles 290, 291 TFEU should be

limited to cases where there is an irrefutable legislative need that cannot reasonably be accommodated in normal legislative procedure. If the contents of the implementing act have direct implications for the creation of positions, the budgetary planning periods must be taken into account.

Furthermore, a time limit of five years should be attached to all the delegated acts, and no implicit extension of the power should be permitted. A critical examination of the further necessity of delegated acts and the possibility of revocation of powers which have already been granted will be possible only if the same qualified majority in the Council applies for the extension as for the justification of the powers.

Fourth suggestion: Reduce the requirements for administrative execution

Particularly with longer lasting processes (e.g. regional and structural funds, state aid control), regular tightening of requirements impedes reasonable implementation by the Member States and narrows existing governmental scope.

- » In the case of structural and investment funding (ESI Fund), the simplifications achieved in the ongoing funding period are offset by significant complications. The bureaucratic burden must be significantly reduced in a structural manner at all levels of funding policies, this being precisely what the High Level Group (HLG) on Administrative Burden Reduction has demanded for the structural funds. This includes, among other things, the following aspects:
 - Focussing on existing national provisions and the work of national institutions, i.e. reducing EU requirements
 - A differentiated, risk-based approach, i.e. the cost and effort of programming, administration and monitoring EU funding must particularly be held on a low level where there is only a minor risk for the EU's budget.
 - No retrospective application of legally uncertain measures.
 - Application of the cost-benefit principle in the administrative and control system, including the establishment of tolerances
 - Consistent application of the "single audit" principle
 - Realistic handling of error rates in public

- » In the European Agricultural Fund for Rural Development in particular (but also in agricultural policies as a whole), it is imperative to significantly reduce the current insecurity among affected individuals arising from existing legal uncertainties and to ensure that more trust in funding programmes for the development of rural regions arises again. It is precisely here that political requirements are interpreted very restrictively by the EU audit bodies and are often tightened in terms of their objectives. The following specific points regarding general concerns about the ESI Funds should be examined:
 - More directive power for the arbitration bodies and short audit decision procedures
 - Distinction between site-specific, investment-related and innovative measures in administrative and control requirements

- » In the area of environmental policies, EU state aid law must not impede acceptance measures of the Member States in support of the EU's nature conservation policy. Necessary preventive measures must be ensured quickly and in full. As a minimum, measures of this kind should be integrated into Commission Regulation (EU) No 702/2014 on aid in the agricultural and forestry sectors and in rural areas, and the aid level should be raised to 100%. This would make it possible to do without a notification procedure.

Fifth suggestion: Eliminate superfluous reporting and notification obligations

Excessive reporting and notification obligations lead to further "means of control". These often result in a large administrative burden for the Member States that is usually not justified by any convincing results. Furthermore, notification obligations can also lead to significant legal uncertainties in reference to the validity of legal provisions, as well as excessively severe interventions in national legislative procedures.

EXAMPLES

One current example of excessive reporting obligations is the planned regulation COM(2017) 795 final. Herein extensive reporting obligations, such as labelling provisions, are prescribed, for which there is no recognisable need and which do not lead to a safer internal market.

The proposal of a directive of the European Parliament and the Council on a proportionality test before new professional regulations are passed (COM(2016) 822 final) provides that regulatory projects relating to the access or exercising

of regulated professions must be subjected to an extensive proportionality test. For this purpose, it establishes not only extensive procedural requirements and reporting obligations, but also individual criteria which must be substantiated in detail and supported with detailed evidence. The associated bureaucratic burden is by no means commensurate with the potential benefits.

In the area of Services of General Economic Interest, the Commission Decision of 20.12.2011 (K(2011) 9380) considerably tightened the existing general reporting obligations. Since then, all public bodies (departments, municipalities, participatory organisations, etc.) are required to compile and aggregate detailed data every two years with a significant administrative burden. However, the reports published on the Internet do not have any recognisable practical relevance.

The "EU Justice Scoreboard" published annually since 2018, the results of which are taken into account in the European Semester as well as in the "Europe 2020" strategy, is another example of excessive reporting obligations. The Bavarian State Government views this instrument with concern: The EU does not have any competence for comprehensive coordination, monitoring or comparative assessment of national judicial systems, nor does the "EU Justice Scoreboard" lead to any meaningful basis for comparison. The areas of responsibility of the courts of the Member States, their procedural requirements and the standards to be upheld differ too widely to permit any meaningful comparison of the judicial systems. The competency system also limits further harmonisation by the EU in this area. In fact, comparisons based on parameters which can be expressed as statistics lead to the attachment of excessive importance to anything which is simple to measure. The quality of a judicial system and the decisions it makes should be the decisive factors, but this has been severely neglected in the concept of the EU Justice Scoreboard. Ultimately, a regular expansion of instruments to other areas, such as criminal law most recently, results in disproportionate burdening of the national justice administrations due to the numerous annual data queries.

Sixth suggestion: Ensure institutional control

Content-related measures developed to strengthen the principle of subsidiarity and self-responsibility of the Member States must be supported by suitable institutional security mechanisms:

- » By means of so-called “interinstitutional agreements” European institutions should agree on the adherence to appropriate criteria and at the same time commit themselves to not further pursue or respectively annul legal acts failing to comply with these criteria.
- » Through a revision of existing EU-legislation European law should be checked for opportunities to improve flexibility.
- » In the long term a „Competence Court“, composed of national constitutional court judges, ought to be established to ensure judicial monitoring also outside the European organisational structure.
- » One of the most effective means against the submittal of unnecessary proposals is the consistent reduction of staff force in the administrative authorities. By downsizing staff force in the Commission as well as reducing the number of agencies and other EU facilities the elaboration of overflowing proposals can be sensibly prevented.

The TFEU's problematic enabling bases in view of competence aspects

Article 114 TFEU (internal market competence)

The internal market competence is the preferred enabling provision for legislation associated with a manifest transgression of competencies. Originally created to promote the free movement of goods, individuals, services and capital, it is meanwhile utilised to justify any market regulation - irrespective of whether it promotes the internal market at all or has any relevance to it. This leads to EU specifications in fields in which the EU has no competence.

This abuse of competence is supported by two circumstances: On the one hand, Article 114 TFEU is formulated like a general clause and therefore complicates an exact delimitation of its scope. On the other hand, Article 114 TFEU allows for legislation to be passed by a majority within the Council. Consequently, individual Member States can be outvoted.

EXAMPLES

For example, Article 114 TFEU has already been cited for health protection measures (in which legal harmonisation by the EU is explicitly excluded by contract), for the proposal of a central Deposit Guarantee Scheme for the Eurozone states only (i.e. outside of the internal market), for far-reaching harmonisation of parts of the Member States' insolvency laws or for far-reaching harmonisation and centralisation of authorities for network and information security (with no reference to the internal market).

In order to counteract that development, the scope of Article 114 TFEU should be limited to projects which are directed primarily and directly to the realisation or accomplishment of the internal market and are absolutely necessary. Parallel thereto, indicators should be developed in order to identify whether the legal act actually promoted the development of the internal market or not. This would remove the basis for legislation previously based on Article 114 TFEU for the sole purpose of a general market regulation.

Article 153(1) and (2)(b) TFEU (social policy)

According to Article 153(1) and (2)(b) TFEU, “minimum regulations” could be adopted by means of directives in certain areas of social policy. However, this term, is interpreted widely, thereby extending competencies.

EXAMPLE

For example, the directive of the European Parliament and the Council proposed by Commission on the compatibility of family and career for parents and relatives providing care introduces new, individual requirements in the area of parental leave (particularly paternity leave, improved flexibility of parental leave until the child reaches the age of 12, financial support, to at least the level of sickness benefit) extending beyond basic financial protection. Regarding the aforementioned points, this proposal even exceeds the comparatively high standards in Germany.

Article 192 TFEU (general environmental competence)

Article 192 TFEU enables guidelines to be passed in all specific environmental fields. It does not differentiate between those sectors of environmental policy that require implementation on EU level and those that can be left to the Member States. However, environmental policy action by the EU is justified only if environmental issues cannot be adequately resolved by individual Member States due to their cross-border impact and if they can be approached by a similar measure in 28 Member States. If the EU’s provisions are too detailed, there is a risk that it will no longer be possible to deal appropriately with local circumstances and individual cases. However, this is not consistently respected.

EXAMPLES

EU actions to improve environmental compliance and governance (COM (2018) 10)

The planned development and updating of directives for approval procedures for protected areas, species protection and species cultivation, as well as sector-specific areas such as wind power and hydropower (announced in the Action Plan for nature, people and the economy on 27 APR 2017, COM (2017) 198)

Quotas in Community law for national utilisation of waste, e.g. in the packaging directive

Purely local contents without transnational or mere procedural regulations should in future be deprived of a regulation according to Article 192 TFEU. The engagement of the EU in the environmental sector should rather focus on:

- » Handling environmental protection tasks with Union-wide (transnational) effects, for example EU specifications climate protection (mitigation),
- » indispensable community standards in the interest of environmental protection,
- » promoting the responsibility of those using the environment, e.g. by the Environmental Management System, EMAS, which reinforces environmental protection without burdensome sovereign action.

Article 194 TFEU (energy policy)

Article 194 TFEU authorises the EU to engage in legislative activities aimed at achieving the Union's energy policy goals. This includes, in particular, making sure that the internal energy market functions properly. However, Article 194(2) subparagraph 2 TFEU contains explicit reservations in favour of measures by the Member States insofar as measures relate to a Member State's right to determine the terms of use of its energy resources, its choice of energy sources and the general structure of its energy supply system.

All too often, this reservation relating to the Member States is undermined in actual practice. When dealing with measures relating to energy policy, the Commission usually bases its arguments on their potential cross-border impact. As the integration of the European energy networks progresses, the very broadly defined enabling provision will barely leave any room for reservations relating to the Member States, especially regarding measures for ensuring proper functioning of the internal energy market.

EXAMPLE

The Commission's proposals in the context of their Winter Package relating to the "Clean Energy for all Europeans" energy policy, particularly in the draft concerning the Internal Electricity Market Regulation, constitute a far-reaching intervention in the Member States' competencies in the field of energy policy. For example, the proposals would limit the national priority dispatch for renewable energies, thereby directly influencing the national energy mix. Furthermore, the Commission is supposed to be authorised to unilaterally divide a Member State into multiple bidding zones, which would have a significant influence on the structure of its national energy supply.

The enabling provision should be defined more narrowly and the reservations of the Member States should be formulated more specifically in the future in order to be able to differentiate European and Member State competencies more exactly. Here, we should ensure that not every potential cross-border effect of a measure that can barely be ruled out in a networked internal energy

market justifies a competence of the EU per se. Member State reservation must effectively ensure that the essential fundamental decisions in the area of national energy policy are not taken at a European level, but rather solely at a national level.

Article 113 TFEU (harmonisation of indirect taxes)

Article 113 TFEU empowers the EU to harmonise the legal regulations governing indirect taxes (e.g. VAT), in order to enable a basis of neutrality of taxation of all companies within the internal market. At the same time this enabling clause is also used for suggestions exceeding the mere harmonisation of regulations on the assessment basis in tax terms and also applying to administrative procedures.

EXAMPLE

Proposal for a directive for the introduction of a standard VAT return in the EU. The Commission withdrew the proposal in 2016 after protracted negotiations at Council level.

Article 79 TFEU (immigration policy)

Article 79 TFEU would enable harmonisation of the entire immigration law of the Member States – with only a few exceptions.

EXAMPLES

Common criteria (minimum standards) were established for family reunion with Directive 2003/86/EG relating to the right to family reunification. In the medium term, initiatives of the Commission to expand the directive can be expected, e.g. with the goal of facilitating subsequent immigration of distant relatives or prohibiting the requirement for language proficiency prior to entry.

Directive 2008/115/EC set up common criteria (minimum standards) for repatriation and removal, which makes it significantly more difficult to consistently end the stay of deported offenders and rejected asylum seekers. For example, indefinite deportation is prohibited, even in the case of serious crime and individuals posing a security threat (e.g. Islamists). The enforcement of detention pending removal in prisons was called into question by the precept of separation from ordinary prisoners. The consequences are substantial additional costs (reconstruction work, separate facilities for detention pending removal). For this reason, detention pending removal can currently no longer be enforced in several states.

Article 91 TFEU (transport policy)

Article 91 TFEU serves as enabling provision for measures required within the scope of a common transport policy. The most problematic provision is Article 91(1)(d), as it authorises the EU to pass “any other appropriate provision” deemed suitable for the purpose of implementing a common transport policy. The application of this enabling provision often lacks sufficient delimitation to other enabling provisions as well as the necessary restriction to the aim of implementing a common transport policy.

EXAMPLES

The Commission’s proposal for a regulation relating to technical inspections of in-transit commercial vehicles (“mobile Technical Inspection Agency”), which does not just determine the contents of the inspection, but rather also prescribes specific check quotas, the selection of the vehicles to be checked and the place of the check to the Member States.

By means of a mutual understanding between the EU Commission and the Member States the previously unspecific target should be replaced by competence-limiting and specifically worded objectives. The EU’s authority should be limited to technical regulations (traffic licensing law) for issues concerning traffic safety.

Article 165(1) subparagraph 2 and 165(2) bullet point 7 TFEU (sports)

Pursuant to Article 165(1) subparagraph 2 and 165(2) bullet point 7 TFEU, the EU promotes and develops the “European dimension in sport”. As the term is not defined more closely, this authorisation is viewed by the Commission as gateway to a variety of measures in various political fields.

EXAMPLE

Proposal for a recommendation of the Council for cross-sector support of health promoting physical activity.

Ultimately, the enabling provision of Article 165(1) subparagraph 2 and 165(2) bullet point 7 TFEU is superfluous, so it should no longer be used.

Article 195 TFEU tourism

Article 195 TFEU makes it clear that the EU should not pursue an independent policy on the promotion of tourism. At the same time, attempts are being made to set up an area of tourism promotion at EU level, thereby violating the prohibition of substitution.

EXAMPLE

In a work programme of the European Commission in 2018 prior to the Joint Declaration on the EU's legislative priorities for 2018 (FC Doc No RESOL-VI/R27), an attempt was made to create a dedicated budget line for financing European tourism projects after 2020, ignoring the fact that tourism development strategies are developed in the individual Member States.

Article 196 TFEU (civil protection)

Pursuant to Article 196 TFEU the EU has coordinating competencies within the scope of civil protection (in particular to promote a swift and efficient cooperation between the individual national civil protection authorities). Not only that, Article Art. 196(2) TFEU rules out any harmonisation of the Member States' legal provisions in this area. According to Article 2(5) TFEU, any measures taken by the EU to support, coordinate and supplement may not replace the competence of the Member States. Nonetheless, there is the danger of Article 196 TFEU being used to create a pan-European civil protection system with the EU's own capacities and competencies.

EXAMPLE

For instance, the EU Commission's current proposal relating to the revision of Decision No 1313/2013/EU concerning the EU Civil Protection Mechanism dated 27 NOV 2017 provides for the creation of EU operative capacities or resources (rescEU).

The creation of pan-European civil protection system of that kind should be ruled out explicitly in the future.

Article 21(2) TFEU (facilitation of freedom of movement)

The enabling provision of Article 21 (2) TFEU has a high potential for an extensive interpretation and, simultaneously, a broad effect. Being the core provision of citizenship of the Union, it guarantees a general entitlement to a free movement of persons within the EU independent of their economic activity. Article 21(2) TFEU authorises the Union to adopt regulations that facilitate the exercising of the right to freedom of movement, if action on the part of the Union is needed to achieve this freedom and agreements do not provide any powers for this case.

In contrast to Article 352 TFEU, Article 21(2) TFEU allows for the regular legislative procedure and gains additional „attractiveness“ by its immense functional scope. Therefore, Article 21(2) TFEU should generally only be used with great restraint.