

"The federalizing process in Italy – challenges from an international perspective"

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Ladies and gentlemen,

First of all I would like to express my cordial thanks to the organisers for inviting me to this conference.

I shall start my presentation by considering very briefly the Bundesrat's history.

Subsequently I shall explain the Bundesrat's constitutional status and functions. I shall conclude by addressing the possible advantages and disadvantages of the German system and offering you my personal sight of these.

The current German federal system is the product of a historical process in which the Länder, the constitutive states, have always played a very significant role. Germany's federal structures can actually be traced right back to the days of the Holy Roman Empire. Particularly in the German Empire, founded in 1871, the constitutive states composing the Empire proved to be an instrument that made it possible to attain national unity without encroaching too much upon either the special rights of the individual states or the powers enjoyed by the independent princes who ruled there. Even in those early days, the Bundesrat offered scope for these princely aristocrats to participate in the Empire's legislation and administration.

Today's constitution also accords a very strong position to the federal states. As enshrined in the Basic Law the federal states constitute the Federation, giving them particular significance, as central government is subordinated to the Federation. Unless stipulated otherwise in the constitution, the federal states assume responsibility for exercising the state powers and for the functions of the state. The Federation is thus only competent to act if the requisite competence is transferred to it by law. However wide-ranging competences have actually been transferred to the Federa-

tion. That means, the Federation has gained greater influence when it comes to legislation. Tax legislation, including provisions on how public revenue is divided between the Federation and the federal states, also falls within the ambit of the Federation's competences. Conversely the federal states are responsible for administration and implementation of legislation adopted by the central state, with only a few exceptions to this general rule.

Through the Bundesrat, the Basic Law creates a structure to counterbalance the Federation's far-reaching powers. The Bundesrat's constitutional role is defined as follows in the Basic Law: "The *Länder* (federal states) shall participate through the Bundesrat in the legislation and administration of the Federation and in matters concerning the European Union."

The Bundesrat is not a genuine second chamber, but rather one of the five constitutional bodies – to be more precise the federative constitutional body. Just like each of the other constitutional bodies, it bears responsibility for the state as a whole, i.e. for the Federal Republic of Germany in its entirety. In addition, the Bundesrat constitutes an institutionalised counterweight to the Federal Government and the Bundestag.

The Bundesrat exists to avert potential abuses of power and thus complements the classical system of division of powers as an additional body that supervises the proper functioning of the federal system.

The system determining the composition of the Bundesrat picks up on the models found in the chamber's predecessors throughout German history: just as the case in these earlier assemblies, the Bundesrat brings together the leaders of the executive from each federal state. Tellingly, the Bundesrat is therefore described as the "parliament of (*Land*) executives", just as German federalism is dubbed executive federalism.

That also provides an explanation for a further particularity of the Bundesrat: the members of the Bundesrat are not elected but are appointed on the basis of decisions adopted by the cabinets in the federal states. As there are never elections to

the Bundesrat, it exists in perpetuity.

The Bundesrat is therefore also described as an eternal constitutional body, and its membership may only change whenever an election is held in one of the federal states.

The plenary session of the Bundesrat is made up of the Bundesrat members from the federal states; each Land has the same number of members as the number of votes allocated to it. The Basic Law provides for a tiered system for allocating votes. Each federal state has at least three and at most six votes, with the number of votes being determined by the number of inhabitants in each federal state. At present the Bundesrat comprises 69 full members and ca. 100 alternate members.

Another unusual feature for a second chamber is the imperative mandate that applies to members of the Bundesrat, i.e. they are bound by decisions taken by the governments in their federal states. That means that the members of the Bundesrat must represent the interests of their federal state rather than adopting their own independent stance.

Looking at the Bundesrat from the perspective of a comparison with other systems, a still more unusual feature is the obligation to vote en bloc. Each federal state must cast all its votes either for or against a motion – i.e. en bloc – on the basis of the position determined in the cabinet of that federal state. For that reason parliamentary groups do not exist in the Bundesrat. The members' political persuasions therefore play a subordinate role.

The rigid provisions on majority voting in the Bundesrat are also unparalleled. The Basic Law stipulates that a majority of the votes of all members must be cast in favour of a motion when decisions are taken - in other words, an absolute majority is required. Abstentions therefore have the same effect as voting against a particular motion.

The election of the President of the Bundesrat is entirely outside the realm of party political influence. Every year the President of the Bundesrat comes from a different federal state, with each federal state taking their turn in accordance with a rota de-

terminated on the basis of the number of inhabitants in the various federal states. This rotation system guarantees that all federal states are treated equally and ensures that the Federal Republic of Germany's diversity is reflected through the Bundesrat.

The President of the Bundesrat is granted certain powers, which are above all of a formal nature. The office is particularly significant as the President of the Bundesrat stands in as a representative for the Federal President whenever the need arises.

I shall now briefly address the most important functions tasks of the Bundesrat. Although the Bundesrat is made up of representatives from the federal states' executives, it nonetheless forms part of the legislative at the level of the Federation. The Bundesrat exercises legislative powers in conjunction with the Bundestag. Although legislation is adopted by the Bundestag, the Bundesrat participates throughout the decision-making process for all bills.

The primary focus of the Bundesrat's work is scrutinizing draft legislation from the Federal Government. In this context the Bundesrat has the "first say" in parliamentary deliberations. The expertise of the federal states is integrated into the process through deliberations in the committees and through the Opinions adopted by the plenary. It is not unusual for the Federal Government and later the Bundestag to find that changes must be made as a consequence of the Bundesrat's Opinions.

The influence of the Bundesrat becomes particularly apparent in the case of what we call consent bills. The main areas that fall into this category are amendments to the constitution, together with legislation on public revenue and on the federal states' administrative sovereignty. Since 1992, transfers of sovereign rights in the course of the European Union's development have also been assigned to this category.

If the Bundesrat does not vote in favour of a consent bill after the Mediation Committee has been convened to resolve any disagreements, then the bill in question cannot get into force.

A parenthesis:

The Mediation Committee is a joint Bundesrat and Bundestag body, which can mediate between the two assemblies should they have conflicting opinions on a particular

bill.

All other Bundestag draft legislation falls into the category of objection bills. The Bundesrat has less scope to bring its influence to bear in this legislative category. If the Bundesrat tables an objection at the end of a mediation procedure, this objection can be overturned if the Bundestag achieves the requisite majority in a vote against the objection.

The Bundesrat's other responsibilities, which have assumed increasing importance, include its participation in matters pertaining to the EU. The Bundesrat also adopts Opinions on draft EU legislation. If the draft legislation primarily concerns the legislative powers of the federal states, their authorities or administrative procedures, the Bundesrat's position "shall be given the greatest possible respect". In such cases the Bundesrat de facto determines the position adopted by Germany in the Council of Ministers. Under certain circumstances this applies even if the Bundesrat and the Federal Government disagree on the approach that should be taken. In addition to these rights to express its opinion, the Treaty of Lisbon's provisions on enhanced opportunities for national parliaments to bring their influence to bear also of course apply to the Bundesrat. (key term: subsidiarity).

Ladies and gentlemen,

I would now like to address the advantages and disadvantages of the Bundesrat model.

I shall begin with the system for determining the composition of the Bundesrat. It has often been argued that this system is undemocratic, and there have been repeated calls to replace the Bundesrat by a directly elected second chamber.

However, as the whole point is that the Bundesrat exists to represent the federal states, the long-established system has been maintained, with the governments from the various federal states represented in the Bundesrat. Furthermore, a directly elected Bundesrat would pave the way for the much-maligned competition between parties to appear here too.

Moreover, the current system for determining the Bundesrat's composition also has

numerous advantages.

On the one hand, it makes it possible for the federal states to represent their interests effectively. That is because the governments in the federal states have the resources needed to do this, both in terms of human resources and in terms of the requisite expertise. This stems from their experience of enforcing legislation, a task for which the executive in each of the federal states bears responsibility.

The Bundesrat's executive composition is a crucial quality factor in its work, and this becomes particularly apparent in the Bundesrat's committees. These committees carefully scrutinise draft bills and decide whether amendments should be proposed. During work in the committees, a kind of competition develops between the positions of the various federal states. Generally amendments are supported or rejected on their merits, rather than in the light of party political considerations. Cooperation between the federal states in the Bundesrat committees thus also helps to avert flawed decisions on major issues that are important for the whole country. That is why the Federal Government and the Bundestag give so much weight to the Bundesrat's Opinions in their deliberations, as described above.

The Bundesrat's influence on legislation is also augmented because it is involved in the legislative procedure at an early stage. The federal states submit their comments at a phase when a draft bill can easily be amended.

There is another advantage to the system for determining the Bundesrat's composition: it ensures that party political discussions that have already been conducted in the Bundestag are not simply replicated along more or less the same lines in the Bundesrat. The significance of party political debates is diminished because the members of the Bundesrat represent the interests of the government in each federal state. This becomes particularly clear in the plenary session debates: the discussions are much more to the point and focussed on solutions in the Bundesrat than in the Bundestag.

Of course, membership of a federal state government is per se no guarantee that party political considerations will be disregarded. It is noticeable however that being a member of a federal state government offers leverage to deviate from the party line on occasion – sometimes to a rather dramatic degree. It is also fair to say that the executive composition of the Bundesrat reduces the degree of influence that

lobby groups and various camps within political parties can exert on the legislative process.

There is a risk that debates may become more heated when the balance of power in the Bundesrat and the Bundestag differs or when elections to the German Bundestag are imminent. In such cases party political interests may gain the upper hand in the Bundesrat too, pushing the interests of the federal states into the background.

This became apparent for the first time from 1969 to 1982 during the so-called social-liberal coalition government (a coalition of the Social Democratic Party and the Free Democratic Party), which was constantly affected by the problem of shifting majorities in the Bundesrat. Since that period, voting behaviour in the Bundesrat has sometimes been used as part of the opposition's strategy.

This rapidly gave rise to a charge that is still levelled today, for some blame the Bundesrat for impeding or paralysing federal legislation. This reproach is however not tenable in these simple terms.

It is true to say that the potential for conflict has grown with the increasing influence of the Bundesrat in the legislative process. Since the foundation of the Federal Republic of Germany, more and more legislative competences once within the ambit of the federal states have been transferred to the Federation. There has however been a reciprocal increase in the number of consent bills. 53 per cent of all bills fell into this category in 2006. The first Commission on Reform of Federalism restructured the division of legislative competences of the Federation and the federal states, leading to fewer consent bills; these bills currently account for around 40 per cent of all legislation.

However, the political clout of the Bundesrat continues to be felt on financial issues. As I mentioned before, the federal states essentially do not have any fiscal autonomy in their own right. The budgets of the federal states are also funded from public revenue, and, as federal laws stipulate the provisions in this sphere, the Bundesrat also participates in determining these budgets. In addition, public finance law provides for a large number of mixed financing competences, meaning that both the

Federation and the federal states participate in financing in these areas. Furthermore, the 16 federal states vary dramatically in terms of their size and economic resources. As harmonising living standards across the country is very important to many voters, the federal states pay particular attention to utilising their power in the Bundesrat to ensure their financial interests are taken fully into account.

Attempts have been made to disentangle this intermingling in respect of fiscal policy by restructuring the system of financial relations between the Federation and the federal states, but these endeavours have proved unsuccessful. In the second Commission on Reform of Federalism, the Federation and the federal states only managed to agree to either reduce the levels of new debt incurred, with a waiver for crisis situations, or not to incur any new debts in the future.

Although the Bundesrat may act as a “hindrance” to the government majority in the Bundestag, it is excessively harsh to say the Bundesrat “obstructs” legislation. The Mediation Committee is of course convened if there is a difference of opinion between the two chambers. Generally both sides do however manage to reach a viable compromise through the mediation procedure. In the 60 years and more that the Federal Republic of Germany has existed, only a very small number of bills (less than 1 per cent of all legislation) have failed to be adopted due to Bundesrat objections.

Another equally misplaced criticism is that the Bundesrat engages solely in opposition politics. This line of argument overlooks the fact that the Bundesrat requests that the Mediation Committee be convened even when the political balance of power is the same in the Bundestag and the Bundesrat. That should never happen if party politics were the sole consideration; the fact this scenario does arise serves as a confirmation that the Bundesrat represents the interests of the federal states. Furthermore, it is also revealing to note that this criticism is only ever voiced by the government or the party with a majority in the Bundestag when the majority in the Bundesrat is held by their political opponents.

A more fitting interpretation is therefore that the Bundesrat is simply fulfilling its functions – namely exercising oversight and presenting an alternative approach – when it requests that the Mediation Committee intervene. The Bundesrat is thus fulfilling its role of providing an additional level of supervision for the political system. This has become especially apparent when politically controversial bills are examined,

dealing, for example, with social welfare, domestic security or taxation issues. The compromises that are reached, which pay due attention to the interests of the federal states, have contributed a great deal to stability and social peace in Germany. The Mediation Committee should therefore be seen as a crucial instrument to ensure that the checks and balances in the political system are respected, and it also plays a vital part in striking an equitable balance between diverging political and social interests. It serves as a complement to the principle of consensus enshrined in the Bundesrat model.

The voting rules in the Bundesrat are also an expression of this consensus principle. I am referring here first of all to the principle whereby votes must be cast en bloc, which makes it imperative to reach an agreement before voting. The consensus principle is also manifested in the strict requirement for an absolute majority when decisions are taken in the Bundesrat's plenary sessions.

One important advantage of casting votes en bloc is that governments in the federal states must engage in intensive discussions before a decision is to be taken and these debates must ultimately make it possible for each federal state to adopt a clear stance. This calls for intensive exchanges of opinions and at the same time ensures that any decision reached has been thought through carefully.

As the influence of traditional parties is increasingly dwindling, and as classical government coalitions are therefore also less frequent, it is certainly not always easy to establish this kind of consensus. A clear stance is however indispensable when seeking solutions to political problems. That means that introducing split voting rather than mandatory en bloc voting, as some have advocated, is not an alternative. Split voting would only open the floodgates of party political influence in Bundesrat. Conversely, the obligation for each federal state to cast its votes en bloc ensures that each federal state's interests are the decisive factor in decisions taken by federal state governments and – particularly in the case of coalitions in the federal states – not party political interests.

Just as the principle of en bloc voting should be maintained, there is also no need to alter the current rules on obtaining a majority. Critics of these provisions would like a simple majority rather than an absolute majority to suffice, claiming this would make the Bundesrat better able to act. Abstentions in a vote would then count as genuine abstentions and not, as it is currently the case, as de facto votes against a motion.

The background to these proposed changes is the assumption that the increasing number of coalitions in the federal states, a phenomenon that has developed due to the shifts in the constellation of political parties in Germany, will lead to abstentions when there is a vote on a controversial issue in the Bundesrat. This gives rise to fears that it will become increasingly difficult to attain the requisite majority in the Bundesrat. Ultimately however, these proposals would signify moving away from the consensus principle, which is enshrined in the Bundesrat model on the basis of constitutional provisions, and for that reason these proposals should simply be rejected.

I would like to finish my presentation with the following conclusions:

The Bundesrat model has been tried and tested in Germany for more than 60 years. The Bundesrat as an institution facilitates excellent cooperation between the Federation and the federal states on the important issues of legislation, administration and European affairs. In particular, the way in which the Bundesrat's composition is determined means that the Bundesrat model demands and fosters effective exchanges of expertise and ideas. The Bundesrat's position of strength does indeed make rapid decision-making more difficult in some cases. It would however be erroneous to view the Bundesrat purely as an obstacle; it is much more accurate to note that the Bundesrat model makes it possible to conduct complex negotiations. At the same time however this model also spurs decision-making and makes it essential to reach compromises.

This German model can certainly not serve as a role model for other states in every single respect. It does however have clear strengths, namely involving the federal states – in other words, the regions – in responsibility for the functions of the state, and in the Bundesrat's key role of additional supervision of the proper workings of the federal system.

Thank you for your attention.