

# ##TRADE IN THE LINDAU AGREEMENT AS FEDERAL MATTER###

## Brexit – Common Frameworks

### (Germany)

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#### Executive Summary

Common frameworks are rare in Germany. As Germany is a federal polity, the net effects which common frameworks will deliver in the UK are contained within the institutional architecture of the federal state itself, through both formal and informal channels. Further, Germany is regarded as an example of cooperative federalism, a highly integrated political system which necessitates cooperation between levels of authority and consensual decision making. This in itself is regarded as a means by which to contain wide deviations in policy between the 16 Länder, and to ensure a high degree of policy coherence.

The term “Common Framework” is not well understood in the German context, nor is its principle. Federalism and joint or cooperative policy making is so deeply enshrined in the political imagination in Germany that the outcomes that common frameworks are aiming to prevent in the UK seem alien, and are indeed frowned upon both by politicians and by the public. Confusingly, the term *is* however common in EU jargon, and can be found in policy fields such as language learning and the Common European Framework of Reference for Languages. Thus to use this term suggests reference to an EU policy rather than a domestic issue in Germany.

The short answer is that Common Frameworks per se, as they are envisaged for Britain, do not exist in the German context. Instead, the German federal system offers various mechanisms by which national policy coherence is achieved, even in areas which are not regulated by EU legislative frameworks. In short, the chief ways in which policy coherence is achieved across German territory with its 16 sub-state parliaments are:

- 1) Collaboration between regional executives in the Upper House of the national legislature, the *Bundesrat* (Federal Council), which offers sub-state perspectives the ability to shape directly the national legislative process, and at times even offers veto rights
- 2) A unified party system with little representation of territorial interests
- 3) A highly networked system of “interlocking” and “cooperative” federalism, which in itself makes policy deviation difficult
- 4) A legal regulatory system which ensures national coherence on standards, not least through the rulings of the Constitutional Court, but also a dense network

of other watchdogs (horizontal ministerial councils, the stability council and such like) – all underpinned by a constitutional ethos of “*Bundestreue*” – loyalty to the federation and the federal principle.

- 5) A unified political culture, which frowns upon variations in standards across the territory of Germany, expressed most sharply through public distaste for anything approaching a competitive model of federalism, or even adjustments to the highly-prized cooperative model which has been established in post-war Germany.
- 6) A deeply rooted sense of social citizenship across Germany as a whole, where standards should be equal irrespective of location. This is in spite of the fact that the constitutionally enshrined objective of an equivalence of living standards across the territory had come under fire lately for penalising the more economically successful Länder.
- 7) An integrated civil service, which also works to the principle of fidelity to the federation. My own research on the impact of the most recent federal reforms of 2006, which aimed to disentangle complex patterns of responsibility across policy areas, found that in the area of criminal justice, which was devolved to the Länder as part of this reform process, civil servants from the justice ministries in the 16 Länder set up their own forum to work together on the drafting of their new, Land-specific, versions of a law on criminal justice. They then collaborated on a skeleton text for this, which most of them then used as the basis for their new laws, thereby limiting further the potential for deviation from a national standard on criminal justice.
- 8) Economic limitations on the ability of Land-level governments to spend their way towards huge differences in approach; both the horizontal fiscal equalisation system and the new debt brake are elements of a wider system that ensures broadly similar spending levels and hence policy outcomes across the entirety of the German state.
- 9) The German constitution, the *Grundgesetz* or “Basic Law”, sets out the precise role for the Länder in European affairs (Article 23) and International Affairs (Articles 24 and 32). Whilst this does offer some scope for the autonomous engagement of the Länder in the international arena, German law establishes clear and tight guidelines on how to proceed, mostly guided by the principle that the Länder cannot depart from the fundamental guidelines of federal foreign policy.
- 10) If European policy proposals have an impact on areas of the exclusive competence of the Land, then the Federal Government has to consult the

Länder through the Bundesrat before signing the treaty that contains these measures (Article 23 of the Basic Law).

- 11) If international treaties contain provisions that affect state competencies, the federal government should, according to the *Lindauer Abkommen* (Lindau Agreement), inform the states and obtain their consent through the *Ständige Vertragskommission der Länder* (permanent treaty commission of the Länder).
- 12) The main difference between the Lindau Agreement and Article 23 of the Basic Law on the EU is that whilst both ultimately give the Länder the final say, if their exclusive competences are affected, in the field of foreign policy-making the position of the German Länder has to be formulated on the basis of *unanimity* whereas in the field of European policy making *majority* decisions are taken by the Bundesrat. Unsurprisingly, therefore, when “mixed” or “hybrid” agreements are being negotiated between the EU and non-EU countries (which need to be ratified by the Parliaments of the EU’s member states), there are differing legal viewpoints held by the Länder and by the Federal Government regarding whether Land involvement in the treaty negotiations should happen via the procedures set out in Article 23 of the Basic Law or via the procedures of the Lindau Agreement.

The following briefing covers the principal areas of intergovernmental relations within Germany which are relevant for an analysis of common frameworks in the UK after Brexit, alongside analysis of the scope for autonomous international engagement by the German Länder, as provided for by the German federal system.

### **Germany’s federalism as an “interlocked” polity**

In comparative research on federal governance, Germany has been classified as a prototype of cooperative federalism and joint decision-making. This aims to offer an integrated decision-making framework and allow for the permanent accommodation of territorial viewpoints, and, significant in light of Germany’s modern history, makes it difficult for any one centre of authority to aggregate power. The inclusion of sub-state perspectives in the national decision making process through the institution of the Bundesrat (where each Land has a number of votes according to population size) is a core example of cooperative federalism in practice.

Germany’s federal structure as a whole is described as “executive federalism”. This term is used to explain the elevated position of Land-level governments and administrations in German federalism. These participate at different levels within the state and decision making. Through the Bundesrat they even have a direct role to play in the national legislative process. The *Landtage* (Länder parliaments) by contrast are not directly involved in this process. Their role is limited primarily to the implementation of national legislation in the Land-level context. Compromises which are negotiated in national legislation are not subsequently analysed or contested by regional parliaments. Land-level executives thus take a leading role. But Land parliaments do

have the ability to shape the position taken by Land executives through the normal parliamentary process, political party working groups, and their own committees.

At the same time, German federalism today is described as being “interlocked”, a term that suggests this permanent drive to find territorial consensus is not without its downsides. The original design of the German federal model (the Basic Law was drafted by the Allies in 1949) never envisaged this “interlocked” system of decision taking. But over the years, incremental changes, primarily responses to new challenges which necessitated new governance frameworks and in a number of instances, funding from different levels of government, drove the development of cooperative arenas, and this “locked in” numerous vested interests from the German system, into a constant cycle of negotiation.

The obvious shortcomings of cooperative federalism and this dense system of joint decision-making, was widely criticised because it typically causes long decision-making processes, incrementalism and policy solutions at the lowest common denominator<sup>1</sup>. Germany’s federal system, by the late 1990s was criticized for being too “interlocked”, unable to change, and unable to meet the demands of flexible governance and rapid decision-making that the challenges of globalisation and European integration brought with them.

The inclusion of veto players in the decision making forums which were established, effectively meant anything more than incremental system change would be momentarily difficult to achieve, and that is why German federalism has been described as unable to change itself. The thresholds for constitutional change are enormous; two thirds of the votes in both Chambers, the Bundesrat and the Bundestag, must vote for the change in order for an amendment to the Basic Law to be approved. Thus, the fact that changes were introduced in 2006 and again in 2009, is indeed noteworthy.

The reforms undertaken in the 2000s were inspired by models of dual federalism, such as US federalism, where there is a clear separation of powers. The aim in Germany was to disentangle a number of the most interlocked policy fields and to separate, as in the US system, more neatly the competences of the German Länder and the Federal Government. Ultimately this meant that disentanglement, a clearer assignment of powers to the territorial units and more competition became the central vision of the 2006 reform<sup>2</sup>. Dual federalism, with its distinct allocation of jurisdictions provides decision-making structures which are transparent to citizens, secures the accountability of political decision-makers and establishes federal competition driving innovation – which is alleged to enhance living standards. Finally, the idea of competition as opposed to solidarity is attractive to the financially stronger states in a federation as it implies less redistribution.

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<sup>1</sup> Scharpf, Fritz (1988) “The Joint-Decision Trap: Lessons from German Federalism and European Integration”, In: *Public Administration*, Volume 66, Issue 3, September 1988, pp. 239-278.

<sup>2</sup> Kropp, Sabine and Behnke, Nathalie (2016) “Marble Cake dreaming of layer cake: the merits and pitfalls of disentanglement in German federalism reform”, In *Regional and Federal Studies*, Volume 26 Issue 5, pp. 667-686.

## **Types of common framework**

Common Frameworks as such as rarely used in Germany and there is really only one comparable arrangement. This relates to the setting of education standards across the entirety of the German state, and aims to ensure that school level education is delivered equally to students irrespective of their location within Germany.

There are two reasons why this is significant. Firstly, education (and culture) are core responsibilities of the German Länder, and are a focus of Land-level pride and distinctiveness.

Secondly, because this fiercely proud sense that autonomy over education and culture is inherent to the Länder's whole *raison d'être*, removing national government interference in education and cultural issues became something of a rallying cry, during the process to reform German federalism in the early 2000s. The Länder successfully campaigned to have all Federal Government involvement in their school systems removed, underscoring their full right to autonomy in this field.

## **Fiscal federalism as a form of common framework**

The German model of fiscal federalism also serves to integrate policy and decision-making, with the net result that wide variations are contained and are not tolerated within the system. The original ambition set out in the Basic Law was to secure equality of living standards across the country through a horizontal "equalisation" system, namely the redistribution of tax revenues raised at the Land level. This proved unworkable after reunification in 1990, and the wording was subsequently changed to read "equivalence" of living conditions; this prevented the richer, economically more prosperous West German Länder having to shore up permanently the poorer and newer entrants to the system, the East German Länder, after 1990.

The third step of the federal reform process of the early 2000s, took issue with precisely this set of arrangements. The financial equalisation system was seen as so controversial and so complex that it was removed from the agenda of the earlier negotiations processes, in order to help secure a deal in other areas first. Issues of redistribution were finally settled in late 2016, when agreement between the Federal Government and the Länder on a post-2020 framework for fiscal relations was hammered out. In return for a sizeable sum of 9.7 billion per year per Land extra ostensibly to "carry out" their obligations under the terms of the Basic Law, the Länder governments will in future see horizontal solidarity payments being redistributed on the basis of population size – a big issue for rich and powerful Bavaria with its large population size. The East German Länder have been struggling with declining population sizes in recent years as younger citizens move elsewhere in search of opportunities and personal prosperity.

The 2016 agreement also resolved a particular issue which had proved problematic under Germany's decentralised policy framework. The changes made see the Federal Government take on sole responsibility for the planning, building, running, maintenance and financing of motorways. This change was made as a way of streamlining responsibility for an issue of nation-wide concern; governance of motorways had previously been subject to a complex set of federal, Land-level and

joint responsibilities, which had led to numerous problems. This change aims to provide a more efficient structure for a nation-wide issue.

### **The Debt Brake – limits on public spending after 2020**

By 2020, the Länder are also obliged to implement Germany's new "debt brake" (*Schuldenbremse*). This was introduced following agreement on a package of federal reforms in 2009. It is now enshrined in the Basic Law and was designed to prevent excessive borrowing by individual Länder, as previous regulations using soft debt limits and de facto implicit debt guarantees between the different levels of government had not proven effective. For the Länder, structural deficits (i.e. adjusted for the business cycle) will be completely forbidden after 2020. If natural or economic disaster strikes, deficit limits can be suspended. The extra debt can be paid off when conditions improve. The idea is to slash public debt from a decadent 83% of GDP (in 2010, close to France's rate) and never again to stray from the path of fiscal virtue.

The debt brake is widely seen as having two principal flaws. First, it breaks the so-called "golden rule" that governments should be able to borrow to make investments that pay long-term dividends, such as in education. Secondly, it could kill off recoveries. The structural target allows deficits to rise when output falls below its potential. These should then be offset with surpluses during the boom years. But this assumption is based on "perfect" economic cycles; in the real world, economic cycles are erratic. A recession followed by a weak recovery can shrink potential growth, which in turn could restrict the deficit spending needed to revive demand.

The *Schuldenbremse* is complicated and tricky to enforce and Germany has yet to put its debt brake to the test. Political oversight is guaranteed by way of a "stability council" (*Stabilitätsrat*) composed of federal and state ministers, has little power to sanction offenders.

### **The Länder and international relations**

The Länder have a claim to be involved in the external relations of the federal nation state, and these are in many areas fixed by law particularly in areas where the Länder are competent domestically. Three separate articles of the Basic Law explain how the Länder are permitted to engage in the international arena.

- 1) The Länder have the most extensive scope for autonomous action, internationally, in the area of European policy, and Article 23 of the Basic Law covers this (fuller detail below).
- 2) Article 24 Paragraph 1a of the Basic Law says that "Insofar as the Länder are competent to exercise state powers and to perform state functions, they may, with the consent of the Federal Government, transfer sovereign powers to transfrontier institutions in neighbouring regions."

This provision allows for cross-border cooperation mainly on pragmatic issues; most of Germany's Länder have an international land border. Everyday

concerns are dealt with by the Länder and their foreign counterparts without involving national authorities in most cases<sup>3</sup> (Michelmann, 1988).

A number of “transfrontier” organisations institutionalise such cooperation, such as:

- the “Arge-Alp” (Arbeitsgemeinschaft AlpenLänder), working group of Alpine states, which brings together Bavaria, Austrian Länder, Swiss Cantons and Italian regions, and has a functional remit to deal with common problems extending from preservation of Alpine environments to the promotion of tourism.
- Bavaria is also involved in a commission with Swiss cantons to deal with the management of concerns related to Lake Constance

3) The precise role of the Länder in *international* treaty negotiation is set out in the Basic Law. Article 32 of the Basic Law (Foreign Relations) states that:

- (Paragraph 1) Relations with foreign states shall be conducted by the Federation
- (Paragraph 2) Before the conclusion of a treaty affecting the special circumstances of a Land, that Land shall be consulted in timely fashion
- (Paragraph 3) Insofar as the Länder have power to legislate, they may conclude treaties with foreign states with the consent of the Federal Government

Although Paragraph 3 gives the Länder scope for formal treaty making in their areas of jurisdiction, for a variety of reasons there have been very few such treaties with foreign states over the years, and they are of limited significance. Treaties and agreements have been concluded both with national governments – such as with the federal government of Austria, Belgium or with the French government - as well as with other sub-state jurisdictions, such as the Swiss cantons. As Germany shares so many international borders, and 10 out of the 16 Länder have an international border, inter-governmental agreements at the sub-state level are crucial. It is therefore not surprising that the bulk of international agreements concluded by the German Länder relate to cross-border issues<sup>4</sup>, such as:

- Environmental protection
- Fishing
- Water policy
- Bridges
- Hydro-electric exploitation of frontier waters
- Hospitals in border areas

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<sup>3</sup> Michelmann, Hans (1988) “Länder Paradiplomacy”, In: *German Politics and Society* Volume 15, October 1988, pp. 22-31.

<sup>4</sup> Nagel, Klaus-Jürgen (2010) “Foreign Policy: The Case of the German Länder”, In: Ferran, Requejo (ed.) *Foreign Policy of Constituents Units at the Beginning of the 21<sup>st</sup> Century*, pp. 121-142.

- University research institutes

However, it is important to note that whilst Article 32 (3) only refers to “foreign states”, by implication the Länder can conclude treaties and agreements with all international legal subjects. Agreements between the Länder and those entities which have no international legal personality lie outside the sphere of application of Article 32 (3)<sup>5</sup>. Therefore the federal government’s consent is not required<sup>6</sup>.

There are a number of reasons, then, why the constitutional provision that allows the Länder to sign international treaties has remained largely insignificant over time.

First, several factors have contributed to the reality that few significant legislative powers remain with the Länder *alone* - a generous assignment of powers to the federation, the unusual breadth of the area of concurrent jurisdiction in the Basic Law and the speed with which the federation can turn matters falling under concurrent jurisdiction into federal concerns; and the formal amendment of the Basic Law over the years which has gradually permitted the federation to become active in areas of Länder jurisdiction.

Secondly, federal governments in Germany have jealously guarded their prerogatives over foreign relations.

Thirdly the federal government must give its assent to Länder treaties to make them domestically binding, and Foreign Office opposition thus goes a long way towards halting any Land initiative in this regard.

Finally, and most importantly, the federation and the Länder have devised a practical arrangement for dealing with the international treaties which touch on domestic issues falling under Länder or concurrent jurisdiction, the *Lindauer Abkommen* (Lindau Agreement), created in 1957. This sets out a process for securing the full approval of the Länder directly (outside of the Bundesrat framework in the normal legislative process) on international agreements.

This is not a legally enforceable framework but rather something of a gentleman’s agreement that has worked well in practice since its inception.

This domestic process of interest accommodation on international matters prior to treaty signing has provided a more effective route in most instances than direct international treaty-making by the individual Länder.

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<sup>5</sup> A further legal step on providing for sub-state cross-border cooperation was taken in 1996, when the “Karlsruhe Agreement on cross-border cooperation” was signed by the leaders of the German Länder, the French regions and Swiss cantons, and was signed by the French and German foreign ministers. The Bundesrat agreed to this in May 1997. This treaty provides a new legal frame for cross-border cooperation between chambers of commerce, voluntary organisations, local and regional community groups and so on, all of whom are now free to set up cooperation agreements with partners on the other side of their borders.

<sup>6</sup> Panara, Carlo (2010) “In the Name of Cooperation: The External Relations of the German Länder and Their Participation in the EU Decision-Making”. In: *European Constitutional Law Review*, Volume 6, Issue 1, February 2010, pp. 59-83.

### ***The Lindau Agreement – a forum for intergovernmental negotiation on international treaties***

The Lindau Agreement offers a practical solution to the ambiguity of the constitutional text. The wording of Paragraph 3 of Article 32 of the German Basic Law (Treaty-Making Powers and Foreign Relations) allows room for two different interpretations of the question of international treaty-making powers in areas of Länder competence. On one side the Länder maintain that this power resides exclusively with them as the transposition of obligations arising from such treaties into internal German law is also a matter of their exclusive competence. On the other side, the federation insists that it has a concurrent competence in this field of the treaty-making power, irrespective of the allocation of corresponding functions in the area of transposition. This dispute has never been settled legally, but the Lindau Agreement offers a mode of practice typical of German federalism which allows both sides to hold to their respective views without disturbing the conduct of business.

The Lindau Convention assigns the federal government the leading role in negotiating with Germany's foreign partners in areas of joint Länder-federal jurisdiction or with respect to such treaties in which Länder jurisdiction is affected in only a minor way. In this way, the Länder are consulted before a treaty is concluded, especially on matters in which they have unquestioned expertise and also because the domestic implementation of those treaties is frequently their responsibility. For matters that are exclusively under Länder jurisdiction, primarily culture and education, the federal government must have Länder consent before a treaty is concluded with the foreign partner state, and the Länder representatives participate in formulating the German position.

The central institution in the operation of the Lindau Agreement is the *Ständige Vertragskommission der Länder* (Permanent Treaty Commission of the Länder). It meets monthly and consists of civil servants from the Länder representations to the federation in Berlin (one from each of the 16 representations). Their function is to communicate demands of the Länder concerning draft treaties to the federal government and to coordinate their recommendations both within and between the Länder (the function of coordination within the Länder is mostly performed by the cabinet offices, which then convey the results to the Missions). The proceedings of the Treaty Commission, assisted by a permanent secretariat in the Bavarian Mission, generally commence with the examination of a draft treaty or agreement conveyed to it by the Foreign Ministry or by any other federal ministry negotiating or intending to negotiate terms with a foreign power or international organisation. In some cases, however, the secretariat of the Commission may itself approach the federal government with the demand to be informed of negotiations which have become known to the Länder<sup>7</sup>.

The examination initially focuses on whether the draft under review falls under the terms of Point 3 or Point 4 of the Lindau Agreement. Under the regulations in Point 3,

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<sup>7</sup> Leonardy, Uwe (1999) "The Institutional Structures of German Federalism", in Jeffery, C. (ed) *Recasting German Federalism. The Legacies of Unification* (London: Pinter), pp. 3 – 22.

the participation of the Länder in the preparation of treaties touching upon any of their exclusive competences must be sought by the federation “as early as possible, but certainly before final agreement is reached on the treaty text”. The consent of all the Länder must be secured before obligations created by the treaty achieve validity under international law. The legislative process of ratification, beginning with the treaty being sent to the Bundesrat, does not normally start in these cases before the federal government has asked for the consent of the Länder to be given. The position of the Länder is thus particularly strong in this field. Point 4 of the Lindau Agreement covers issues which touch substantially on Länder interests, irrespective of whether these are exclusive competences of the Länder. Here, the agreement of the Länder is not a prerequisite but the Länder must be informed early about proposed treaties relating to these areas, in order that they have time to put forward their own preferences<sup>8</sup>.

The Lindau procedure ensures that any demands made by the Länder for the alteration of, or amendment to, the treaty text can be taken into account at a sufficiently early stage in the negotiations with the foreign power or international body concerned. As most of these cases concern cultural affairs (such as the mutual recognition of diplomas or other educational matters), a representative of the Secretariat of the Permanent Conference of Länder Ministers of Culture almost always takes part in an advisory capacity in the deliberations of the Permanent Treaty Commission. The Commission then decides on an opinion to be conveyed to the federal ministry in charge. If the solution reached by the federal ministry appears to be unsatisfactory to the Commission after further consultation by its members of the relevant departments of their respective governments, the original opinion or a modified version of it may need to be restated<sup>9</sup>.

Whilst in practice the Lindau Agreement works well as a forum for resolving any differences between national and sub-state perspectives on international issues, and public disputes are rare, there are suggestions that in the field of environmental policy, for instance, which a complex policy area with numerous, overlapping Land-level, federal-level and concurrent domestic responsibilities, there often remain discrepancies between Länder and the Federal Government which can, for example, result in implementation difficulties<sup>10</sup>.

### **Evaluation of the Lindau Agreement**

Essentially, the need for unity which the Lindau Agreement requires, secures over the long term the readiness of the Länder to transpose international agreements which touch on their exclusive domestic competences of the Länder<sup>11</sup>.

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<sup>8</sup> The full text of the Lindau Agreement is available (in German) at <http://www.lexexakt.de/index.php/glossar/lindauerabkommtext.php>

<sup>9</sup> Leonardy, Uwe (1999) “The Institutional Structures of German Federalism”, in Jeffery, C. (ed) *Recasting German Federalism. The Legacies of Unification* (London: Pinter), pp. 3 – 22.

<sup>10</sup> Engel, Sabine and Zimmermann, Melanie (2007) “Environmental institutions in Germany: Leader or Laggard?” In: Breton, A., G. Brusio, S. Dalmazzone and G. Garonne (eds.) *Environmental Governance and Decentralisation* (Cheltenham, Edward Elgar), pp. 173-222.

<sup>11</sup> Lindner, Sebastian (2015) *Zwischen Öffnung und Abgrenzung. Die Geschichte des innerdeutschen Kulturabkommens* (Christoph Links Verlag, Berlin)

Furthermore, it should be noted that in a large number of cases, foreign countries would not have been prepared to negotiate and conclude treaties with each individual Land, meaning that the Lindau Agreement effectively gives substance to the Land governments that they otherwise would not have had, regardless of the competence in question. Ultimately, the right to conclude contracts is valuable only to the extent that contractual partners can be found<sup>12</sup>.

Overall, therefore, it can be seen that despite the provisions set out in the Basic Law, the Federal Government can in actual fact conclude international agreements on matters falling under the exclusive competence of the Länder after obtaining their consent by way of the Lindau Agreement process. For example, treaties relating to sea, fishing or the allocation of the continental shelf can only be concluded after the coastal (northern) Länder have been consulted<sup>13</sup>. The same applies to education, for instance. And as federal laws are often executed at the regional level and the federation may need to draw upon the technical knowledge of the Länder, this point is extremely relevant.

The Lindau agreement has served as an effective forum for the accommodation of territorial interests since its inception. Indeed, the federal government has repeatedly rejected the idea of formalising the Lindau Agreement by anchoring it more firmly in law, reasoning that any kind of moves that might potentially limit the Federal Government's capacity to act in the international realm should be avoided<sup>14</sup>. Furthermore, Germany's highly integrated party system, which sees in the main, similar coalitions in office at both the national and the sub-state level, means that the political parties themselves remain important arenas in which territorial interests can be accommodated during the process of international treaty drafting.

In conclusion, where international treaty-making is concerned, German Law establishes fairly clear and tight guidelines on how to proceed, mostly guided by the principle that the Länder cannot depart from the fundamental guidelines of federal foreign policy.

### ***The “paradiplomatic” activity of the German Länder***

The strong legal framework on international treaties stands in contrast to the activities of the Länder abroad. Here, the German Länder have significant room to conduct their international affairs – opening offices or meeting representatives of foreign governments and such like, broadly characterised as “paradiplomacy”.

In matters of foreign affairs concerning relations with political and / or administrative counterparts below the level of the nation-state, the Länder have always considered themselves free of constitutional restriction. Their right to communicate directly with foreign regions, provinces or autonomous communities was indeed confirmed in one of the first decisions of the federal constitutional court.

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<sup>12</sup> Fassbender, Bardo (2007) *Der offene Bundesstaat. Studien zur auswärtigen Gewalt und zur Völkerrechtssubjektivität bundesstaatlicher Teilstaaten in Europa*. Tübingen: Mohr Siebeck

<sup>13</sup> Tavares, Rodrigo (2016) *Paradiplomacy. Cities and States as Global Players* (Oxford: Oxford University Press).

<sup>14</sup> Fassbender, 2007

This is evidenced by the growing presence of the German Länder on the international stage; sub-state government bodies, investment agencies and such like now operate a permanent presence globally, through investment bureaux (well over 150 today), partnership agreements with international state and sub-state actors alongside the numerous visits to overseas territories by ministers from the Länder governments, most likely accompanied by regional business leaders.

The most important field of Länder external activity is economic development. Constitutionally speaking, regional economic structure is an issue of Länder competence. The federation is only involved if competences have clearly been passed to it. A country like Bavaria that has high export rates and its status as a high technology country, has also established more secure partner regions: Shandong 1987; Québec 1989; Western Cape (South Africa) 1995; Gauteng (South Africa) 1995; Sao Paulo 1997; California 1998; Guangdong 2004; Karnataka (India) 2007.

For instance, formal partnership agreements were signed between Bavaria and two South African provinces, Gauteng and Western Cape in 1995. These cover economic relations, education, security, tourism and the development of SMEs. The automotive industry and the automotive supply chain have played a significant role in the creation of employment opportunities in South Africa since the lifting of sanctions in 1994, and Bavaria, with its large automotive industry, was quick to establish cooperative agreements with the provincial governments which were established in 1994<sup>15</sup>.

All of this combined overseas effort is aimed both at driving forward the individual international trade and investment agendas of the Länder themselves, but also serves to gather significant political information (Fischer, 2007). International engagement focuses primarily on the EU, with each of the 16 Länder maintaining a permanent representative office in Brussels, followed by the USA. Other key international priorities are Asia, Russia and Central and Eastern European countries, where there are strong ties to Germany, as well as the dense network of international, cross-border cooperation agreements at the sub-state level, vital for Germany's central European location.

Bavaria is a good example of how international relations are conducted in Germany, and has the most well-developed profile of engagement beyond national borders. Bavaria's representative offices are financed by the ministry for the business, energy and technology, and form part of the global objectives to boost trade between Bavaria and other parts of the globe – it now has a presence in 26 countries, most recently opening offices in Israel and in Ukraine.

Again within this wider remit to boost global trade in Bavaria, the Bavarian administration has set up and continues to foster a more formal partnership with 6 other economically powerful sub-state entities across 4 continents: Georgia (USA), Québec (Canada), Sao Paulo (Brazil), Shandong (China), Upper Austria and Western Cape (South Africa). The partnership covers a combined population of 180 million people, and a combined GDP of around US\$ 3 trillion. This "Regional Leaders

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<sup>15</sup> Representation of Bavaria in South Africa online:

<https://www.bavariaworldwide.de/suedafrika/ueber-suedafrika/geschichte/>

Summit”<sup>16</sup> meets every two years to encourage new ways of working in partnership and stimulating collaborative growth (informally referred to as the network of power regions).

Research has shown that certain Länder, like Baden-Württemberg, Bayern and Nordrhein Westfalia have profited more than their poorer, weaker counterparts in Germany from their ability simply to invest more heavily in an international infrastructure for partnership building, trade and investment<sup>17</sup>.

According to Hans Mayer, a former international adviser to the Bavarian administration, Bavaria’s main objectives in external policies are contacts with neighbouring states and regions, to defend the interests of Bavaria in the political, economic and cultural fields, and to promote its ideas on subsidiarity and federalism. He clearly confirms that Bavaria’s foreign policy is not meant to be in opposition to the federal one, but to unburden and to add value to the federal policy<sup>18</sup>.

### **The Länder and engagement with the European Union**

Article 23 of the Basic Law regulates Federal Government / Länder relations with regard to European policy. This was a new constitutional provision, written in the early 1990s, in response to what the Länder saw as a “hollowing out” of their competences as a result of increasing European integration. For instance, they argued that issues of cultural policy or environmental policy were being transferred to supranational competence at the EU level. This was happening by executive agreement within the EU, through inter-governmental decision making, and was not subject to domestic parliamentary scrutiny.

Paragraphs 3-6 are of particular note for establishing relative roles and responsibilities across policy areas:

Article 23 reads:

Paragraph 3: Before participating in legislative acts of the European Union, the Federal Government shall provide the Federal Government with an opportunity to state its position. The Federal Government shall take the position of the Federal Government into account during the negotiations. Details shall be regulated by a law.

- The Bundesrat shall participate in the decision-making process of the Federation insofar as it would have been competent to do so in a comparable domestic matter, or insofar as the subject falls within the domestic competence of the Länder

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<sup>16</sup> The official website of this collective can be found at: <https://www.land-oberoesterreich.gv.at/54152.htm>

<sup>17</sup> Fischer, Thomas (2007) “Bundesländer und Bundesrat”. In Schmidt, Siegmund, Hellmann, Gunther and Wolf, Reinhard (eds) *Handbuch zur deutschen Außenpolitik*, pp. 192-202.

<sup>18</sup> Mayer, Hans (2005) “Die Beziehungen Bayerns zu Ländern und Staaten Mittel-, Ost- und Südeuropas”, In: Europäisches Zentrum für Föderalismus-Forschung Tübingen (EZFF) *Jahrbuch des Föderalismus* 6, 2005, pp. 587-596 (Baden Baden: Nomos)

- Insofar as, in an area within the exclusive competence of the Federation, interests of the Länder are affected, and in other matters, insofar as the Federation has legislative power, the Federal Government shall take the position of the Bundesrat into account. To the extent that the legislative powers of the Länder, the structure of Land authorities, or *Land* administrative procedures are primarily affected, the position of the Bundesrat shall be given the greatest possible respect in determining the Federation's position consistent with the responsibility of the Federation for the nation as a whole.

One of the most important aspects of the Länder work on the EU is through their representative offices in Brussels. These carry out the information gathering that is necessary to allow the Länder to have an impact on EU agendas, both at the Federal Government level and directly in Brussels. The Länder representations in the EU are differently powerful. Generally the bigger (more populous) and richer (more economically successful) the Land is within Germany, the bigger its EU representative office will be. This is simply because the domestic civil service is bigger, and better resourced.

The representations in Brussels are modelled to an extent on representations in Berlin which facilitate dialogue between the sub-state perspectives of the Land and the development of national policy within the Federal Government. They serve also to prime the work of the Federal Government, the Upper Chamber of the German national parliament.

The impact and effectiveness of the Länder EU representations in Brussels is notoriously difficult to measure, given that so much of the Brussels work involves "soft" information gathering and networking, so as to influence policy making at an early phase. Further, it is not in the interests of the Länder EU offices to broadcast any significant achievements in shaping the legislative process in Brussels, as this would lay them open to criticism of parochialism or self interested behaviour from both the press and the German public, not to mention the other 15 Länder, particularly if they were to be disadvantaged by one Land's move. It is therefore really only anecdotal evidence which illustrates where the Länder, either individually, as a group or working in small clusters with shared sectoral interests, have successfully engaged with EU policy making.

Suffice it to say however that the work of the Länder offices in Brussels is significant. Accountability rests with the Länder executives in most instances (parliamentary scrutiny of their work tends to be weaker, and indirect at best). The best conclusion we can draw is that the offices are delivering value for money; they are seen to be delivering on the objectives set for them in the domestic arena. Were this not the case, we would surely see a reduction in their footprint rather than the gradual expansion of these offices in recent years, with greater staffing profiles and more financial resources from the Land being made available to them. Brussels representations work best when there is a clearly articulated set of European objectives, set by the governing authority in the domestic political arena.

There is, however, evidence of EU representations helping directly to shape legislative outcomes in the EU. By way of example the EU Floods Directive proposals put forward by the European Commission were calculated by the Bavarian administration as leading to an additional €250 million infrastructure investment, funds which would have to be found by the regional government itself. This came on top of their own flood-defence mechanisms, which did not fall within the criteria set out by the Commission's proposals but were felt, on alternative measures, to constitute adequate flood protection. As the administration had only calculated the increased costs once the Commission's draft proposals had been made clear, the Bavarian representation in Brussels focused instead on working with their MEPs to amend the first draft of the legislation on its reading in the European Parliament. This cooperative approach was felt (by the Bavarian government) to have helped prevent the region's administration from having to take on this additional financial burden<sup>19</sup>.

### **The Länder and EU international treaty negotiations**

The procedural approach for the intergovernmental accommodation of viewpoints within Germany on international agreements is unclear, and depends both on the actual substance of the agreement, as well as on the legal arguments put forward.

The EU-Canada Comprehensive Economic and Trade Agreement (CETA), for instance, has not been considered in Germany through the mechanisms of the Lindau Agreement. Instead, the Länder have been able to exercise their right to be involved in CETA by means of the procedures set out in article 23 of the Basic Law. This stems from the view taken by the Federal Government that CETA is a so-called "mixed" agreement, one which touches both on the competences of the EU and of the member states<sup>20</sup>.

According to point no. 3 of the Lindau Agreement, the Länder will be asked for their approval on proposals to sign an international agreement, if the Länder feel that their autonomous competences are affected by the substance of the proposals. The federal government takes the view that this situation does not apply for so-called "mixed" or hybrid treaties where both EU competences and those of the member states are affected<sup>21</sup>.

Both the federal government and the Länder have differing views of the extent of Länder involvement in the negotiation of the areas of "mixed" or hybrid international treaties which fall under national responsibility/jurisdiction. The federal government argues that for this element of the international treaty negotiation, the procedure to be used should simply be that of a European Union policy negotiation, and should therefore be regulated domestically under the provisions for EU politics in Article 23, Paragraph 2 of the Basic Law. The Bundesrat on the other hand has taken the view that for these discussions, the procedural basis should be those provided for by Article 32 of the Basic Law, and the Lindau Agreement<sup>22</sup>. The difference being: under Article 23 Paragraph 2 of the Basic Law, the Länder engage indirectly and not independently

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<sup>19</sup>Rowe, Carolyn (2011) *Regional Representations in the EU. Between Diplomacy and Interest Mediation* (Basingstoke: Palgrave MacMillan)

<sup>20</sup> Deutscher Bundestag Drucksache 18/1057, 07.04.2014, response to question 12

<sup>21</sup> Ibid.

<sup>22</sup> Wiater, Patricia (2014) "Föderalismus 'hoch zwei'.: Zur Rolle der deutschen Länder bei der Ausgestaltung der gemeinsamen Handelspolitik der EU", In: *Archiv des öffentlichen Rechts*, No. 139, pp. 497-572.

in the negotiations process, but rather through their collective organ of the Bundesrat, where individual Land positions are subject to the constraints of majority voting. The Lindau Agreement process, on the other hand, gives each individual Land, in theory at least, a veto.

The German Federal government stated that they would only assess fully the nature of the CETA agreement and hence how it should be processed domestically prior to German agreement on the issue, once the full scope of the CETA with Canada was clear and a full, final draft was available. But their starting presumption from the beginning of negotiations in 2009 onwards was that this was to be a mixed agreement and would therefore need ratification both at the European level and by the parliaments of the member states.

The negotiations on the proposed Transatlantic Trade and Investment Partnership (TTIP) are illuminating. The Länder tried, through their collective representative forum, the Bundesrat, to use their constitutionally enshrined sovereignty over culture and media policy as a means to set the terms of the German national position on the treaty. Again, as a mixed agreement, the provisions of Article 23 would allow for Länder viewpoints to be presented within the development of a German negotiating mandate, rather than the Lindau agreement, irrespective of the extent to which TTIP would touch on issues of culture or media<sup>23</sup>. With the Commission the lead actor in international trade politics, the Bundesrat's position was clear that the Commission should be advised by the German side to push for exceptions for culture and media products – which are clearly not definable as economic goods. The second position on this taken by the Bundesrat was for the German government to insist on this particular mandate in the Council of Ministers. The Bundesrat's key point was that irrespective of broadcast means, audiovisual services reflect the cultural identity of individual member states, and are thus in substance cultural goods rather than pure economic goods. But the Bundesrat position on this was not taken into account in the development of a German position on this; the German government instead was pushing for a broad and comprehensive negotiation mandate, which included the culture and media sectors.

### **Transposition of EU Directives – differences within a federal system**

The transposition of EU Directives is problematic in a federal system owing to the number of devolved competences which are simultaneously EU policy issues.

The ECJ can demand a fine if European law is not implemented or not correctly transposed. The situation can therefore arise that the Federal Government is obliged to pay the fine, when the constitutional division of competences in fact means that only the Länder governments can remedy the situation (the breaking of EU law).

Germany is often seen as a laggard in the transposition of EU directives, particularly in the area of environmental protection. This is a direct result of the complexity of domestic arrangements for political responsibility on environmental issues. So if for instance an issue on which the EU has legislated falls domestically under the exclusive

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<sup>23</sup> Deutscher Bundestag (2015) Ausarbeitung: TTIP und Kultur. Die Rolle von Kulture und Medien im Rahmen der Transatlantischen Handels- und Investitionspartnerschaft, WD 10-3000-009/15

competence of the Länder, then the Federal Government has virtually no influence on the speed of transposition or the process as a whole. This can lead to complications, and can have financial ramifications. These can then become politicised. The complexity of the domestic distribution of competences within Germany for environmental protection legislation means that EU directives which cover a number of environmental issue areas (for instance, the Directive on the integrated avoidance and reduction of pollution) can only be transposed domestically by dividing the directive up into different regulatory areas before processing them. This can lead to quite significant delays in the transposition process.

Any fines levied for failure to transpose EU law remain a national issue; the ECJ fines the member state government and is not interested in the internal division of competences within the member state. Under European Law, a member state cannot use their domestic political arrangements as an excuse for not transposing EU legislation within the required time limit; federalism and the existence of 16 sub-state governments was therefore no justification tardiness. There have been instances when in Germany, the Federal Government would have been obliged to pay EU fines, whereas only the Länder governments were in a position to actually implement the legislation.

One notable example of this is the EU's Flora – Fauna – Habitat Directive. This obliged all member states to select and report to the European Commission a list of areas which meet the definition of nature reserve that the directive defines/ sets out. The directive thus aims to establish an EU-wide network of conservation areas, the Natura 2000 arrangement. The point of the directive is not simply to have all existing conservation areas protected under this framework; instead, the member states were obliged to report to the EU authorities a list of all natural areas which meet the criteria.

But herein lies the problem. Firstly, the Federal Government was late selecting and reporting back the areas which met the criteria, as this was due to have been completed by 1995. Secondly, the Länder took the position that they had a bit of leeway in deciding which areas were to be reported to Brussels. They therefore listed these areas in tranches, starting with areas which had no other use, so largely pre-existing nature conservation areas. Other areas which would have met the nature conservation criteria were not reported. In the case of the FFH directive, the ECJ was mooting a level of fine of around DM 100 000 per day.