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Expert opinion on the need for further development of hospital planning on the basis of service groups

How the federal government can intervene

Prof. Dr. Winfried Kluth, former judge of the State Constitutional Court. D. and since 1999 Chair of Public Law at the Martin Luther University Halle-Wittenberg, presented a legal opinion for the AOK on questions of the need for further development of hospital planning on the basis of service groups. In it, Kluth recommends a reorientation of hospital planning from a ‚control science perspective'.

>> According to Kluth, in order to enable such a perspective of hospital planning that meets the legal requirements according to § 1 KHG (federal government), the first prerequisite is a transparent inventory of the health care situation in all Länder. This presupposes a uniform planning language as well as uniform assessment criteria so that the constituent elements of the section can be applied precisely and uniformly. Secondly, according to Kluth, with regard to the goal of economic and high-quality service provision, suitable and sufficiently differentiated points of reference must be introduced for control by hospital planning. The third most important point, according to the legal scholar, is that there must be sufficiently specific obligations to act and bases for authorisation that would enable the planning authorities to proceed with planning in a legally secure manner.

Furthermore, in Kluth's opinion, a specification of the legal requirements for planning and control should refer to the following individual questions, among others:

- Inclusion of a definition of needs-based care in § 2 KHG (Federal Government) .
- The criteria for underuse and overuse should also be defined.
- The Countrys are to be obliged to conduct a periodic inventory of the supply situation according to uniform specifications of the G-BA.
- A basis of authorisation for the exclusion of areas in the case of quality violations must be created.

According to Kluth, hospital planning should be based on service areas and service groups, following the example of the new regulations in the state of North Rhine-Westphalia. According to Kluth's advice, this obligation should be anchored nationwide in §8 KHG (federal). Kluth is of course aware that this requires a basis in competence law. In his opinion, the more far-reaching federal legal requirements for hospital planning by the Länder - insofar as they go beyond the federal government's already far-reaching legislative competence under Article 74 (1) No. 12 and No. 19a of the Basic Law - are legitimised as ‚legislative competences by virtue of substantive coherence and as annex competences, since they serve the effective implementation of requirements from the area of undisputed federal competences'. In addition, the new regulations proposed in his expert opinion and the control measures based on them were compatible with the fundamental rights of private and non-profit hospital operators under Articles 12 (1), 14 (1) and 3 (1) of the Basic Law, as they served to implement important public interest concerns (restriction of supply to identified need and quality assurance), were proportionate and were based on sufficiently specific statutory authorisations.

Annex competence and legislative competence by virtue of substantive connection

The reason why, in Kluth's opinion, the federal government can intervene in the sovereignty of the Länder with regard to hospital planning is based on two aspects: annex competence and legislative competence by virtue of subject-matter coherence.

Kluth explains these two legal concepts in detail on page 8 of his report. Here he states that it is possible for the federal legislature, if it is necessary for the ‚effective shaping of the regulatory matter that has been unequivocally assigned to it', to make regulations by virtue of substantive connection or annex regulations. In this context, federal regulations may also have an effect on hospital planning, insofar as these are limited encroachments. In particular, because there is a close link between financing aspects, quality aspects and planning decisions.

The competence to introduce hospital planning based on service areas results from this competence by virtue of the factual connection, since the federal legal requirements in the area of quality assurance should not be improved by individual requirements, but by the orientation of hospital planning to service areas. According to Kluth, this is the only way that the quality criteria of the G-BA, which are related to service areas and not to health care areas, can be effectively implemented in supply management at the level of hospital planning.

Annex competence, on the other hand, is a ‚depth competence'. Here, the focus is on whether regulations of the implementation are also necessary for an effective performance of tasks. According to Kluth's explanations, the legislative competence expands the competence in breadth by virtue of the factual connection, insofar as this is necessary for a sensible and effective performance of tasks. From this annex competence, Kluth in turn derives the competence of the federal legislature to make the proposed extensions and concretisations with regard to the needs orientation of hospital planning, since the regulations are to contribute to ensuring the effective implementation of the already existing and, as far as can be seen, undisputed obligation of the Länder under competence law.

Furthermore, it should be noted that quality and structural requirements guarantee a minimum quality of treatment and thus also serve to protect patients. Since the protection of the health and life of the population is an overriding public interest, according to Kluth, the state's duty to protect both legal interests can arise from Article 2 (2) sentence 1 of the Basic Law. In view of the importance of these legal interests, the protection of health and life constitutes a legitimate purpose, the pursuit of which can also justify objective restrictions on the choice of occupation. <<

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