The *Kernkraftwerk Biblis-A* Decision of the Federal Constitutional Court: The Division of Administrative Powers Between the German Federation and the *Länder*

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I. Introduction

[1] With Hessen\'s constitutional complaint, which took advantage of the special procedure of *Bund-Länder-Streit* (Federation-Land-Dispute) provided by Art. 93 para. 1 no. 3 of the *Gundgesetz* (German Basic Law), (1) the Federal Constitutional Court had a new occasion to clarify the division of administrative powers between the Federation and the *Länder* (Federal States) in an dispute concerning the execution of federal laws by the *Länder*, specifically the technical supervision of nuclear power plants. The crucial question of the dispute concerned the possibility for the Federation to become active directly and externally with regard to third persons. The circumstances of the case, implying the use of informal measures and supposedly non-binding political commitments by the federal authority show how difficult it may be to appreciate the constitutionality of informal measures due to their uncertain legal nature and uncertain effects.

[2] The Federal Constitutional Court has, by its decision of 19 February 2002, indirectly permitted the use of informal acts by the Federation, qualifying them in the case at hand as having neither a binding nor a similar force. By this decision, the Court may have broadened the possible ways for Federal administration to exercise its authority. At the same time, by stating that the commitments of the federal authorities showed no sign of the existence of a will to be somehow bound by those commitments, the Court may have reduced the factual value of such commitments and, thereby, put into question the utility of the conclusion of public-private \"political agreements.\"

II. Background

Facts (2)

[3] The nuclear power plant \"Biblis-A\" in Hessen had obtained its initial authorization for operation (*Betriebsgenehmigung*) in 1975. After a technical incident in 1987, a security assessment of the power plant had been made and revealed, in 1991, the necessity of the installation of supplementary security measures (*Nachrüstmaßnahmen*). Therefore, the Ministry for Environment and Nuclear Security of Hessen (*Ministerium für Umwelt und Reaktorsicherheit*), charged with the execution of the federal Nuclear Energy Act (*Atomgesetz*), issued in 1991 an administrative order to the operator (RWE) of Biblis-A requesting the implementation and installment of some 49 supplementary security devices. Thereafter, RWE proposed to take certain measures and applied for their authorization, which was granted in 8 cases in 1991 by Hessen\'s Ministry. Between 1994 and 1997, Hessen\'s Ministry worked out several administrative orders for a provisional closure of of Biblis-A due to its conviction that the operation of Biblis-A without deficiencies could only be accomplished by such a measure. But each time, the implementation of these closure orders was prevented by formal directives of the Federal Ministry enjoining Hessen\'s Ministry not to order the provisional closure of Biblis-A. In 1999, however, these directives were withdrawn by the Federal Ministry for Environment, Nuclear Security and Protection of Nature (*Bundesministerium für Umwelt, Nuklearsicherheit und Naturschutz*). Hessen\'s Ministry for Environment, Agriculture and Forestry (*Ministerium für Umwelt, Landwirtschaft und Forsten*), now responsible for the supervision of nuclear power plants in Hessen, authorized several measures and the on-going operation of Biblis-A in October 1999. The Federal Ministry was informed of these authorizations. Reacting to this information, the Federal Ministry alleged that Hessen\'s Ministry had, by the issuance of these authorizations, disregarded former arrangements between the Federation and the *Land* concerning the authorization of supplementary security measures. Hessen\'s Ministry, instead, was of the opinion that it hadn\'t disregarded such arrangements and refused to condition further authorizations on a prior (positive) statement obtained from the Federal Ministry as the latter had requested. Therefore, the Federal Ministry issued, at the end of October, 1999, a directive to Hessen\'s Ministry not to issue any further authorization for operation without prior consent of the Federal Ministry.

[4] In June 2000, the so-called \"Nuclear Consensus\" (*Atomkonsens* (3)) was elaborated. (4) The Nuclear Consensus, an \"agreement\" between the Federal Government and the operators of nuclear power plants in Germany, aimed at the abandoning of nuclear energy on the long term (5) and contained in an annex a commitment by the Federal Ministry for Environment, *inter alia*, to check which measures were deemed appropriate to assure the secure further operation of Biblis-A and to issue instructions to Hessen\'s Ministry for the acceleration of procedures

for authorization. Hessen had not participated in the drafting of the Nuclear Consensus, nor was it involved in the negotiations between the Federal Ministry and RWE with respect to the concrete measures to be taken by RWE following the elaboration of the Consensus agreement. The result of the negotiations between the Federal Ministry and RWE was a statement to RWE regarding the remaining deficiencies with respect to operation of the Biblis-A plant. This statement was also sent to Hessen\'s Ministry, accompanied by a letter requesting it to take organizational measures to accelerate the authorization procedures for the measures mentioned in the statement and to provide the Federal Ministry with an action plan for the implementation of these acceleration measures.

[5] The activities of the Federal Government relating to the \"Nuclear Consensus\" as well as the statement and the instructions for the acceleration of the authorization procedures were seen by Hessen as an intrusion by the federal authorities into its administrative competencies giving rise to its application for constitutional review to the Federal Constitutional Court.

[6] However, a closer look at the history of the dispute reveals that disputes between the Federation and a *Land* often have the character of a dispute between distinct policies pursued by different political parties - one acting on the Federal-level, the other acting on the *Land*-level. (6) In the Biblis-A dispute, the ups and downs in the procedure for the authorization of supplementary security measures were closely related to changes in the composition of the Federal Government and the Government of Hessen, with coalitions of the Christian Democratic Party (CDU) and the Liberal Democratic Party (FDP) having a \"nuclear-friendly\" position and coalitions of the Social Democratic Party (SPD) and the Green Party taking a negative position towards the use of nuclear energy. The initial supplementary measures had been sought on the *Land*-level by a CDU/FDP government in 1991, soon replaced in 1991 by a SPD/Green government that refused to issue further authorizations and tried to order a provisional stop of the operation of Biblis-A, which was prevented by the instructions of the federal CDU/FDP government. After a change on the federal level in 1998, the new federal SPD/Green government (7) withdraw these instructions in March 1999, but in April 1999, the CDU/FDP coalition got back to power in Hessen, now (and still) opposing the actions of the federal government.

Relevant Legal Provisions

[7] According to Art. 74 para. 1 no. 11a of the Basic Law, the Federation is competent to take the legislative measures on the use of nuclear energy. The Federation has used these powers by issuing the Nuclear Energy Act (*Atomgesetz* (8)) in 1976.

[8] The German federal structure, which is part of the fundamental principles of the German constitution mentioned in Art. 20 para. 1 of the Basic Law and protected by the eternity clause of Art. 79 para. 3 of the Basic Law, is characterized not only by a division of legislative powers between the Federation and the *Länder* but also by a distinct division of administrative powers between these two levels. The basic rule concerning the exercise of administrative powers by the Federation and the *Länder* is contained in Art. 30 of the Basic Law which states that the exercise of state powers and the discharge of state functions is primarily a matter for the *Länder*. As far as the execution of federal laws is concerned, Articles 83 *et seq*. of the Basic Law provide for several regimes with distinct intensity of involvement of the Federation in the execution of these laws. The general rule, as contained in Art. 83 para. 1, is that the *Länder* execute federal laws in their own right as long as the Basic Law does not provide otherwise. This includes the autonomous establishment of the necessary authorities and their administrative procedure by the *Länder* without the interference of the Federation as long as the federal law does not provide otherwise. Under this regime, the Federation may only supervise the lawfulness of the execution of the federal law by the *Länder*, not the decision on the substance and the *Länder* may not receive instructions from the federal authorities.

[9] In the case at hand, however, the special regime of \"execution on federal commission\" (*Bundesauftragsverwaltung*) of Art. 85 of the Basic Law applied to the Nuclear Energy Act (9) and the *Länder* had the primary competence to issue authorizations for the operation of nuclear power plants or to amend such authorizations (10) and to supervise the operation of authorized power plants. (11) The regime of execution on federal commission implies, however, that the *Länder* may receive instructions for the execution of the federal law by the federal authorities, even though the federal authorities may only address such instructions to the government level of the *Land\'s* administration and may not exercise hierarchical powers on the *Land\'s* lower levels of administration.

[10] Although being subject to instructions by the federal authorities, not only on matters of law but also on the substance (*Sachkompetenz des Bundes*), the *Länder* have (according to the jurisprudence of the Federal Constitutional Court) the inalienable competence to exercise administrative powers directly over third parties in the relationships external to the administration and to be accountable to these persons. (12) In other words, the federal authorities might, in the internal relationship between the Federation and the *Land*, shape decisions by the issuance of instructions to a *Land*. But the administration of the *Land* must conduct the external relations and issue the administrative measures to the individual.

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III. Legal question

[11] The concrete question raised by the Biblis-A Case concerned the characterization of the activities of the federal government with respect to the \"Nuclear Consensus,\" which included direct negotiations of the federal government and the conclusion of an \"agreement\" complete with potential measures to be taken by the administration of Hessen under the Nuclear Energy Act. In terms of the division of administrative powers between the Federation and the *Länder* under the regime of execution of federal laws on federal commission, the question to be answered by the Federal Constitutional Court was whether the forementioned activities of the federal government were still covered by its competence to decide on the substance (*Sachkompetenz*) or whether they represented the conduct of external relations leading to (potential) administrative measures violating the inalienable competencies of the *Land*. As well, the Federal Constitutional Court had to decide on the question whether the Federation had violated the unwritten principle of federal loyalty by not involving Hessen in its negotiations concerning the \"Nuclear Consensus\" and its negotiations with RWE on the supplementary security measures.

IV. Positions of the Parties to the Dispute

Government of Hessen (13)

[12] The government of Hessen contended that the federal government had infringed Articles 30 and 85 of the Basic Law with its activities related to the \"Nuclear Consensus.\" Based on the jurisprudence of the Federal Constitutional Court regarding the inalienable external competencies of the *Länder* under the regime of execution on federal commission, (14) Hessen took the position, that this inalienable competence to act in the external relationships with regard to third parties (*Maßnahmen im Außenverhältnis gegenüber Dritten*) was not limited to formal acts having a legally binding character but also included informal acts relating to the concrete execution of federal laws. Otherwise, in the opinion of Hessen\'s government, the Federation secured the broad possibility to act on third parties as long as its acts remained \"informal.\" Hessen argued that such possibilities would be contrary to the regime of execution on federal commission, which does not provide a right for the Federation to replace the *Land* administration and execute the concerned federal law directly and on her own (*Selbsteintrittsrecht*). In any event, in the view of the Hessen government, the failure to involve Hessen in the negotiations on the \"Nuclear Consensus\" and the negotiations with RWE on concrete measures, violated the principle of federal loyalty requiring the Federation to take due account of the interests of the *Länder* in its activities as far as they affect the *Länder*.

Federal Government

[13] The federal government contended that the annex to the \"Nuclear Consensus\" containing the commitment on the assessment of necessary supplementary measures and on the acceleration of authorization procedures was not part of an administrative procedure to execute the Nuclear Energy Act, but was rather part of a legislative procedure in a material meaning without relation to executive matters. The activities of the federal authorities were presented as being part of informal, consensual actions of the state in preparation for the adoption of legislative measures and therefore devoid of any intention to be legally bound by its outcome. At best, the agreement could possess some \"political\" binding force.

[14] As well, the federal government saw no violation of the principle of federal loyalty in light of the intense coverage of the negotiations of the \"Nuclear Consensus\" in the media, which gave Hessen the possibility of staying informed about the ongoing negotiation process. The federal government further noted that the *Länder* have no right to be involved in such kind of agreements which serve only to prepare for the adoption of legislative measures.

[15] Concerning the statement from the summer of 2000, which was addressed to RWE and made known to Hessen\'s administration together with the letter asking for the acceleration of authorization procedures, the federal government admitted that this statement related to a concrete administrative procedure but took the position that the accompanying letter did not constitute an instruction to Hessen because of its mere informative character. Furthermore, the federal government argued, the statement did not constitute an administrative act with external effects. Therefore, both statement and letter were seen to be covered by the federal competencies to decide internally on the substance and not to violate the *Land*\'*s* competence to act externally.

V. Decision of the FCC

[16] The application of Hessen being admissible, the Federal Constitutional Court dismissed it on the merits.

[17] Taking up its jurisprudence from the *Kalkar II* Case, (15) the Federal Constitutional Court confirmed the inalienable competence of the administrations of the *Länder*, under the regime of execution on federal commission, to

take all administrative measures with external effect. But the Court emphasized the limits of the competencies of the *Länder* concerning decisions regarding the substance of the law under that regime. These competencies lie with the *Länder*, the Court concluded, only as long as the Federation has not made clear that it intends to exercise them. With a view to its *Kalkar II* Case, in which the Federal Constitutional Court had to decide on the relationship between federal instructions and the inalienable competencies of the *Länder*, the Court came to the conclusion that the case at hand required a further development of that jurisprudence as it did not concern an instruction but an informal act of the federation. (16)

[18] The Federal Constitutional Court took the position that, once the Federation has expressly or implicitly made clear its will to exercise its competence over the substance (17) - which in the case at hand had been made in the eyes of the Court by way of the federal government\'s instruction of 1999 asking the administration not to issue further authorizations without prior consent by the federal authorities (18) - it may have direct external contacts with third parties in order to prepare for the exercise of this competence. Such external contacts may also include \"informal\" negotiations and agreements, even if the Federation may not thereby replace the administration of the *Länder* (*kein Selbsteintrittsrecht*). (19) But the Court saw no necessity to decide on the concrete criteria for establishing under which circumstances informal acts of the Federation might amount to an illicit replacement of the *Land\'s* administration by the federal administration. (20)

[19] Concerning the inalienable essence of the exercise of external competencies under the regime of execution on federal commission, the Court focused its decision on the exercise of external competencies by measures having a legally-binding character. Only external measures of the Federation having a legally-binding character or statements that are equal to a legally-binding decision may violate the competencies of the administration of a *Land*.

[20] As to the contents of the \"Nuclear Consensus\" and its annex, the Court decided, that this was purely a matter of federal competencies and that the *Land* Hessen had no legal position to claim involvement in the process. The content of the annex, as well as the statement from the summer 2000, were seen by the Court as simple \"political\" measures having no binding effect.

[21] The opposite position, requiring the Federation to involve a concerned *Land* in steps taken to obtain information on a matter and, thereby, to prepare the exercise of its competence to decide on the substance, would, according to the Federal Constitutional Court, limit this competence and therefore contradict the division of administrative tasks as provided for by Articles 83 *et seq* of the Basic Law. (21)

[22] The Federal Constitutional Court then turned to the question of the content of the principle of federal loyalty, stating, in line with its previous jurisprudence, that this principle requires the Federation and the *Länder* to take due account of their respective interests.

[22] In its *Kalkar II* Case, the Federal Constitutional Court, on the basis of the principle of federal loyalty, established standards for the Federation\'s involvement of a concerned *Land* in the procedure prior to the issuance of an instruction, including the obligation of the Federation to give the *Land* the opportunity to express its position. (22)

[23] But the Court estimated these standards not to be applicable in the case at hand as the activities of the federal authorities had not led to the adoption of a formal instruction (but only to the informal letter sent to Hessen together with the statement). The Court came to the conclusion that the Federation is not obliged to take into consideration the position of a *Land* as long as the activities of the Federation are part of the stage of collection of information and the issuance of an instruction is not concretely envisaged. (23)

[24] Adopting the view, that the case at hand showed some particularities due to the parallel activities of the federal authorities concerning, on the one hand negotiations with operators of nuclear energy plants to prepare the adoption of legislative measures leading in the long term to the abandoning of nuclear energy, and on the other hand concerning questions of concrete supplementary security measures to be taken by one of the operators as part of an administrative procedure, the Court took the position that these particularities demanded an overall approach leading to the conclusion that the \"Nuclear Consensus\" as a political measure covered by the Federation\'s competence to take the political decisions overarched the underlying administrative relationships and thereby modified their contents.

VI. Dissenting Opinion of Judges Di Fabio and Mellinghoff

[25] Dissenting to the majority decision of the Federal Constitutional Court, Justices Di Fabio and Mellinghoff were of the opinion that the federal authorities had indeed violated Articles 30 and 85 of the German Basic Law by their activities relating to the \"Nuclear Consensus\" and that, even if one admitted these activities to be covered by the Federation\'s competence to decide on the substance, the Federation had violated its obligations stemming from the principle of federal loyalty by not involving Hessen in to process preparing the agreement on the \"Nuclear

Consensus.\" Justices Di Fabio and Mellinghoff saw no justifications for these violations in the fact that the \"Nuclear Consensus\" aimed at the preparation of a legislative act nor did they accept the argument of the Court that the internal relationship between the Federation and the Land Hessen as fixed by the constitutional provisions regarding the execution on federal commission had been overlapped and thereby modified by the federal activities preparing for the abandonment of nuclear energy.

[26] Justices Di Fabio and Mellinghoff emphasized that the division of legislative and administrative powers between the Federation and the *Länder* constitutes a basis of the federal structure of Germany; the purpose being to ensure the respective independence of the Federation and the *Länder* and thereby securing a *vertical division of powers*. Justices Di Fabio and Mellinghoff pleaded for a strict respect of the division of powers which is a precondition for a clear attribution of responsibilities and recalled that neither the Federation nor the *Länder* may dispose of their competencies freely. (24)

[27] According to Justices Di Fabio and Mellinghoff, the Federation may, under the regime of execution on federal commission, direct the execution of federal laws by the *Länder* by the use of instructions, but only by the means of the internal administrative relationship between the Federation and the *Länder* and not by direct external activities relating to third parties. Contrary to the position adopted by the Court, Justices Di Fabio and Mellinghoff were of the opinion that the crucial point of external activities of the Federation was not whether these activities took the form of legally-binding measures but whether the content of the measures aimed at the concrete execution of the concerned federal law. Therefore, under the regime of execution on federal commission, the Federation may not execute the federal law on its own right by influencing the behavior of third persons through the use of concrete informal agreements. Otherwise, not to see informal measures having the quality of concrete execution measures to be covered by the inalienable competencies of the *Länder* under the regime of execution on federal commission would undermine these competencies significantly.

[28] Based on this position, the crucial question was whether the informal activities of the Federation in the case at hand amounted to an execution of the Nuclear Energy Act with external effect. Direct contacts and negotiations with the operator of a nuclear power plant with the goal to achieve a certain behavior of the operator relating to questions covered by the Nuclear Energy Act represented, in the opinion of Justices Di Fabio and Mellinghoff, measures having the quality of external acts thereby violating the competencies of the *Land* Hessen. (25) As well, the two Justices rejected the Court\'s view that the activities of the federal authorities were only part of the process of the preparation of an instruction because of the very concrete content of the commitments concerning Biblis-A.

[29] In any event, Justices Di Fabio and Mellinghoff found the existence of a violation of the obligation of federal loyalty by the federal authorities because they did not involve the concerned *Land* in their negotiating process and thereby did not take due account of the interests of the *Land*. The necessity of involving a concerned *Land* existed, in the eyes of Justices Di Fabio and Mellinghoff, not only in case of the imminence of an instruction but also in circumstances where, as in the case at hand, the federal authorities act on an informal basis and commit themselves politically if this political commitment amounts, due to the circumstances, to a *de facto* irreversible commitment of the Federation. Otherwise, the purpose of the *Land\'s* right to present its position may not be preserved. The use of informal means of action being characterized by the corollary avoidance of formal measures that make a clear attribution of competencies possible makes it, according to Justices Di Fabio and Mellinghoff, all the more necessary to oblige the federal authorities to involve concerned *Länder* in the process, because of the related difficulties to establish clear limits between simple informal activities and informal activities amounting to the external execution of laws. (26)

[30] Finally, Justices Di Fabio and Mellinghoff affirmed their position, that the implicit use by the Federation of its competencies to prepare legislative acts may not influence the division of administrative powers of the Basic Law and such preparatory activities may not take the form of measures being covered by the administrative competencies of the *Länder*. (27)

Conclusion

[31] The decision of the Federal Constitutional Court on Biblis-A, and the position expressed in the dissenting opinion of Justices Di Fabio and Mellinghoff, give the occasion to reflect on several points.

[32] First, the question as to what extent at all the (federal) legislature may, during the process of the preparation of legislative acts, give concrete commitments with regard to persons being potentially subject to the future legislative act. The Court did not answer this question because it took the position that the \"Nuclear Consensus\" and related informal acts of the federal authorities were only politically binding and had no effective binding force. As well, the dissenting Justices only raised the question but gave no answer to it. (28) But they pointed out rightly that a political commitment may very well represent a *de facto* binding force on public authorities, especially if it is the object of a

broad media coverage gaining thereby a specific external effect. One also has to keep in mind, that the \"Consensus\" had been negotiated by the federal executive branch and that part of its content related to the later adoption of legislative measures by the Parliament - this implies as well some kind of blurring of the *horizontal division of powers* between the executive and the legislative branches if one admits a *de facto* binding effect of the \"Consensus\" also on the legislator.

[33] Second, the case at hand shows the difficulties related to the use of informal measures by public authorities, especially if these measures possess some kind of external effects. Both, the Court and the dissenting Justices admitted (29) or underlined (30) the risk for the constitutional division of powers to be undermined by such acts because of their uncertain legal nature (31) and because of the related absence of procedural safeguards coming into play in the adoption of formal acts.

[34] In light of these uncertainties and risks, the federal authorities should at least, as expressed by the dissenting opinion, be obliged by the principle of federal loyalty to give concerned *Länder* the opportunity to express their opinion on the concerned matter which implies an appropriate previous notification of the activities to any concerned *Land*. As well, such behavior would be a better sign of the existence of a certain \"political culture.\" The federal authorities, not being bound to conform their measures to the position expressed by a *Land* but only to take this position into account in their decision making process, there can hardly be seen good reasons not to accept this minimum-involvement of a concerned *Land* into the federal activities.

[35] Third, one might question the behavior of both the federal and the *Land\'s* administration concerning the best interests of the population. Security deficiencies became obvious in 1991 and, for more than a decade, only some supplementary technical measures were taken due to the disagreements between the federal and the *Land\'s* administrative authorities. One might be seriously concerned about the way public authorities did (or better: did not) discharge their duty to protect the public against dangers stemming from potential incidents at the nuclear power plant Biblis-A. Who would have taken the responsibility if, during the disputes between the federal government and the *Land*, a serious incident had occurred due to either the non-authorization of supplementary technical devices by one level or the non-authorization of a provisional closure of the operation of Biblis-A by the other level?

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(1) An english version of the German Basic Law is available at http://www.bundesregierung.de.

(2) See the \"Biblis A\"-decision, paras. 2 to 45.

(3) A german version of the *Atomkonsens* is reprinted in NVwZ-Beilage (supplement) no. IV/2000.

(4) The agreement has only been signed definitely on June 11, 2001.

(5) The way to achieve the progressive abandonment of nuclear energy had not been clear. Consensus existed only concerning the power of the federal legislator to decide not to issue new authorizations for the construction and operation of nuclear power plants (see BVerfGE 49, 89, at 127), but different opinions existed on the conditions required to lawfully end the operation of already existing and authorized nuclear power plants. Critical points concerned, especially, the constitutional right to property (Art. 14 Basic Law) of the operators of the power plants. Therefore, the attempt was made by the conclusion of the \"Nuclear Consensus\" to reach an agreement with the concerned operators of nuclear power plants by the way of which the operators consent to the progressive abandoning of the use of nuclear energy receiving in return commitments from the federal government that the existing nuclear power plants may continue to be operated for a certain time (fixed separately for every single power plant in an annex to the agreement) to ensure the operators that, in the end, their investments in the power plants are going to be paid back. See M. Böhm, *Ausstieg im Konsens*, 23 NATUR UND RECHT 61 (2001), (discussing two reports by legal scholars on the legal questions raised by the abandoning of nuclear energy). For an in depth discussion of the subject see U. Di Fabio, DER AUSSTIEG AUS DER WIRTSCHAFTLICHEN NUTZUNG DER KERNENERGIE (1999).

(6) A similar phenomenon is evidenced by the most recent \"embryo\" of a constitutional dispute: the discussions concerning the voting in the Bundesrat (the representation of the *Länder*) on the adoption of the new Immigration Act on March 22, 2002. Each *Land* is represented in the *Bundesrat* by several members but the votes of one *Land* must be given unanimously. In brief, the SPD/Grüne coalitions on the federal and the *Länder* level were in favour of the new law, the CDU/FDP coalitions were not. Unfortunately, one of *Lands* – Brandenburg – actually is governed by a SPD/CDU coalition that couldn\'t reach a common position on the issue which lead to the rare situation that one *Land* had differing voices in its vote in the *Bundesrat*. The President of the Bundesrat finally only took into consideration the (positive) vote of the Minister President of Brandenburg (SPD), which cast the crucial vote to make the bill pass the

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Bundesrat. The *Länder* governed by CDU/FDP coalitions now claim a violation of the voting procedure in the *Bundesrat* (the majority opinion of constitutional lawyers being that a ununiform vote given by one *Land* in the *Bundesrat* has to be qualified as an invalid vote, see FAZ.news at http://de.news.yahoo.com/020322/249/2p3ki.html). The next question is now, whether the Federal President, Johannes Rau (SPD), is going to sign and enacts the law or whether he will cede to the pressure exerced on him by CDU/FDP an declare the law to be the outcome of a procedure that was not conform to the constitutional requirements. See:

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and

http://www.faz.net/IN/INtemplates/faznet/default.asp?tpl=uptoday/content.asp&doc={4ACD-0-D-2-D-26A8-4877-A9FB-277E8F57BB59}&rub={9E7BDE69-469E-11D4-AE7B-0008C7F31E1E}.

(7) A crucial point in the SPD/Grüne coalition agreement of 1998 has been the progressive abandonment of nuclear energy.

(8) Peaceful Use of Nuclear Energy and Protection against its Dangers Act (Gesetz über die friedliche Verwendung der Kernernergie und den Schutz gegen ihre Gefahren), original version in BGBl. I 1976, 3053; actual version in BGBl. I 2001, 2331 (as amended).

(9) Art. 87c GBL together with § 24 para. 1.1 Nuclear Energy Act.

(10) § 7 together with § 23 para. 2 Nuclear Energy Act.

(11) §§ 7, 19 and 23 para. 2 Nuclear Energy Act.

(12) See decision of the Federal Constitutional Court of May 22, 1990 on \"Kalkar II\", 2 BvG 1/88 (BVerfGE 81, 310), as well dealing with the question of the division of administrative powers between the Federation and the Länder under the regime of execution on federal commission. Confirmed by the decision of the Federal Constitutional Court of April 10, 1991 on \"Schacht Conrad\" (BVerfGE 84, 25). See as well the \"Biblis-A\" decision, para. 71.

(13) See the \"Biblis-A\" decision, paras. 48 to 60.

(14) See footnote 12.

(15) See footnote 12.

(16) See the \"Biblis-A\" decision, para. 72.

(17) See the \"Biblis-A\" decision, para. 74.

(18) See the \"Biblis-A\" decision, para. 83.

(19) See the \"Biblis-A\" decision, para. 75.

(20) See the \"Biblis-A\" decision, para. 75.

(21) See the \"Biblis-A\" decision, paras. 80 and 88.

(22) See footnote 12, at 317.

(23) See the \"Biblis-A\" decision, para. 91.

(24) See dissenting opinion in the \"Biblis-A\" decision, para. 99, with reference to earlier jurisprudence of the Federal Constitutional Court in BVerfGE 63, 1 (39).

(25) See dissenting opinion in the \"Biblis-A\" decision, paras. 102 to 111.

(26) See dissenting opinion in the \"Biblis- A\" decision, para. 117 et seq.

(27) See dissenting opinion in the \"Biblis-A\" decision, paras. 123 to 125.

(28) See dissenting opinion in the \"Biblis-A\" decision, para. 124.

(29) See the \"Biblis-A\" decision, para. 93.

(30) See dissenting opinion in the \"Biblis-A\" decision, para. 117 et seq.

(31) For a discussion of the legal nature of the \"Nuclear Consens\" see H. Wagner, *Atomkompromiss und Ausstiegsgesetz*, 20 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 1089, 1091 (2001), who concludes that the \"Nuclear Consensus\" is the sign of a loss of legal culture in reason of its trade-off-character and underlines the competence of the *Länder* to amend authorizations for the operation of nuclear power plants and to supervise their operation.