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Expert Opinion on the ‚Constitutional Conformity of the Reform of Hospital Planning

Why there can be no federal competences

Prof. Dr. Ferdinand Wollenschläger of the Faculty of Law at the University of Augsburg takes a contrary position. In his expert opinion on the ‚Constitutional Conformity of the Reform of Hospital Planning‘ commissioned by the Bavarian State Ministry of Health and Care and the Ministry of Justice and Health of the State of Schleswig-Holstein, he explains why there can be ‚no federal competence to implement the recommendations of the Government Commission‘.

>> ‚Constitutional conformity of the reform of hospital planning on the basis of the third statement and recommendation of the government commission for modern and needs-oriented hospital care‘ is the title of the expert opinion by Prof. Dr. Ferdinand Wollenschläger, full professor for public law, European law and public economic law at the law faculty of the University of Augsburg. In his abstract to the expert opinion, the jurist writes that there is ‚no federal competence for implementing the recommendations of the government commission‘ and that the hospital reform must respect the competence split between the federal government and the Länder - in particular the planning sovereignty of the Länder - for regulating hospital care.

Like Kluth, Wollenschläger refers directly to the Basic Law, which does not provide for comprehensive federal legislative competence for the health or hospital sector. Rather, there are only selective (concurrent) federal competences, namely for the economic security of hospitals and the regulation of hospital care rates (Article 74 (1) No. 19a GG) as well as for social insurance (Article 74 (1) No. 12 GG). The Basic Law, confirmed by the Federal Constitutional Court, had assigned hospital planning to the Länder, which limited the scope of the aforementioned titles of competence as a basis for federal regulations. In addition, the Länder must retain considerable independent scope for planning, especially for the legislative, abstract-general framework. Wollenschläger in his report: ‚In this context, the primacy of state hospital planning applies over federal remuneration regulations. In Wollenschläger‘s opinion, and contrary to Kluth‘s, this distribution of competences cannot be overridden by means of unwritten federal competences (annex competence or competence by virtue of factual connection), which, moreover, would only apply within extremely narrow limits. In Wollenschläger‘s opinion, there is also no federal competence under the constitutional order of competences to implement the recommendations of the government commission, as this would excessively curtail the planning authority of the Länder. It is irrelevant in this context that the commission‘s recommendations are not directly intended to set guidelines for hospital planning, but to regulate remuneration. The latter are of considerable relevance to planning. Wollenschläger: ‚If, as planned, the remuneration of hospitals depends on the federally defined authorisation to provide services qua level allocation and compliance with federally defined quality requirements, the hospitals can only fulfil the care mandate assigned in hospital planning (adequately remunerated) according to detailed structural specifications of the federally defined remuneration regime‘.

According to Wollenschläger, the structural and quality specifications of the reform proposal obviously affect categories of hospital planning to a considerable extent - he mentions here

- The detailed definition of levels and service groups ,
- the allocation of service groups to levels ,
- detailed minimum structure requirements and
- the role of specialist hospitals .

According to Wollenschäger, the remuneration specifications not only create considerable pressure to adjust planning; rather, the control of the health care structure is also intended. At the same time, this contradicts the competence-based primacy of hospital planning over remuneration regulations, since the remuneration regime would formulate independent structural requirements that excessively restrict planning sovereignty. ‚Beyond this, the reform proposal causes a systemic break in the dual hospital financing system - also relevant against the background of the freedom of contradiction of the legal system - since the first and second pillars of hospital financing would no longer be synchronised, meaning that hospitals would have to be included in the investment cost funding, although they would not be entitled to adequate remuneration,‘ writes the Augsburg professor in his expert opinion.

However, in his opinion, there are various possible solutions to realise the hospital reform. For example, important concerns could be realised by means of a remuneration regulation that does not excessively restrict the planning sovereignty, namely the changeover from a purely performance- and volume-oriented remuneration of the DRG system to a combination of performance-based remuneration and, above all, reserve financing linked to service groups, which would eliminate false incentives. It is also possible to implement the reform proposal autonomously in the Länder in a legally secure manner and in accordance with competencies, whereby coordination across the Länder is possible by means of a state treaty and a model draft as well as coordination with the Federal Government. According to Wollenschläger, hospital planning could be controlled more strongly than in the status quo by setting framework requirements for hospital planning in the Länder (namely, the Länder would be required to plan according to service groups and levels as well as on the basis of minimum structural requirements, whereby no further binding specifications would be allowed), although objections could already be raised against this approach on the basis of competence. Wollenschläger: ‚A detailed control of hospital care with comprehensive powers of deviation in favour of the Länder encounters weighty competence-related objections because of the excessive regulatory power nevertheless claimed; these will prevail in any case if the planning sovereignty of the Länder is interfered with to a considerable extent, which would be the case with the introduction of detailed defined levels and the allocation of service groups to levels.‘ <<

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