



Reforming Swiss federalism: ready for the EU?

Recent reforms have revitalized the Swiss federal system by clarifying cantonal roles and improving equalization mechanisms. But are the Swiss cantons ready to take the next step and approve a possible joining with the EU?

THEME I: FEDERALISM AND FOREIGN POLICY

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In the last century, the Swiss federal government assumed power over almost all the government functions that first emerged with the creation of the modern social and economic state. Yet virtually no functions were taken away from the Swiss cantons in the last century. Now the cantons have very few substantive powers in these areas to pass legislation of their own. Too little if any attention was paid to the question of whether the interests affected in this process could have been better handled on the canton or municipal level. As a result, the federal structure of the Swiss state was undermined.

Since the 1990s though, there has been a marked change and a new departure, which found expression in the creation of the Conference of Cantonal Governments in 1993. Attempts are underway to revive the federal system. The citizens of Switzerland approved a totally revised federal Constitution, in a plebiscite on April 18, 1999. Currently under consideration by the federal government are the plans for the redesign of financial equalization and functions (the so-called "*Neugestaltung des Finanzausgleichs und der Aufgaben [NFA]*").

The new federal Constitution

The new Constitution didn't do anything to change the prominent features of the Swiss federal state, but did recognize its federal nature in the written law of the land.

The division of power is expressed through the tripartite structure, consisting of the federal government, the cantons and the municipalities. Municipalities are expressly mentioned for the first time, although this does not change the fact that the cantons remain the partners with whom the federal government deals directly. The federal government guarantees the existence, territorial integrity and constitutional order of the cantons.

As for the distribution of powers and responsibilities, the new constitution gives the reserve power to the federal government while the cantons have subsidiary jurisdiction. In addition, the federal government acts as "guarantor" of the cantonal constitutions - thus assuring that cantons cannot pass laws that go against the division of powers.

The cantons are all basically equal. They have substantial autonomy to determine and implement their programs, to determine, collect and use their revenues, and to determine their organization and political procedures. They can look after their common interests in cooperation with one another, whether through written agreements or through joint organizations or institutions.

The federal state is therefore unified in two ways: through the federal government and among the cantons. All intergovernmental relationships within the two levels are marked by a duty to cooperate (the so-called "*Bundestreue*" or faithfulness to the federal state).

To ensure power sharing, the new Constitution contains substantial rights for the cantons to participate in the development of federal policies. This finds expression above all in the fact that the federal constitution cannot be changed against the will of the majority of the cantons. In addition, eight cantons can come together to invoke the optional referendum against the enactment of federal legislation.

However, long before this could happen, the federal government would have to inform the cantons about its plans, and they would have a right to state their views through the consultation procedure. The same holds in the realm of foreign policy.

After federal legislation is enacted, the cantons take charge of its implementation and the federal government is supposed to allow them the widest possible latitude to shape it as they see fit in each of their cantons.

See also "Reforming Swiss federalism: who will pay?", by Ulrich Klöti on page 39

The federal government must give them sufficient money to do this and provide for appropriate financial equalization. This is intended to prevent the federal state from becoming a mere decentralized state as a result of extensive material requirements by the federal government in the spheres of competence of the cantons.

The redesign of equalization

In addition to ensuring financial equalization in the federal government's relation with the cantons, there has to be a similar balance of power among the cantons. The redesign of financial equalization and functions (the NFA) attempts to find appropriate solutions in both areas of cooperative federalism, which includes working together in solidarity with one another and out of concern for each other's needs.

It also attempts to strengthen the federal structure by disentangling competences and improving the instruments of cooperation.

The redesign of competences is based first on newly introduced Art. 3 on the subsidiarity principle (*see box p. 43*). It states: "The subsidiarity principle must be adhered to in the allocation and discharge of government functions." Centralization is only considered when horizontal cooperation fails or the costs of coordinating it would be excessive. The NFA provides for the first time for fiscal equivalence, equal treatment in the provision of basic services, and the requirement to meet the need in an economically efficient way to be viewed as additional criteria

in the assignment of government functions.

The new Constitution encourages cantons to work together with each other and with the federal government. The NFA creates a legal basis and legal certainty for agreements between these governments on the implementation of federal legislation.

The federal government can declare inter-cantonal agreements generally binding, or require cantons to participate in them, if interested cantons ask it to do so.

But the declaration that something is generally binding is tied in the draft Financial Equalization Act to such a high quorum (18 cantons) that there must be a very broad consensus among the cantons. In contrast to a change to the Constitution, a simple majority in the upper house will not suffice. This means that in an area of pan-Swiss importance, there must be an even greater consensus regarding a federal settlement.

Inter-cantonal legislation is also given priority over cantonal legislation. For the first time the status of inter-cantonal norms is settled in the Federal Constitution with the recognition of them as an intermediate level in the federal state. This settles what was previously an unclear relationship.

Finally, certain jurisdictions are ascribed either entirely to the federal government or the cantons, or jointly to the federal government and the cantons, or to the inter-cantonal level. The Federal Court can also review federal legislation to ensure that it complies with the constitutional division of functions.

Ideas on integration with the EU

Even after these institutional reforms, there are still some dangers facing the supreme authority of the cantons.

The federal government binds the cantons more and more through its foreign policy and integration policy, i.e., through the development and implementation of ideas for continuing European integration and Switzerland's possible entry at some point into the EU. It is therefore necessary to develop institutions and procedures that will enable the cantons to control developments and preserve their autonomy. The cantons are no longer just subordinate territorial entities that carry out tasks. In accordance with a

modern understanding of federal states, they are actual partners in certain areas who are even co-responsible for federal policy – since it can only be fully realized with the support and implementation powers of the member states in the confederation.

If Switzerland were to join the EU, a large number of cantonal jurisdictions would likely be cut back to some extent or restructured. This is especially true of education and culture; health; regional planning and infrastructure; economic development; industrial inspection (*Gewerbepolizei*); professional diplomas; public procurement; public service legislation; justice and the police; and taxation.

The cantons' ability to regulate in these areas would be limited while their enforcement duties would increase. In addition, the cantons' functions could be considerably altered or entirely new functions could be added.

The new Constitution does not explicitly address the possibility of membership in the EU. And the power of the federal government to conclude international treaties does nothing in regard to the allocation of jurisdictions. In fact, there is a danger that a centralization process will set in, as occurred in Austria after it joined the EU, because the internal organization of the state has not been prepared for and adapted to joining the EU.

The EU can only be compared in very limited ways to standard international treaties. After (or better: before) Switzerland joins, the Federal Constitution will have to stipulate in its basic elements the various responsibilities, requirements and controls regarding the implementation of EU legislation.

What role for the cantons in the EU?

A further consequence of Switzerland joining the EU is the fact that the cantonal right to participate in the conclusion of international treaties could no longer be implemented. European policy takes the form of regulations, guidelines or decisions

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issued by legislative or quasi-legislative authorities. Once a European decision has been made, it no longer needs the approval of the individual national authorities.

The cantons would therefore have to register their views

very early in the process. The most common case would be reacting to proposals of the EU Commission – the only organ with the right of initiative.

The tools available to the cantons are:

- a statement in the consultation procedure,
- the formulation of mandates,
- inclusion in a Swiss delegation and the conduct of negotiations,
- sitting on the working groups of the Council of Ministers, and;
- sitting on the Committee of the Regions.

It is very common for the Commission to make proposals at the instigation of member states. This means that a canton could request that the federal government make a proposal on its behalf.

In addition, the member states can place numerous experts on the committees that prepare the Commission's proposals. The federal government would be totally free to appoint people to these committees who are recommended by the cantons as well.

Since many tasks can only be undertaken now on the European or even global level, it would not be very sensible for the cantons to adopt a defensive posture and attempt to prevent increased political integration.

In the words of Thomas Pfisterer: "An offensive strategy of participation is therefore called for. The cantons must:

1. Reform themselves internally to make themselves suitable (for Europe),
2. Intervene in the division of functions in the field of foreign relations and in implementation and financing and also work together with the federal government and neighbours,
3. Cooperate within the country and in relation to the Community,
4. Play an active part in European politics." 