Federalism and European Community Law: A Study on the Mechanisms of Internal Participation in European Community Decision Making in Germany, Austria, and Belgium

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I. THE PARTICIPATION OF THE GERMAN BUNDESLÄNDER IN THE DECISION-MAKING PROCESS OF THE EUROPEAN UNION: THE CONSTITUTIONAL DIFFICULTY

A. Federalism is a fundamental principle of the Federal Republic of Germany, embedded in Article 20(1) of its *Grundgesetz* (i.e. its Constitution).[1] Article 79(3) ensures that this principle may not be removed, or even substantially impaired, through constitutional amendments.[2]

Federalism has, however, been endangered in recent years in the Federal Republic, as evidenced by the considerable loss of legislative competence suffered by the German Bundesländer. In large part, these competences have simply been taken over by the Federation itself: In the area of so-called concurrent competences,[3] for example, within which the majority of legislative matters fall, and in which, in principle, the Länder are entitled to legislate, most legislation now comes from the Federation. The Federation has been able to achieve this with comparative ease, since the conditions of Article 72(2) GG (the need for legal and economic unity, or for equal social conditions within the Federation) were easily satisfied. The Federation, in turn, has surrendered a considerable part of these competences to the European Community,[4] usually by the enactment of Federal law. One can conclude, therefore, that as far as legislation is concerned, the Länder have ended up with fewer competences, partly as a consequence of European integration.

That cannot be said to be the case in the area of administrative power, in which the Länder are in principle required to take responsibility for protecting their own interests:[5] Only in particular, exceptional cases does the Federation itself legislate,[6] or accept that the Länder should carry out the task of implementing a federal law.[7] Notwithstanding this, regulations, directives, and other legal instruments of supranational organisations frequently contain rules concerning the administrative process, administrative organisation and even the legal protection granted by the administrative courts. This is only necessary when administrative competence is transferred

1. *See* BRUNO SCHMIDT-BLEIBTREU & FRANZ KLEIN, KOMMENTAR ZUM GRUNDGESETZ, 8th ed., 1995, art. 20, marg. no. 1.
2. *See* GRUNDGESETZ [Constitution] [GG] art. 79(3) (F.R.G.).
3. *See* GG arts. 72, 74.
4. Rupert Scholz, Grundgesetzkommentar, vol. 1 (art. 12 a - 37) (Theodor Maunz & Günter Dürig ed., 1996), art. 23 marg. no. 92.
5. *See* GG arts. 83, 84.
6. *See* GG art. 87 (indicating areas of direct federal administration).
7. *See* GG art. 85.

to the supranational level; whenever this happens, a domain of the Länder is encroached upon, since they are, in principle, responsible for the implementation of both national and EC law.

It is not only through the transfer of competences to the supranational level that the Bundesländer have had to accept the loss of some of their competences. A further problem for them has been the tendency of the Community institutions to interpret the transferred competences broadly, and to further narrow their competences. The interpretation of Community law is guided by the position of the Court of Justice on the principle of the '*effet utile*,' according to which the competence norms of Community law must be interpreted in such a way that their practical effect can be realised. This is one of the factors leading to a broad interpretation of such norms.

An example of this in Community practice is provided by the use made by Community bodies of Article 235 of the EC Treaty. This provision allows the Council, through a unanimous decision, to adopt a legal instrument which is necessary for the realisation of the Common Market but is in an area in which the Community has no specific competence. This possibility, which was intended merely as an emergency measure, has not always, in the opinion of the Länder, been used with restraint. Relying on Article 235 of the EC Treaty, directives have been issued which intrude into the competence areas belonging to the Bundesländer, causing them to see a reduction in, or at least a threat posed to, their authority.[8]

B. The constitutional question posed by these developments is whether the losses in competence of the Bundesländer have already exceeded permissible levels. The prevailing opinion is that the legal principle behind Article 79(3) applies equally to the area of European integration. If the loss to German Federalism caused by European integration is so large that the central concept, or substance, of federalism is disturbed, Article 79(3) is violated. Although the transfer of competences to the European Communities is not a formal amendment to the Constitution which is covered directly by the wording of Article 79(3), it is, arguably, a material change[9] governed by the legal principle behind that Article. Competences that, under the German Constitution, were originally intended as competences either of the institutions of the Länder, or of the institutions of the Federal Republic of Germany itself, have now become the preserve of

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8. Peter Dröll, 135 DIE DEUTSCHEN BUNDESLÄNDER UND DIE EUROPÄISCHE GEMEINSCHAFT (1992).

9. Christian Tomuschat, KOMMENTAR ZUM BONNER GRUNDGESETZ, art. 24, marg. no. 50 (1981).

the supranational institutions. This alteration effects a material constitutional change brought about by the integration norms in Article 24(1), and now also in Article 23(1), which prescribe the form for the passing of a Federal law.

C. Notwithstanding the materiality of the change, it is possible that the current position still conforms to the Constitution. The academic literature on this issue is of the opinion that the situation is not yet constitutionally impermissible, although the matter is not free of doubt.[10]

The subsidiarity principle (Art. 3 b of the EC Treaty), which is to be strictly observed by Community institutions, grants a certain measure of protection to the Bundesländer.[11] The principle should be understood in the following way: The "transfer" of the member states' sovereign powers, that is to say of their internal competences, to the Community level, involves more a sharing of these with other member states, than their becoming the sole competences of supra-national institutions. In every area covered by such "shared" competences the subsidiarity principle comes into effect, so that it is *primarily* the member states that are empowered to issue rules in this area. It is only when the member states cannot accomplish by themselves the desired aim that will the supra-national level come to their aid (in a *subsidary* role). It is easy to see how this principle protects the Bundesländer. If, according to the principle of subsidiarity, the member states are primarily responsible for regulation in a particular field, and the internal division of competences of the Federal Republic empowers the Länder in this field, then it is the Länder that have relevant competences. The media field provides a good example of this. Media law, in so far as it does not deal with the technical side, is a matter for the Länder because it is an aspect of culture. In order to realise the freedom to provide services (Art 59 EC Treaty), however, the Community also has a 'shared' competence to regulate particular areas of media law. To the extent that the member states, through their own laws, regulations or other measures, are able to adequately achieve the regulatory aim, the Community is not permitted to regulate but is required to leave this to the member states. Since, in the Federal Republic of Germany, it is not the Federation but the Länder that are responsible for the

10. Meinhard Schröder, BUNDESSTAATLICHE EROSIONEN IM PROZEß DER EUROPÄISCHEN INTEGRATION, 35 Jahrbuch des öffentlichen Rechts [JöR] 83 (1986).

11. Kai Hailbronner, *Die deutschen Bundesländer in der EG*, JURISTENZEITUNG [JZ] 149, 153 (1990).

regulation of media law, the regulatory competence of the Länder in this field is protected.

D. The principle of subsidiarity only partly mitigates the constitutional problem of the danger posed to federalism, and more far-reaching protections have had to be created in domestic law. It was for this reason that it was felt to be necessary for the removal of constitutional misgivings, to create an efficient system for the participation of the Bundesländer in the decision-making process of the European Community and so compensate them for their other losses.[12] If there are enough participatory rights of the Bundesländer at the level to which their competences have been transferred—i.e., to the federal and, for our present purposes, the European, level—the practical effect is to re-establish the influence of the Länder on the decisions of the Federation and within the European Community. This modern form of federalism, characterised by the connection between the different levels of the Länder, Federation and the supranational communities, is more a "participatory federalism," or a contributory federalism, than a federalism of competences.[13]

The participation of the German Bundesländer in federal legislation takes place in the Bundesrat, and their participation in the decision-making process of the European Community is provided for by new Article 23 (2)-(7). This Article for the first time established the participatory system at a constitutional-legal level, though participatory rights of the Länder, similar in some ways to those in Article 23, although not so extensive in their functions, were laid down at the time of the ratification of the Single European Act of 1986, the first major reform treaty of the European Community.[14] Even before this date there were participatory rights of the Länder based on agreements between minister presidents of the Bundesländer and the federal governments, but these were essentially only consultative rights. The duty to inform the Bundesländer of EC matters through the federal government had been established earlier in the German ratification law of 1957 to the Treaty of the European Economic Communities.[15]

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12. Dieter Dörr, *Die Europäischen Gemeinschaften und die deutschen Bundesländer*, Nordrhein-Westfälische Verwaltungsblätter [NWVBl.] 293 (1988).

13. Joseph Isensee, IDEE UND GESTALT DES FÖDERALISMUS IM GRUNDGESETZ, 4 Handbuch des Staatsrechts der Bundesrepublik Deutschland (Joseph Isensee & Paul Kirchhof ed., 1990) marg. no. 272/273; 281.

14. Stefan Schmidt-Meinecke, BUNDESLÄNDER UND EUROPÄISCHE GEMEINSCHAFT—ENTWICKLUNG UND STAND DER LÄNDERBETEILIGUNG IM EUROPÄISCHEN EINIGUNGSPROZEß 15 (2d ed. 1988).

15. Christian Schede, BUNDESRAT UND EUROPÄISCHE UNION 34 (1994).

II. THE CONTENT OF PARTICIPATORY RIGHTS ACCORDING TO VALID CONSTITUTIONAL LAW

A. General Comments

A. One can differentiate between *three* types of participatory rights for the Bundesländer: First, a comprehensive right of information; second, a right to influence, or even determine, the position of the Federal Minister who represents the Federal Republic in the Council of Ministers in Brussels; and third, in certain matters, to send a Land Minister to Brussels, chosen through the Bundesrat, as the representative of the Federal Republic.

B. The Federal Länder are represented through the Bundesrat, the institution that must be informed of all events at European Community level. It is also through the Bundesrat, by means of a decision of its majority, that the position of the Länder is determined on any given question; and it is a majority of the Bundesrat that decides upon a Land minister who, in particular situations, exclusively represents the Federal Republic in Brussels.[16]

Thus, the influence of the Bundesländer is qualified: Only the opinion of the majority of Bundesländer will be relevant in the process of joint decision-making in the EC. Unanimity is not a condition for the determination of the Länder opinion. In practice, however, there is frequently agreement between the Länder in the Bundesrat, so that it is only in politically disputed questions of principle that great controversies appear, which need to be decided through majority decisions.

C. The influence of the Bundesländer is further qualified by the fact that, in the Council of Ministers in Brussels, matters are often decided by qualified majority voting. This gives rise to the possibility that the Federal Republic of Germany might, in a case in which its position will have been decided in conjunction with the Bundesländer, be outvoted in the Council of Ministers. In such a case, the Bundesländer will not have exercised any influence on the decision in Brussels. Even in such a case, however, the opinion of the Bundesländer will have been stated through the Federal minister (at least as a general rule) in the debates in the Council of Ministers, and therefore their arguments taken into account in the deliberations of the Council of Ministers. So long as the Federal Republic has the

16. See art. 23 VI 1 together with Para. 6 s. 2 Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union [EUZBLG]; Rainer Arnold, BETEILIGUNG DER BUNDESLÄNDER AM ENTSCHEIDUNGSPROZEß DER EUROPÄISCHEN UNION (Ursula Männle ed., 1998), vol. 15, at 131.

opportunity to participate in debate and thereby exert an influence upon the making of decisions in the Council of Ministers, the will of the Bundesländer will be expressed. This only ceases to be the case when the Länder take no part in the decision at all, that is to say, when it is purely a federal competence and the interests of the Länder are not affected. However, this is seldom the case; more often, the Bundesländer decline to take a position, so that it is the ideas of the Federation only that are put forward in the debate and decision-making process in Brussels. None of this, of course, alters the fact that, where unanimity is required in the Council, the action of the Bundesländer, when they are internally involved, will clearly affect the decision-making in the Council.

D. If, in relation to a decision at the supranational level, the position of the Federal Republic with regard to foreign or defence policy would be threatened if the Länder interests were to be carried out, the constitutional principle of loyalty to the Federation, expressed in Article 23(5), (6), demands that the Länder interest not be given precedence over those of the Federation,

E. The participatory rights of the Bundesländer with respect to a particular area reflect their level of participation in the legislative process with respect to that area. If the matter is one in which the Federation is exclusively competent domestically, the participation of the Bundesländer in supranational decision-making process will be correspondingly limited.[17]

Stronger forms of participation exist in the areas in which there are framework competences and concurrent competences. The *framework* competences are detailed ground rules, and encompass those rules belonging solely to the Bundesländer. The Bundesländer are empowered to issue such framework regulations, so long as and to the extent that the Federation has not yet regulated the area.

In the area of *concurrent* legislative competences, the responsibility to regulate belongs, in the first instance, to the Bundesländer and stays with them so long as the Federation does not regulate these matters itself within the conditions laid out in Art 72 GG. It is clear that in both these cases, the Länder have considerably

17. The Länder participate in the internal area through the Bundesrat, the representative body of the Länder. This is always the case and can take place in a weaker or stronger form. The weak form is participation merely through an "Einspruchsgesetz," i.e. after an objection by the Bundesrat, the Bundestag must negotiate once again, and then can, with an absolute majority, overrule the Bundesrat. In the strong form, the Länder participate through the Bundesrat, if it is a case in which consent is required. Such cases are laid down in the Constitution itself. Then the Bundesrat must expressly approve the bill; its final refusal to approve the bill leads to its failing to become law.

greater rights than the case when the Federation is exclusively competent; and their participatory rights, in these two cases, in the decision-making process of the EC, are correspondingly broader. The same can also be said in the area of administration, where the Länder have almost exclusive competence.

Naturally, the participatory rights of the Länder are greatest in the areas in which they are *exclusively* competent, where they have the right to be represented at EC level by a Land minister voted for by the Bundesrat.

B. The Particular Participatory Rights

1. The "Weak" Participatory Right

If a matter lies within the exclusive competences of the Federation (listed in Art 73 GG e.g. currency, defence, citizenship, etc), the opinion of the Bundesrat, determined through the majority of the Länder votes, must be "taken into account" by the minister who is acting for the Federal Republic in the EC Council. This means that the Federal minister must seriously consider the opinion of the Bundesrat, but may depart from it if it appears preferable to him to do so.

2. The "Strengthened" Form of Participation

If a matter being dealt with in the EC Council of Ministers in Brussels is one which, in the domestic system of the Federal Republic, would belong within the areas of concurrent legislative competences or the framework competences of the Federation, the Federal minister in Brussels must 'substantially take into account' the opinion of the Bundesrat, thereby using the position of the Bundesrat as the guiding principle of his actions. The procedural rules for the co-operation of the Bundesrat and the Federal Government in matters of the European Union were given constitutional force by the enactment of Art 23 GG. Before the discussions in Brussels, the Federal minister and the Bundesrat, which has already determined its position, discuss the arguments to be put forward in Brussels. If it emerges that there are irreconcilable differences, the Bundesrat may pass a "*Bestätigungsbeschluß*," i.e. a resolution stating its position. If, having done so, it reaffirms its position by a two-thirds majority, the Federal minister must accept this position as the basis for his discussions in Brussels. This decision of the Bundesrat is then "substantial," and therefore binding on the Federal minister.

This procedure also applies if an EC directive affects the administrative competence of the Länder and the organisation of their civil servants or administrative procedures.

3. The "Strongest" Form of Participation

If the matter is within the exclusive competence of the Länder, particularly in the area of culture, a representative of the Länder nominated by the Bundesrat must assert the position of the Federal Republic of Germany as a member state of the European Union. According to Article 146 of the Treaty of European Union, the representative must be of "ministerial rank,"[18] which means that he must be a Land minister who was appointed by the Bundesrat to serve in the Council of Ministers.

The underlying justification of this provision (Article 23(6) GG), is that the Federal Republic, as a federal state, is a member state of the European Union. According to Community law, it is entitled to certain membership rights, such as voting in the Council of Ministers, but the GG states that, in certain cases, the assertion of these rights "shall" be transferred from the Federal Republic to a representative of the Länder. It is clear that while there is no strict obligation to make such a transfer, under both general principles and the federal state principle, it must be made unless there are serious grounds against doing so—only in extremely exceptional cases could such a transfer be refused.

The Länder representative who safeguards the rights of the Federal Republic acts for the Republic in the Council of Ministers and votes there. Although this is, according to the GG, "through participation and in agreement with the Federal Government,"[19] it is clear that participation in this case cannot mean that there is a real participatory right of the Federal Government. The representative of the Länder must inform the Federal Government of his line of action. The Federal Government also has the power to force an agreement between the Land minister and the Federal Government, if the Land minister departs from the previous integration policy line. This results from the fact that it is the Federal Republic that has the principal capability, and duty, of exercising the rights of membership of the European Community. This principle lays down that the Land

18. *See* Para. 6 s. 2 EUZBLG.

19. *See* Schede, *supra* note 15, at 74; *see* Arnold, BETEILIGUNG DER BUNDESLÄNDER AM ENTSCHEIDUNGSPROZEß DER EUROPÄISCHEN UNION (Männle ed., 1998), vol. 15, at 131.

minister has to respect the common good, which is a clear manifestation of the principle of loyalty to the Federation.

If a minister of a Land represents the Federal Republic in the EC Council of Ministers, then the opinion of the Länder, as determined by a majority in the Bundesrat, will be directly presented by him. It follows from this that the minister of the Land may not put forward in Brussels the opinion of the Bundesland from which he comes, if that opinion is inconsistent with that of the majority of the Bundesrat. Therefore, the assertion of the rights of the Federal Republic through a Land minister guarantees a clear articulation of Länder interests, in contrast to a Federal minister who, due to his position is nearer to the interests of the Federation than those of the Länder.[20]

III. THE INTERACTION OF FEDERATION AND BUNDESLÄNDER AT THE LEVEL OF THE EUROPEAN UNION

In order to clarify the provisions of Art 23 GG, an Act was passed under Section 3 of this article thereof to define the requirements of co-operation of the Federal Government and the German Bundestag in regard to matters of the European Community (12th March, 1993, BGBl I, p. 311 (Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union, EUZBLG)). At the same time, an Act on Co-operation of the Federation and the Länder in regard to matters of the European Community was passed under Section 7 of Article 23 (BGBl I, p.313). These Acts served to clarify both the provisions of Art 23 GG and the opinions based upon it; of particular importance among their provisions is that in Para. 5 s.2 EUZBLG, whereby (as already referred to), in cases where emphasis is placed upon the legislative competences of the Länder,[21] the Bundesrat may adopt a "*Bestätigungsbeschluß*" by a two-third majority of its votes, thereby making its view "substantial" for the Federal Minister handling the matter in the EC Council of Ministers.

The Acts also contain other significant provisions. They provide, for example, in cases involving the application of Art. 235 of the EC Treaty (which permits the EC Council of Ministers, despite the lack of a specific competence, to adopt unanimously a legal act which is necessary for the realisation of the internal market) that the Federal

20. Paul Wilhelm, *Europa im Grundgesetz: Der neue Art. 23*, Bayerische Verwaltungsblätter [BayVBl.] 705/709 (1992).

21. According to the opinion put forward here, this is in general the area of concurrent legislative competences and the framework competences of the Federation to the above extent.

Government must produce the "*Einvernehmen*" with the Bundesrat, i.e. it must acquire a vote in its favour. This is necessary if the particular measure that the Council wishes to pass affects, at national level, an area for which the Länder are competent, or one which the Bundesrat would also have to approve. And finally, there are those cases in which, according to Para. 5 s.3 EUZBLG of the Act, the vote of the Bundesrat is expressly required.

Yet another important provision is that the Bundesrat may demand that the Federal Government initiate proceedings before the European Court of Justice, if the Länder are affected through an act or an omission of an EC institution in an area of their *legislative competences*. This only applies in those legislative areas of the Länder where the Federation has no right to legislate. One example of such a case is in the area of *concurrent* legislative competences where none of the conditions in Art 72(2) GG. are present, and therefore, neither legal nor economic unity, nor the need to further equal social conditions, require a federal law. And finally, there are the situations falling within the *framework competences* of the Federation, where the Länder fill in the details, through exact regulations of the "framework" constructed by the Federation itself. Even in such cases, however, it should be noted that the Federation can only construct such a "framework" regulation if the conditions of Art 72 GG are present (i.e. the conditions for Federal regulation of concurrent competences). If these conditions are not satisfied, the Federation does not have the regulatory competence of the type described above.

The above-mentioned provisions also apply to competences of the Länder without the regulatory competences of the Federation in the sense of Para. 7 s.1 EUZBLG. If they apply, the Bundesrat has the right to demand that an action be brought by the Federal Government. This provision, along with the requirement of loyalty to the Federation, provides a clear illustration of the complete state responsibility to protect the Federation. On foreign, defence or political integration grounds, a situation may arise where the Federation must distance itself from an action. In judging whether such grounds exist, the Federation has a certain freedom of judgement, under Para. 7 s.1 EUZBLG.

It should be observed that this duty of the Federal Government is independent of the Länder's own right to bring an action. They may bring an action, as legal persons, to declare a decision void according to Art 173(4) of the EC Treaty, if a legal act of the Community affects them individually and directly. Even if the Länder are not, however,

affected in this way, and are therefore unable to bring an action to have a decision declared void, the Federal Government in the name of the Federal Republic may bring the action, even if it is not itself affected. This is possible because the Federal Republic, like every member state, is a privileged applicant, that is not required to show proof of an effect upon itself in order to bring an action to declare an EC act void. In addition, on the demand of the Bundesrat, and in fulfilment of the conditions of Para. 7 EUZBLG, the Federal Government is also obliged to bring certain other actions; and Para. 7 obliges the Federal Republic to produce the opinion of the Bundesrat before the European Court of Justice, in cases where the legislative competences of the Länder are affected and the Federation has no legislative competences.

A particular problem is illustrated by the so-called *Länder offices*,[22] (offices of the Bundesländer) in Brussels, or in other places with a link to the European Community. Since the politics of integration are in principle a matter for the Federation (Art. 32(1) GG), it could be argued that these offices are an encroachment upon the competences of the Federation. One must take into account, however, that the activities of such offices are only of an informal nature and do not display any sovereign characteristics. Para. 8 of the above Act only permits the Länder to "maintain direct links with the institutions of the European Community, insofar as this enables them to fulfil their state competences and tasks according to the GG." This makes clear that the Länder may only become active in the area of their own competences, so as directly to defend the relevant EC law aspects of this activity against encroachment by the EC institutions. The consequence of this is that the EC legal aspects of such activity are no longer mediated through the foreign and integrational political competences of the Federation. As a result of the direct effect of EC law, which frequently directly affects the Bundesländer, the Länder can themselves fulfil their tasks at the supranational level.

IV. THE AUSTRIAN MODEL OF PARTICIPATION OF THE LÄNDER IN THE EC DECISION MAKING PROCESS

A. Introduction

Elaborate and detailed rules have been introduced into Austrian law concerning the participation of the nine Länder (Oberösterreich, Niederösterreich, Wien, Steiermark, Tirol, Kärnten, Salzburg,

22. Para. 8 EUZBLG.

Vorarlberg and Burgenland) in the decision making process in the Council of Ministers of the EC. The decisive steps were taken in 1992 with the constitutional amendment of Art 10 § 4-6 of the Bundesverfassungsgesetz (B-VG) and the conclusion of an Agreement between the Federation and the Länder, signed on 12th March 1992,[23] further supplemented by an agreement concerning the creation of the "Integrationskonferenz der Länder"(Integration Conference of the Länder) of the same date.[24] Austria only became an EC Member State on 1st January 1995, but the creation of the above mentioned rules, in anticipation of this event, can be explained by the fact that Austria was long a candidate for entry, and in any event intended to apply these rules in case it became a member of the European Economic Area (EEA), the organisation for EFTA States that wanted closer relations with the EC without becoming formal members of it. As it turned out, the EEA was formed by Norway, Iceland and Liechtenstein, while the other EFTA countries (Austria, Finland and Sweden) joined the Common Market directly at the beginning of 1995. The constitutional dispositions remained in force as to their context, but the rules relating to integration were incorporated into a new set of articles, namely Article 23 a-e of the B-VG.

B. The Integration of the Länder as the Nucleus of the Participation System

It should be noted from the outset that the Austrian participation mechanism, in contrast to that of Germany, is founded not upon the Federal Council, which exists both in Austria and Germany, but upon an institution which appears to be characteristic of co-operative federalism—the Conference of the nine Länder concerned with EC matters ("*Integrationskonferenz der Länder*," IKL). The main reason that the competence to determine the Länder's will, which is to be imposed on the Austrian representative in Brussels, has not been attributed to the Federal Council itself, is that it lacks the ability efficiently to promote the Länder's interests. This is because of two circumstances, the first of which is also important for the issue of EC participation. First, the Federal Council is composed of deputies chosen by the *Landtage*, the Länder Parliaments, in proportion to their political composition. These deputies also have a free vote in the

23. österr. BGBl. (official journal) 1992, 276

24. The agreement has been in force since April 4, 1993. Heins Schäffer, *Europa und die österreichische Bundesstaatlichkeit*, Die öffentliche Verwaltung [DöV] 181-195, at 193 (1994).

Federal Council, and their position is often influenced by that of the political party to which they belong. Thus, their political views are often presented by them in a national perspective in the Federal Council, as opposed to the specific interests of the Länder they represent. A strict, coherent representation of Länder interests would be guaranteed by a system such as exists in Germany, whereby the Federal Council consists of Land ministers who are bound to represent the position of their governments in the Federal Council. By not choosing such a system, the Austrian constitutional order avoids "executive federalism" and strengthens parliamentarism in the Länder, a concept which is normally threatened in modern federal systems. To summarise, the Austrian Federal Council does not appear to be sufficiently representative of Länder interests, and therefore, the participation in the EC decision making process was not attributed to this political institution.

Second, the position of the Federal Council is regarded as weak, as its participation in Federal legislation is limited to a suspensive veto which can easily be overridden by a simple majority vote in the National Parliament (*Nationalrat*). In contrast, the German Federal Council has, in many cases, a right of consent to Federal laws, the refusal of which cannot be overridden by the *Bundestag*. It would therefore follow, that the EC participation mechanism should not be founded upon an institution with weak internal functions.[25]

The weak position of the Federal Council also explains the fact that in the Austrian constitutional order, multiple forms of co-operative federalism have evolved which attempt to compensate for the deficiency in the representation of Länder interests, whilst counterbalancing unitary tendencies on a national level. Thus, it has not been an atypical step to install the Integration Conference of the Länder. It was felt that unanimity, which can only function where the body is composed of members of an equal status and not organised upon a proportional voting and majority rule basis, would lead to inefficiency; and accordingly, the Agreement creating the Conference introduced flexible procedural rules. The central function of the Conference is to form an opinion on matters which are debated in the Council of Ministers in Brussels, and which belong, from the internal Austrian perspective, to the legislative competence of the Länder. If this opinion is a "uniform" one ("*einheitliche Stellungnahme*"), it is binding upon Austria's EC representative in the Council: He must

25. *Id.* at 191; *see also* H. Scambeck, LANDESBERICHT ÖSTERREICH, FÖDERALISMUS UND REGIONALISMUS IN EUROPA (F. Ossenbühl ed., 1990) 55-110, in particular at 81.

follow it and may only deviate from it for compelling reasons of foreign or integration policy, in which case he must immediately inform the Conference.[26] The answer to the crucial question, "What constitutes a 'uniform' opinion?," is that it is one that is actively supported by a majority of the nine Länder (i.e. by five Länder), that have voted in favour of it. The opinion would not be regarded as "uniform" if one of the Länder were expressly to oppose it. But since it is only required that the minority of Länder not be strictly against it, an abstention, or nonparticipation in the Conference (which is deemed to be the same as an abstention), would not be an obstacle to a "uniform" opinion.[27]

A further question that arises is as to the representation of the Länder in the Integration Conference. Here an element of "executive federalism" is to be seen in the voting attributed to the Heads of the Länder Governments, the so called "*Landeshauptmänner*." The Presidents of the Länder Parliaments are also members of this Conference, but only play a consultative role in it, as is the case for the Presidency of the Federal Council. The reduced role of Länder Parliaments in the participation mechanism has provoked strong complaints of a decline in Länder parliamentarism. In response to these, the Länder have, by means of their constitutions, created a duty to provide information, established specific EC Committees and, in particular instances, bound the *Landeshauptmann* to the Land Parliament's decision when acting in the Integration Conference.[28] If a "uniform" opinion fails to be reached due to, for example, the express opposition of one Land, the majority can nevertheless form a "simple" opinion which does not have the same binding force as a uniform one. It must, however, be taken into account seriously by the Austrian representative in Brussels, although he may derogate from it if he prefers a different position which he considers more appropriate.[29]

It should be mentioned at this point that the binding effects of a "uniform" opinion may not be extended to the Austrian members of the European Parliament, who are required, under Community Law, to comply with the common principle of modern parliamentarism, and therefore remain free from external imperative influence. As representatives of the people of Europe, they cannot be bound by

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26. *See* Art. 23 d § 2 B-VG. For the structure of the Federal Council, see Art. 34-37 B-VG.
27. Schäffer, *supra* note 24, at 193.
28. *Id.*
29. *See* Art. 23 d § 1 BV-G.

instructions from national institutions, and must make their decisions freely and voluntarily, subject only to Community law and their conscience. This is worth mentioning at this stage as the decision making process in the EC is not monopolised by the Council of Ministers, but is widely shared, especially in the numerous matters subject to the so-called "co-decision procedure" (see Art.189(6) EC Treaty) involving the European Parliament. The Council, however, plays an important part (even greater than that played by the European Parliament) in EC decision making, and its executive structure and its composition of national ministers lays it open to the influence of Member States and their territorial sub-entities. It would be accurate to say that influencing the Council results in significant influence upon the process, and consequently upon the decisions themselves. The discussion of this issue is, therefore, in no way superfluous, although it bears little relevance to the discussion of the European Parliament. Austrian constitutional law also provides the opportunity for a representative of the Länder, as opposed to the Federal Government, chosen by the Länder themselves, to be sent to Brussels. According to Article 146 of the EC Treaty, as modified by the Maastricht Union Treaty, the representative of a Member State must have the rank of a minister, either of the central Government, or, as introduced by the latter treaty, of a Land Government in a federal system. It is within the discretionary power of the Federal Government to transfer the power to act in the EC Council to a Länder representative, if the matter to be negotiated in Brussels falls within the Länder legislative competence. As many such matters cover fields belonging both to federal and Länder competence, the Constitution also allows such a transfer to a Länder representative in cases of concurrent competence. If the Federal Government makes such a transfer, the Länder representative has to act with those members of the Federal Government who are competent for the matter in question.[30] Although the Constitution is not very clear on this point. Article 23 d § 3 of the B-VG speaks of the "participation" ("*Beteiligung*") of the Federal Government member in the acts of the Länder representative and of the "harmonisation" ("*Abstimmung*") of their opinions. This cannot be interpreted as meaning that the Federal minister would have equal status and power with the Länder minister, because the role of negotiating in Brussels as such is clearly attributed to the latter; the role of the Federal minister can only be supplementary, and he cannot impose his will upon the representative.

30. *See* Art. 23 d § 3 BV-G.

The intention of the provision would seem to be that the interest of the Federation as a whole should not be neglected by the Länder representative, which suggests that the role of the Federal minister is more a protective one. In most cases of divergent opinion, however, a compromise will be reached.

The Länder representative is of course bound by a uniform opinion taken by the Integration Conference of the Länder (as is expressly laid down in Art. 24 d § 3 B-VG), to the Länder Parliaments in matters of Länder competence, and to the Federal Parliament in matters of Federal competence (Art 23 d § 3 B-VG).

It should also be mentioned here that, in exceptional cases, the Federal Council's "uniform" opinion is of importance. If a law adopted by the EC has the internal effect of transferring Länder competences to the Federation, it must, according to Articles 44 § 2, 33 e § 6 B-VG,[31] be implemented in Austria by a constitutional Act to which the Federal Council has consented. If such a law is debated in the Council of Ministers in Brussels, a "uniform position" taken by the Austrian Federal Council is as binding on the Austrian representative in the Council as would have been a uniform opinion of the Integration Conference of the Länder, as described above.

The Austrian system of participation in EC decision making is not only federalism orientated, but reflects, in general, a compensation for the loss of competence by the internal institutions. A greater attempt has therefore been made to compensate sufficiently for the reduced function of the Federal Parliament in Austria than in Germany. If, from an internal standpoint, a matter to be negotiated in Brussels falls within an area of Federal legislative competence, the *Nationalrat* can adopt, by majority, an opinion which is binding upon the Austrian representative in the EC Council. The degree of the binding force of the opinion, the exceptions, and the responsibility of the person acting in Brussels for Austria are the same as in the cases described above. Article 23 e § 2 of the B-VG details the cases in which the *Nationalrat* may intervene in this way: namely, if a legal act (the constitutional provision speaks of a "project" (*Vorhaben*)) is to be adopted by the EC which needs to be implemented by an Austrian *federal* Act, or in the event that national implementation is required. Both types of case can be described, as has been done above, as cases falling within the competences of the Federation.[32]

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31. See the similar disposition of Article 23(6) GG.
32. *See* Scambeck, *supra* note 25, at 79.

It should also be mentioned that, following an agreement between the Länder and the Federation, the right of a Land to ask the Federal Government to bring an action before the European Court of Justice was introduced, in the case where an EC institution had adopted an *unlawful act* in a matter which internally belongs to the Länder legislative competence, or where it had failed to fulfil a duty within such an area. The Federal Government, therefore, has to bring an action to the European Court of Justice, under Articles 173 or 175 of the EC Treaty, even at the request of one Land, so long as there is no express objection from any other Land.[33]

V. PARTICIPATION OF BELGIAN COMMUNITIES AND REGIONS IN THE EC DECISION MAKING PROCESS

A. The system of the third Federal State in the EC, Belgium, is characterised by an intention to give participation to the various linguistic groups in the field of EC matters. As is well known, the Belgian Federation consists of a trilingual community (*communauté*); Flemish, French, and German, belonging to the Flemish, Wallonien and Brussels regions, respectively (see Arts 1-3 of the Constitution of 17th February 1994). There are also 4 "linguistic territories" (Art 4 of the Constitution); the German, French, and Flemish linguistic territories and the bilingual territory of the capital, Brussels. Each local entity belongs to one of these linguistic territories. Furthermore, there is a subdivision into provinces (Art 5 of the Constitution), each of which is attributed to one of the Regions, though exceptions to this rule are possible. The Communities and the Regions have their own Parliaments (Councils) and Governments, with the power to enact decrees with legislative force in certain areas, namely culture, schools, matters concerning social relations, language, relations between the Communities and international co-operation, including the conclusion of treaties relating to the above mentioned areas.

B. There are three main fields of EC-related judicial dispositions that are of importance in this context.

a) the disposition of the internal power to determine the standpoint of Belgium in EC matters, in particular those relating to the deliberations in the EC Council, known as "co-ordination."

b) the rules relating to the identity of the minister (coming either from the Federation or a "federated entity" (*entités fédérées)*,

33. Main examples are regulations (Art. 189(2) EC Treaty) in matters belonging internally to Federal competences and directives (Art. 189(3) EC Treaty) in such competence matters.

i.e. Community or region) representing Belgium in the EC Council, known as representation, and in connection with this,

c) the regulation of the length of time that the representatives of the various entities have the right to act for Belgium in the EC Council.

The important dispositions in these three fields have been laid down principally in the Agreement of 8th March, 1994[34] on co-operation between the Federation, Communities and Regions concerning the representation of Belgium in the EC Council. This Agreement was supplemented by another concerning the participation of the so-called United Collegium of the Common Communities Commission[35] to determine Belgium's EC standpoint. These agreements are based on the Belgian Constitution and on various special Acts relating to the Belgian State's institutional structure dating from the years, 1980, 1983, and 1989 (with modifications in the 90s). It should be mentioned that these rules have been introduced in the light of the new text of Art 146 of the EC Treaty, which allows an EC Member State to be represented in the Council by a minister either of the Member State itself or of one of its territorial sub-entities.

C. As to "co-ordination," it should be said that it is organised by the so-called "Administrative Directory for European Affairs" (*Verwaltungsdirektion Europäische Angelegenheiten*) which is part of the Ministry of Foreign Affairs. This Directory summarises the "co-ordination meetings" which normally take place in adequate time before EC Council meetings, and refers to the singular issues which will be deliberated upon at these meetings. All important executive members of the various groups (Federation, federated entities) are invited to the co-ordination meetings, such as the representatives of the Belgian Prime Minister, the Vice Prime Minister, the minister of European Affairs, the presidents of the governments of the Communities and the Regions, the members of the latter governments responsible for foreign relations and the Permanent Representation of Belgium in the EC and the "attachés" of the Communities and Regions. The responsible ministers of the Federation and the Communities and Regions are also invited, according to the nature of the matter being deliberated in the EC Council. It can be seen clearly that the very complex composition of the co-ordination meetings is due to the need for adequate participation of the Flemish, Wallonic

34. Belgisch Staatsblad [Official Journal of Belgium], at 28217 (17th November 1994).
35. *Id.* at 28224.

and German population in all matters important for the Federation as a whole. Co-ordination also means consent. The standpoint of Belgium is not reached by majority vote but by debating until a compromise is reached. In the event of irreconcilable differences, an "appeal" can be made to the "Interministerial Conference in Foreign Affairs." If a solution cannot be found, the matter must be referred to the "Concertation Committee of the Federal Government and the Governments of the Communities and Regions" which has the task of finally establishing the Belgian standpoint.[36]

D. The next question to be posed is, who represents Belgium in the EC Council? There are four categories: (a) Belgium is exclusively represented by a federal minister, in matters in which the Federation has the principal internal competence, such as matters relating to the economy, currency and finances, justice, consumer protection etc.[37] (b) Belgium is represented by a federal minister who can negotiate and vote ("*ministre siégeant*"), but who is accompanied by a minister from one of the federated entities ("*ministre assesseur*"); this is so where matters such as agriculture, the internal market, environment etc are concerned. (c) Belgium is represented by a minister from one of the federated entities as the "acting" minister ("*ministre siégeant*"), with a supporting federal minister ("*ministre assesseur*"), in matters relating to industry and research. (d) The last category is that of a minister of one of the federated entities, who represents Belgium exclusively in areas affecting culture, schools, tourism, youth etc., without any supporting and accompanying federal minister. It should be said that the representation of Belgium in categories (c) and (d), by a federated entities minister, is based upon a transfer effected by Belgium and a member State whose rights to negotiate and vote in the Council are linked to membership and only submitted to be transferred to a sub-entity minister under Art. 146 of the EC Treaty.[38]

E. The *rotation system*[39] is important for the equal treatment of the above mentioned population groups in Belgium. The rotation period is half a year (corresponding to the period of a Member State's presidency in the Council). If the Council has several meetings during the half-year period to determine a matter such as environmental protection, the competent minister is authorised to

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36. See the explanation to the Cooperation Agreement which is an integral part of the latter.

37. See the list in Annex I to the Cooperation Agreement.

38. *See also* Explanations to the Cooperation Agreement in Staatsblad 1994 at 28221).

39. See Annex II to the Cooperation Agreement in Staatsblad 1994 to 28220.

represent Belgium in all the Council meetings; but if the Council has no such meeting during this period, but does in the following period, the competent minister is automatically authorised to represent Belgium in this matter during this latter period. Rotation means that the ministers of the various entities constituting the Belgian State, competent for a certain matter to be deliberated in the EC Council, shall in turn have the right to represent Belgium.

VI. COMPARATIVE SUMMARY

In all three EC Member States with federal structures, detailed systems of participation of the federated entities (the Länder in Germany and Austria, the Communities and Regions in Belgium) in the supranational decision-making process have been created. The underlying aim is to guarantee these entities co-operation rights not only at the internal, but also at the external level, and in particular at the level of supranational affairs which increasingly substitute for internal State action. This makes it necessary to equalise and reconcile the different parts of the Federation, in a vertical as well as (particularly in Belgium) in a horizontal sense, thus ensuring equal treatment of the different population groups.

It remains to be seen how efficient the participation mechanism proves itself to be in practice, in particular where consent is required for determining the Member State's position in the EC Council (as is the case in Belgium and Austria where Länder competences are affected). In these systems, the horizontal element of co-ordination between the Federation's members of equal status is evident. In Germany, the determination process is attributed to the Federal Council by majority vote. In all three countries, there seems to be a tendency towards "executive federalism": In most cases, the influence of the Federation's members (the Länder in Germany and Austria, and the Communities/Regions in Belgium) is transferred to executive bodies instead of to Parliaments (the Federal Parliaments in Austria and Germany are involved with varying degrees of influence, although only as far as federal legislative competences are concerned).

As to the degrees of participation of the federated entities, there is a detailed system of varying degrees of participation in Germany (depending upon federal as well as Länder areas of competence), while in Austria only Länder legislative matters are connected with Länder participation. In Belgium, all population groups co-operate in each area of competence.

A distinction must be drawn between the determination of the EC Member State's position to be upheld on the supranational level by internal institutions, which is discussed above, and the representation of the Member State in the EC institutions, especially the Council. All three states provide for direct representation by the Länder/Federated entities in areas of their own competence, the most detailed system being that of Belgium. It is always the Federation itself, however, which enables these sub-entities to perform this function. Until now, the general structure of these systems has proved adequate and largely efficient.