“Federalizing Process in Italy – Challenges from an International Perspective”

Case Study Germany: How did Germany disentangle competences?

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At this conference, I have the honour of presenting the German example of restructuring legislative competences. If we were really successful in clarifying and disentangling the division of competences between the Federation and the *Laender*, you may decide by your own.

I would like to begin my presentation with a brief introduction of our federal system and then turn to the changes introduced under the reform of federalism in 2006. I will then conclude with an assessment of the initial experience in government practice.

As you know, the Federal Republic of Germany is a federated state with two levels of government – Federation and the *Laender* – which may pass legislation within the framework of their specific competences. The German *Laender* are neither provinces nor *départements*, but rather states with their own government powers, own state constitutions, own parliaments and own administrations. The German nation-state has always been federally organized, ever since the founding of the *Reich* in 1871. The *Laender* were originally sovereign states – mostly kingdoms and duchies – and this history still influences their sense of identity.

Each federal country has to deal with the issue of how legislation is to be divided between the various levels of government. The German constitution, the Basic Law, describes the division of powers between the Federation and the *Laender* as follows: The Federation has the right to legislate only over the matters explicitly or implicitly assigned to it, while the *Laender* are responsible for all other matters. Federal laws apply to the entire country, while *Land* laws apply only in the state where they were passed.

However, if you look at the catalogue of federal legislative competences in the Basic Law, you will find that the Federation is responsible for most areas of legislation, while

relatively few areas are left in which the *Laender* can take autonomous action. Above all, these include education, law concerning the police and public order, and local government. However, the *Laender* are mainly responsible for carrying out federal law through their government agencies or through the local governments under *Land* supervision.

The Basic Law is not limited to assigning the Federation specific legislative matters; it also distinguishes between modalities and intensities of regulation. Initially the Basic Law distinguished in particular between three types of legislative competences, namely exclusive legislative power of the Federation, concurrent legislative powers, and federal framework legislation.

Exclusive legislative power of the Federation means that the matters covered are the exclusive responsibility of the Federation. The *Laender* may not pass legislation in this area unless federal law gives them explicit authority to do so, which has rarely happened in practice. Matters of exclusive federal legislative power are for example foreign affairs, military defence, passports and registration.

With regard to concurrent legislative powers, the *Laender* have the authority to legislate only to the extent that the Federation has not exercised its legislative competence by passing a law. Or put another way: Unless otherwise provided in the constitution, the *Laender* may pass laws only if and as long as the Federation has not already done so. Subjects of concurrent legislative power include civil law, criminal law, traffic and transport, public welfare, some areas of environmental law, and commercial law etc.

Concurrent legislation is subject to what is known as the “necessity clause”, which was made stricter in 1994 in order to avoid competences being taken away from the *Laender*. Under this clause, the “Federation shall have the right to legislate on these matters to the extent that the establishment of equal living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest.” The Federal Constitutional Court interpreted this clause in a narrow sense, which threatened to seriously restrict the Federation’s concurrent legislative competence.

The third type, federal framework legislation, resulted in a two-stage procedure: The federal legislature adopted general regulations, which then had to be specified and implemented by the *Land* laws. As the Federal Constitutional Court stressed in its decisions, the framework provisions had to be "capable and in need of being fleshed out". For this reason, framework provisions could include detailed and directly applicable regulations only in exceptional cases. As a result, to a certain degree they were comparable to European Community directives, which are also formulated to be implemented by the Member States. Framework legislation covered for example higher education, public service law, nature conservation and water resource management.
However, a look at environmental law shows that federal framework legislation was not effective, and so it was abolished in the 2006 federalism reform.

Environmental law is strongly influenced by European legislation. Since the mid-1980s, the EC has enacted a great deal of legislation, setting the pace for Member States in the field of environmental law.

Wherever these directives affected the area of federal framework legislation, it led to a difficult and contentious three-stage process of implementation: EC directive – federal framework legislation – detailed provisions under *Land* law. To implement an EC-directive on water policy, for example, 33 legislative acts were necessary: 17 parliamentary acts and 16 regulations. Germany was able to avoid a reprimand for missing the deadline to implement the directive only because the last of the 16 *Land* regulations was published shortly before the Commission filed a complaint. According to rulings by the European Court of Justice, difficulties arising from Germany's federal division of powers are not sufficient reason for missing such deadlines for implementation.

The 2006 federalism reform redistributed the legislative competences between the Federation and the *Laender*. The federal framework legislation was abolished and the subjects previously covered by it were divided between the Federation and the *Laender*. This strengthened *Laender* sovereignty in the field of personnel and organizational matters, as the exclusive responsibility for civil service law governing *Land* employees and judges, which had been subject to framework legislative power, was transferred to the *Laender*. Only the sub-area of status rights and duties was made into a subject of con-

current legislative power, allowing for nationally applicable legislation in the interest of civil servants' mobility. The federal framework legislative power for higher education was also abolished, leaving the Federation only the responsibility for regulating higher education degrees and access.

Nature conservation and water resource management were made subjects of concurrent legislative powers. A number of other changes were made to the catalogue of competences in the Basic Law which were intended to strengthen the legislative competences of the *Laender* on the one hand, and on the other to improve the Federation's ability to act in certain areas. For example, the Federation was given exclusive legislative power in the field of weapons and explosives law, nuclear energy law, registration and identity documents, and the protection of German cultural heritage from being taken out of the country. The Federal Criminal Police Office was strengthened in prevention of terrorism. In return, among other things the *Laender* gained exclusive competence for the law of assembly, law applicable to restaurants, bars and pubs, and certain areas of economic and environmental law which are compatible with regional differences, such as law concerning shop opening hours or so called activity-related noise which means in connection with leisure or sport facilities.

The federalism reform also amended the "necessity clause" as requirement for federal legislation in the context of concurrent legislative powers. Now this clause no longer applies in general, but only in the case of specific matters. In all other cases, the need for legislation is supposed and requires no separate examination and justification. For example, a concrete need must be demonstrated for new legislation in the field of economic law or public welfare. In the field of criminal law, civil law and much of environmental law, by contrast, no demonstration of need is required.

On the other hand, the federalism reform gave the *Laender* the option to pass laws which partly differ from federal law. If the Federation has adopted legislation in a certain area, the *Laender* can pass laws that diverge from this legislation which means that existing federal laws can be replaced by *Land* laws. The matters where this applies are largely the same ones that were subject to the former federal framework legislation and

are now subject to concurrent legislative powers, such as hunting, nature conservation law and law on water resource management.

However, the power of the *Laender* to pass divergent legislation applies only in the absence of what is called a “firm core”, such as the general principles of nature conservation. Divergent legislation is also subject to the principles of allegiance to the Federation and of *Laender*-friendly action: When exercising their competences, the Federation and the *Laender* must show the necessary and reasonable consideration for the overall interests of the federal state and the concerns of the *Laender*. Divergent legislation that violates European Community law would therefore violate the unwritten constitutional rule of allegiance to the Federation.

The declared policy aim of the federalism reform was to strengthen the various levels of government by disentangling the interaction of the Federation and the *Laender*. The goal was to disentangle both the area of competences – especially by abolishing the framework legislative power – and the legislative procedure at federal level by reducing the veto rights of the *Laender*, which are involved in federal legislation through the *Bundesrat*.

Even though the federalism reform strengthened the legislative powers of the *Laender* in certain areas, the Federation clearly still has the largest share of legislative competences. If the Federation takes full advantage of all its legislative competences, the *Laender* are left only with the areas not listed in the Basic Law’s competence catalogue, their so-called residual competences.

So what has our initial experience been during the three years of government praxis since the 2006 federalism reform?

The findings are unmistakeable:

The Federation has taken action or is planning legislation in almost every one of the new areas of competence assigned to it.

The *Länder*, by contrast, have only partly taken advantage of their new competences. They have also used the right to adopt divergent legislation, which was the subject of much discussion during the consultations on the reform, in only a few cases, for example Bavaria with a regulation concerning hunting seasons. Otherwise, the smaller *Laender* in particular are utilizing the transitional provision created by the federalism reform, which allows federal law for which the Federation is no longer responsible to remain in force until replaced by *Land* law.

However, this transitional arrangement carries the risk that the federal law will become “set in stone”, since the federal legislature can no longer amend it. Here, the Federation's only option is to repeal the federal law after a reasonable period, thereby forcing the *Laender* to take up their legislative responsibility.

In conclusion, we can see a phenomenon that was apparent already during the consultations on the federalism reform: The heads of the *Laender* government are very interested in defending their position vis-à-vis the Federation and are always striving for greater autonomy and stronger *Land* competences, whereas the *Land* parliaments and ministries often choose the path of least resistance, preferring to have input on federal legislation rather than initiating action themselves. And when their own legislation is needed, then they prefer to coordinate with the rest of the *Laender* if possible, so that the result is as standardized as possible. This was also apparent in the second stage of federalism reform adopted last year, amending the financial relations between the Federation and the *Laender*.

In this respect, I believe the German *Laender* have given up a little bit too much of their historical self-confidence. But as a representative of the Federation, I am of course not really unhappy about it.

Thank you for your attention.