Freie Universität Berlin

Law Faculty
Chair for Public, Constitutional and European Law
Ad Personam Jean Monnet Chair

Prof. Dr. Christian Calliess[1]
Boltzmannstr. 3
14195 Berlin

Telefon +49 30 838-51456
Fax +49 30 838-53012
E-Mail europarecht@fu-berlin.de

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Towards a new working method for the EU: More efficiently, more citizen-friendly and more flexible

A. Where we stand …

For a number of years, the European Union has been in crisis mode, culminating in a '**polycrisis**' in 2016. The global financial crisis and the knock-on crisis in the euro area, together with the migration and security crisis in the 'area of freedom, security and justice' ('Schengen area'), have made it clear that two of the moves towards integration launched by the Maastricht Treaty in 1992 had become '**fair-weather areas**' that were inadequately prepared for stormy times. To cap it all, the UK referendum has confronted the EU for the first time with the organisational and political challenge of the withdrawal of a Member State under Article 50 TEU.

[1] *Christian Calliess* is Professor for Public and European Law at Free University of Berlin and holds an Ad Personam Jean Monnet Chair (c.calliess@fu-berlin.de). From 2015 till 2018 he was on leave from his chair and Legal Adviser to the European Political Strategy Center (EPSC), the In-House-Think-Tank of the President of the European Commission. There he was as well Head of the Institutional Team being in charge of questions regarding the reform of the EU, including among others the White Paper on the Future of Europe and the Security Union. Moreover, he is a member of the Glienicker Gruppe, an interdisciplinary expert group that made proposals for the reform of the EU (see www.glienickergruppe.eu).

Tackling the 'polycrisis' has been complicated by the lack of a consensus between the 28 Member States and among European citizens about the role they want the EU to play, its tasks and its future. This is due to some extent to the fact that reforms in the **euro area** touch on such domestically sensitive issues as further 'Europeanisation' of finance and budget policy and its repercussions on national social policy. No less sensitive are the challenges posed in the **Schengen area** by European asylum, refugee and immigration policy and internal security ('**Security Union**'[2]). Even in matters of the **European single market**, which is set to change shape under the disruptive effects of digitisation and the associated innovations (platform economy, blockchains, artificial intelligence) and decarbonisation in the energy and transport sectors, consensus seems difficult. This is because the changes involved will give rise to regional and social changes and fault lines calling for a common response in the European single market.

European citizens expect the EU and its policies to function properly. Where this is not the case there is a **mismatch between promises by the EU on the one hand, and delivery, on the other**. In this regard the EU faces two challenges: While some national governments were successful in putting pressure on institutions of political control in their countries, others were not capable or even unwilling to implement agreed rules defining European public goods and interests.[3] Implementation gaps and enforcement shortcomings in the Member States are responsible for the fact that the European 'law in the books' fails to become 'law in practice' and undermines citizens trust in it.

It is in this politico-institutional cycle that the EU has to find convincing and efficient answers if it wants to restore trust and regain credibility.

The **Conference on the Future of Europe** can be an important step in this direction. Citizen dialogues in all Member States might feed in debates and finally the results of the conference. However, if this process should be successful, the EU should provide different **visions and a narrative**, in order to provoke a substantive debate. In this regard the **White Paper on the future of Europe** presented by the Commission on 1 March 2017 could contribute food for thought for the conference.[4] Unlike earlier white papers it does not include a roadmap with specific reform proposals. Instead it outlines five scenarios that are not to be (mis-)understood as Commission proposals but are intended to prompt a process of reflection whereby the Member States' governments, parliaments and citizens chart the way forward for Europe. In certain policy areas the

[2] European Commission (EPSC), Towards a Security Union, EPSC Strategic Notes, Issue 12 of 20 April 2016 (available online).

[3] See in detail: Calliess, Restoring credibility and trust by enforcing the rule of law, in: European Policy Centre (editor), Yes, we should, EU priorities for 2019-2024, Brussels 2019.

[4] European Commission, White Paper on the future of Europe, COM(2017) 2025, 1 March 2017.

scenarios of the White Paper are supplemented by reflection papers on the issues of globalisation and trade policy, the social dimension, reform of the economic and monetary union (EMU), defence and the budget[5].

On this basis the Conference on the Future of Europe could explain the need for reforms, start a transparent debate and finally deliver proposals. However, reforms are not an end in itself. They have to demonstrate an added value; each proposal has to be justified. With this ambition **the EU has to develop a narrative** framing the debate and preparing the ground. **This narrative should not be about "more Europe" but about a better functioning and more resilient Europe based on a new working method of the EU.**

B. In search of a narrative for the reform of the EU: A new working method for the EU based on three elements

1. First element: More efficient

Being more efficient implies that the EU has a proper capability to act. This would allow for the EU to bridge the gap between promise and delivery that citizens feel when it comes to European objectives and European action.[6] Being 'big on big and small on small' provides for the necessary prioritisation of efforts, ensuring that the EU focuses on areas where action at EU-level has the greatest positive impact for citizens.

(a) Focusing on certain powers by setting political priorities

This suggests, first and foremost, **defining political priorities** with an eye to the big issues. **In general terms the big issues include** the functioning and sustainability of a **future proof single market**, including **decarbonisation** (climate protection and its

[5] European Commission: Reflection paper on harnessing globalisation, COM(2017)240 of 10 May 2017; Reflection paper on the social dimension of Europe, COM(2017) 206 of 26 April 2017; Reflection paper on the deepening of the economic and monetary union, COM(2017) 291 of 31 May 2017; Reflection paper on the future of European defence, COM(2017) 315 of 7 June 2017; Reflection Paper on the future of EU finances, COM(2017) 358 of 28 June 2017.

[6] Communication from the Commission to the European Parliament, the European Council and the Council, 'A Europe that delivers: Institutional options for making the European Union's work more efficient', COM(2018) 95 final, 13.02.2018.

implications for all other policies, see Art. 11 TFEU) and **digitisation**, trade policy[7] as well as safeguarding the **stability of the euro** by closer political coordination of economic and fiscal policy with monetary policy (see in detail below under D. Annex). This is accompanied by the **free movement** of Union citizens in the 'area of freedom, security and justice' in the framework of **sustainable border management and a functioning migration and internal security policy including cybersecurity (Security Union)**[8]. Externally, this is to be rounded off by the development of a genuine European **external security and defence policy**[9].

Becoming more efficient with regard to these political priorities would enable the EU at the same moment to tackle the above-mentioned challenges of the polycrisis. A prerequisite for this is the European **capability to act** that delivers a **strong narrative** for institutional reforms:

On a **political level**, the **lead candidates (Spitzenkandidaten) for the office of Commission president** could announce their political priorities to the European Parliament in the run-up to the elections, so they would have a mandate for them in the event of being elected.[10]

On this basis a more **comprehensive approach** could enhance efficiency on the one hand as well as transparency and democracy on the other:[11]

If the concept of Spitzenkandidaten would be combined with the idea of transnational lists as well as a merging of the functions of the Presidents of the Council and the Commission in one person, a double-hatted European President, European democracy would experience a great leap forward.

[7] CJEU, Opinion 2/15, ECLI:EU:C:2016:992; See also the Commission's Reflection paper on harnessing globalisation, COM(2017) 240 final of 10 May 2017, and the Trading Together Declaration (https://www.trading-together-declaration.org/ (14.12.2017)).

[8] European Commission (EPSC), Towards a Security Union, EPSC Strategic Notes, Issue 12 of 20 April 2016.

[9] European Commission (EPSC), In Defence of Europe, EPSC Strategic Notes, Issue 4 of 15 June 2015.

[10] European Commission, European Political Strategy Centre (EPSC), Building on the *Spitzenkandidaten* Model. Bolstering Europe's Democratic Dimension, #EURoad2Sibiu Series Issue 1, https://ec.europa.eu › European Commission › EPSC › Publications.

[11] In this direction as well: Communication from the Commission to the European Parliament, the European Council and the Council, 'A Europe that delivers: Institutional options for making the European Union's work more efficient', COM(2018) 95 final, 13.02.2018.

The EU has to decide on the seats left vacant after Brexit. A promising option would be to reserve a number of these seats for **a transnational (European) constituency and transnational lists**.

In this context the time is ripe to reflect on **the idea of a double-hatted President of the EU**: A single person holding the two offices of President of the European Council and President of the European Commission could make the helm of the EU more efficient, transparent and democratic by building bridges between the supranational Commission and the intergovernmental European Council.[12] **If all Spitzenkandidaten running for the office would candidate on a transnational list defined by a European constituency, citizens by a second vote could elect the European President in all Member States directly**.

Although Council and Commission deliver on different interests in terms of the substance of policy proposals, they have a shared interest in ensuring that the policy process runs smoothly and results in effective decision-making and problem-solving. the merger will not put an end to this healthy competition. Indeed, Member States will still enjoy vigorous debates regarding proposed policies. But a lot of the discussions will take place further upstream, leading to more operational efficiency overall.

As European democracy is based on dual legitimation (see Article 10 (2) TEU), **a double-hatted European President** would be an appropriate step to strengthen the visibility and corresponding responsibility of the EU towards European citizens. **In combination with the idea of transnational lists and the *Spitzenkandidaten* process, the merger of the functions of the two presidents might therefore improve the perception of citizens regarding European democracy.** This new step in enhancing democratic legitimation would contribute to stimulating transnational politics in Europe, closing the gap between the EU and its citizens, and in this sense between expectations and delivery.

Merging the functions of the Presidencies is merely **a question of political will**: according to the Treaty of Lisbon, its execution would be possible without Treaty change.[13] Nonetheless the management and harmonisation of appointment procedures between the European Council on the one hand and the European Parliament on the

[12] See European Commission, European Political Strategy Centre (EPSC), A Double-Hatted President, A New Way of Governing for a Union of 27, #EURoad2Sibiu Series Issue 2, https://ec.europa.eu › European Commission › EPSC › Publications.

[13] See European Commission, European Political Strategy Centre (EPSC), #EURoad2Sibiu Series Issue 2, A Double-Hatted President, A New Way of Governing for a Union of 27, https://ec.europa.eu › European Commission › EPSC › Publications.

other, will remain a major challenge. The political process behind this challenge will become even more complex as the merger will have an impact on the *Spitzenkandidaten* decision in the context of the election of the European Parliament.

Moreover, the EU should decide on whether to maintain the principle of one Commissioner from each Member State, or to make the Commission smaller.

Finally, with the objective to achieve more efficiency in the Euro area, the time is ripe to think about the creation of **a double-hatted European Economic and Finance Minister**, merging the functions of the responsible Commissioner and the President of the Euro-Group, combined with the transformation of the European Stability Mechanism into a European Monetary Fund (see in detail below under D. Annex) [14]

If the EU confines itself to exercising a limited number of competences in policy fields of political priority, it has to deliver on these more efficient. In this regard the facilitation of decision-making through the **extension of qualified majority voting** should be envisaged.

In a number of policy fields legislative proposals can be adopted **by a qualified majority of the Council without Treaty change by using the so called 'passerelle' clauses (see Article 48(7) TEU)**. This would be possible for example in Common Foreign and Security Policy, energy policy and harmonisation of taxes in the Single Market.[15] However democracy as well as efficiency are not only a question of democratic elections, institutions and procedures, but also a question of delivery on substance.

(b) More efficient by a cooperative enforcement

Becoming more efficient with regard to priorities means as well to **close the gap between promise and delivery as well as "law in the books" and "law in action"**. This gap stems from a lack of EU enforcement powers, insofar as the implementation and execution of EU law is still largely in the hands of member states, who must ensure compliance by private parties.

[14] Communication from the Commission, 'A European Minister of Economy and Finance', COM(2017) 823 final, 6.12.2017; Proposal for a Council Regulation on the establishment of the European Monetary Fund, COM(2017) 827 final, 6.12.2017.

[15] Letter of Intent to President Antonio Tajani and to Prime Minister Juri Ratas, 13 September 2017. See also 'President Juncker's State of the Union Address 2017: Proposals for the future of Europe that can be implemented on the basis of the Lisbon Treaty, available at https://ec.europa.eu/commission/sites/beta-political/files/soteu-explained_en.pdf.

As a consequence of this the EU and its Member States should understand the implementation of agreed rules as a **joint responsibility**. On this basis the EU should develop a method of cooperative enforcement.

In this regard the division of labour in competition policy could serve as a model.[16] The Merger Regulation[17] divides competence for merger control between the Commission and national competition authorities, providing for guidance in the event of separate enforcement. Regulation 1/2003[18] establishes a model of joint enforcement in the **anti-trust field**, whereas the previous Regulation 17/62[19] applied a centralised approach in which the Commission had sole competence. Cooperation with national anti-trust authorities is now conducted through the European Competition Network, which enables information and know-how to be exchanged. The upshot is that 85 % of cases can be handled at national level.

This method of **cooperative enforcement** calls for a clear legal framework and for national authorities strong on cooperation, which would, where appropriate, have to be built up with European assistance. It would also be necessary to develop forms of cooperation, potentially ranging from the exchange of information to specialised, personnel or technical support by the European level (perhaps along the lines of the Structural Reform Support Service, SRSS)[20]. Above all, however, there have to be safeguards so that Europe can act as a fall-back if national authorities endanger the common European good[21] because they are unable or unwilling to implement or apply agreed objectives.

Therefore, the Commission or a European agency under its supervision should have — wherever necessary and subject to certain conditions — supplementary **implementation and enforcement powers**. Building on the Treaty principles of subsidiarity and solidarity, this would mean that a European agency could step in where a Member State was unable or unwilling to implement or enforce agreed European

[16] European Commission, White Paper on the future of Europe Reflections and scenarios for the EU27 by 2025, COM(2017) 2025, 1 March 2017, p. 22.

[17] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.01.2004, p. 1.

[18] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003, p. 1.

[19] Council Regulation No 17 of 6 February 1962, OJ 13, 21.02.1962, p. 204.

[20] This is a Commission department set up in 2015 based on the experience of the crisis in the Euro and the Schengen Area.

[21] See also the Glienicke Group on this issue.

objectives (defining European public goods); as a last resort, this could be done even against a Member State's will.

In this context, the Regulation on a European **Border and Coast Guard** (EBCG)[22] can serve as a **blueprint**. The 2015 migration crisis had revealed the shortcomings in Frontex's mandate. The EBCG, which continues to be referred to as Frontex, creates a model of **joint responsibility** for integrated border management, in which the Member States, in keeping with the principle of subsidiarity, retain primary responsibility for their share of Europe's external border. Functioning — and therefore effective — border management is, however, in the interests not only of the Member State with an external border but of all Member States which have abolished controls on internal borders in the Schengen area. This means that whenever a Member State is unable or unwilling to protect its national external borders effectively and thereby undermines the 'European interest' in effective border controls, the EU acquires a **fall-back responsibility** graduated in accordance with the principle of proportionality. In application of the principle of solidarity based on the European interest the EBCG can issue recommendations and provide financial, personnel or technical support. If the national authorities do not cooperate, however, the EBCG — with the legitimacy conferred by a Council decision adopted by a qualified majority — should be in the position to take over without being called in by the Member State concerned. This would happen only if there were an urgent need to deal with a migratory pressure posing a potential threat to the working of the Schengen area and the national authorities had failed to follow recommendations issued by the Commission or the EBCG.

On the basis of the relatively restrictive *Meroni* doctrine[23], which the CJEU has admittedly opened up a bit with the recent *ESMA* ruling[24], Union law does, however, place certain limits on the delegation of powers to agencies. Under this case-law, delegation is possible in the framework of the institutional balance created by the Treaties. What this means in practice is that the division of competences laid down in the Treaties (see Article 5 TEU) permits only clearly defined executive powers subject to the control of the CJEU to be delegated. Under the *ESMA* ruling, direct supervisory and enforcement powers, including the power to impose fines, may be delegated to an agency under Article 114 TFEU. Notwithstanding, there remain no grounds for conferring autonomous powers on an agency: its discretion must be clearly defined by the underlying act. However, if an agency's decisions are linked with the European institutions, especially the Council, an agency may be delegated even more extensive powers which can — as in the case of the EBCG — interfere with the sovereignty of Member States.

[22] See Regulation No 2016/1624, which was adopted in September 2016 on the basis of Articles 77(2)(b) and (d) and 79(2)(c) TFEU.

[23] CJEU, Case 9/56 *Meroni* v *High Authority* ECLI:EU:C:1958:7.

[24] CJEU, Case C-270/12 *United Kingdom* v *European Parliament and Council* ECLI:EU:C:2014:18.

Apart from the example of the European Border and Coast Guard Agency already established in 2016[25], the Commission proposed a European Asylum Agency, a European Public Prosecutor for counter-terrorism[26], a Labour Authority tasked with improving cooperation at EU level on cross-border mobility and social security coordination matters as well as authorities with stronger powers to police food security and food quality.

2. Second element: More citizen-friendly

In those policy fields that are not defined as political priorities the EU would have to do less. This would imply to work more citizen-friendly in the sense of closer to citizens. Legally speaking, there are various ways for the EU to act more citizen-friendly by doing less.

(a) Transferring powers back to the Member States?

Consideration could be given to transferring powers conferred on the EU by the Treaties back to the Member States. This would require amendments to the Treaties, which could be based on Article 48(6) TEU. Under this Article, the powers conferred on the EU by the Treaties are not to be increased. Reasoning *a contrario*, it could be argued that the simplified amendment procedure can be used to transfer powers back to the Member States.

In this regard one might think that USA's dual federalism might serve as a model. If, by analogy, there were a return to the EU's core competences, then **only the common customs tariff, international trade, foreign and defence policy, trade between Member States (the single market) and monetary policy would remain at European level**. In the matter of internal trade, more specifically the **Inter-State Commerce Clause**, there is, however, also a harmonisation of 'small things' in the USA. This establishes the federal level's competence '[to] regulate commerce with foreign nations, and among the several states, and with the Indian tribes', and is often read **in conjunction** with the 'necessary and proper clause'[27]. While the US Supreme Court

[25] See Regulation No 2016/1624, which was adopted in September 2016 on the basis of Articles 77(2)(b) and (d) and 79(2)(c) TFEU.

[26] See European Commission (EPSC), Towards a Security Union, EPSC Strategic Notes, Issue 12 of 20 April 2016, https://ec.europa.eu › European Commission › EPSC › Publications.

[27] This clause confers the power '[to] make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof'.

initially interpreted the **Inter-State Commerce Clause** very narrowly, it later acknowledged the federal government's competence where the latter was able to prove a limited, potentially inter-state effect on 'commerce' (without further specifying what sort of commerce it had in mind).

Doing less can also mean that powers are **transferred back** to the Member States by means of **a review of EU legislation** under Article 2(2) TFEU and the Commission's REFIT process as part of the Better Regulation Agenda. However, in the run-up to the UK referendum, the British government delivered an example how difficult it is to define policy areas for ceasing legislation. Its 'Review of the balance of competences between the United Kingdom and the European Union' examines 32 different policy areas. On that basis, experts concluded that the review **did not warrant transferring back to the Member States powers currently held by the EU** under the Treaties[28].

(b) Tapping the potential of the principle of subsidiarity and proportionality

A **key element** of working closer to citizens would be to accord greater weight to the principles of **subsidiarity and proportionality**. A working method permitting for greater flexibility when implementing European legislation would enable Member States to introduce made-to-measure solutions in certain policy areas. European legislation would then be characterised in certain policy areas by a **multi-level division of labour** based on common policy objectives.

In order to make the principles of subsidiarity and proportionality better work, a bundle of measures should be taken:

- **Refrain from exercising certain powers**

By choosing **not to exercise powers** at European level or confining European legislation to minimum standards, the EU would already 'do less' without the need for major amendments to the legal framework. In this sense, 'doing less' can mean above all that the EU decides, in the light of its policy priorities based on the European added value, **to refrain from exercising certain powers (see Article 5(1) and (2) TEU)**. As the EU would not be occupying the policy area in question or confining its action to minimum standards, Member States would retain (full or opt-up) competence (see Article 2(2) TFEU).

[28] See, for instance, Senior European Experts: Britain & the EU: What the Balance of Competences Review Found, March 2015; Michael Emerson (Ed.): Britain's Future in Europe. Reform, renegotiation, repatriation or secession? (available online).

- **Develop a common language and culture of subsidiarity based on a subsidiarity grid**

With the objective of **better applying the principles of subsidiarity and proportionality** in their work the Unions Institutions (Commission, Council, EP and the Committee of Regions) should agree on a **common and single framework of reference (subsidiarity grid)** which should be elaborated on the basis of Art 5 TEU and Protocol No 2 as well as of the procedural and material guidelines agreed by the European Council of Edinburgh in 1992 and therefore, indirectly, of the Protocol No 30 annexed to the Treaty of Amsterdam. A convincing proposal was tabled by the Commission in 2018.[29]

Notwithstanding a better application of subsidiarity and proportionality depends **on procedure**. In this regard proposals should follow the decision-making process of the European institutions[30]:

- **Consultation by the Commission in the preparatory phase**

When the **Commission is preparing a draft legislative act** (the same would count for the so called green and white Papers and communications) it is supposed to exchange views with civil society and representative associations, to maintain a dialogue with them and to carry out consultations with parties concerned (see Art. 11 TEU). In this **preparatory phase**, when the proposal is not yet shaped, stakeholders have the chance to communicate their position. At that early stage the Commission should **involve as well regional and local authorities together with national and regional parliaments**. These should be informed and given the opportunity to raise their concerns based on the mentioned common and single framework of reference on the principles of subsidiarity and proportionality. In this regard a special kind of consultation procedure that starts before the draft legislative act is tabled by the Commission should be established. It may even include a hearing held by the responsible Commissioner. The results of this consultation should be mirrored in the accompanying subsidiarity sheet and (later) in the reasons of the proposal (Art. 296(2) TFEU).

[29] ANNEX II to COM(2018) 703 final, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL, THE COUNCIL, THE ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS, The principles of subsidiarity and proportionality: Strengthening their role in the EU's policymaking, COM(2018) 490 - COM(2018) 491, Strasbourg, 23.10.2018.

[30] See in detail: Calliess, Subsidiaritäts- und Solidaritätsprinzip in der EU, Baden-Baden, second edition, 1999, pages 271 ff. and 279 ff.

- **Special subsidiarity sheet as a living document**

In accordance with Article 296(2) TFEU and Article 5 of the current Protocol No 2 the Commission is required to justify adequately 'draft legislative acts ...with regard to the principles of subsidiarity and proportionality'. Any draft European legislative act should, it provides, 'contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality.' Therefore, a special **subsidiarity sheet** should be added to each proposal of the Commission. It should mirror the common and single framework of reference for the application of Article 5 TEU and be binding for all institutions involved in the decision-making process.

- **Strengthening subsidiarity and proportionality in the framework of Protocol No 1**

In the next step the so called 'yellow card procedure' of Protocol No 1 should require the Commission to forward its proposal **together with the subsidiarity sheet** to national parliaments. During the 8 weeks period (that might be prolonged informally by the Commission holding the 'lettres de saisine' until the last language version of the legislative proposal, that could even be delayed on purpose, can be sent) national parliaments can raise their concerns regarding the proposal tabled by the Commission. Regional parliaments with legislative powers have the opportunity to raise their concerns via the second chamber. Their reasoned opinion should **be based on the common and single framework of reference** on the principles of subsidiarity and proportionality **as well as on the subsidiarity sheet**.

- **Assigning a 'green card' to national parliaments**

Apart from this 'negative' veto based on subsidiarity concerns, it could be helpful to assign as well a more 'positive' role to national parliaments. In this regard a new kind of 'green card procedure' could be launched to give national parliaments an opportunity to introduce subsidiarity concerns by **suggesting new legislation or a revision/abrogation of existing legislation** to the Commission. A certain threshold of national parliaments would be necessary for launching such a kind of 'green card' procedure. Taking into account Article 7 of Protocol No 2 this could be set at the level of one-third or one-fourth. However, the Commission should not be obliged to submit a proposal upon receiving a 'green card' initiative but it would be required to offer an explanation for not doing so. The 'green card procedure' could be practiced in a manner which is consistent with the existing mechanisms such as the citizens' initiative and the right of the European Parliament and the Council to request the Commission to submit proposals.

- **Establishing Subsidiarity Boards**

To manage and monitor the implementation of the process during the decision-making process, a **Subsidiarity Board** (that could be based in the Commission on the already existing Regulatory Scrutiny Board) should be established – not only in the Commission but as well in the Council and the EP. By this, a **subsidiarity network** among the institutions (maybe together with a **common subsidiarity platform)** would emerge, which could integrate the positions of both the national parliaments according to Protocol No 1 as well as the Committee of Regions being the "guardians of subsidiarity".

- **Proportionality, better regulation and a legislative tool box**

Under the principle of proportionality (Article 5(4) TEU), according to which '*the **content and form** of Union action must not exceed what is necessary to achieve the objectives of the Treaties*', it must be determined **how** the Union is to act. In this regard it must be established whether the Union has met the proportionality criteria in both its choice of legislative act (form) and content of the act. **Form and content** of the planned measure must therefore be **suitable** with regard to the objectives of the planned measure and **necessary** in kind, extent and intensity to the objective they are intended to serve (Is there a less stringent measure that would achieve the objective in the same manner?). Finally, the planned measure must **not be out of proportion to that objective**.

In the framework of proportionality, the EU could work closer to citizens by **confining European legislation to minimum standards, opt-out clauses or a result-based approach**. This way it would not only permit greater flexibility to Member States when implementing European legislation but also enable them to introduce made-to-measure solutions in certain policy areas. European legislation would then be characterised in certain policy areas by a multi-level division of labour based on common policy objectives.

In this context and with the same objective the **Better Regulation Agenda could be developed further**.[31] Better Regulation aimed at delivering better results for a stronger Union for citizens, businesses and public authorities. By taking account of citizen criticism, it sought to focus on providing effective solutions to the big challenges while trying to cut with past practice of excessive and badly designed regulation through a proper application of the principles of subsidiarity and proportionality.

[31] Communication from the Commission to the European Parliament, the European Council and the Council 'Better Regulation: Delivering better results for a stronger Union', COM(2016) 615 final of 14 September 2016, p. 2.

This approach has been materialised by the focus on the **ten predetermined political priorities** of the Juncker Commission that have steered political action in the medium term. In the context of Better Regulation, legislative proposals made by the Commission in the context of the ordinary legislative procedure also decreased from 159 in 2011 to 48 in 2015. At the same time, proposals that had been outdated or that were not advancing have been taken off the table in order to focus on priority files. Furthermore, legislation is tabled after a rigorous impact assessment and an analysis determining whether EU-level action is required, or whether it is best left for the Member States.

In this context a **legislative tool box** that allows for more flexible and differentiated ways of doing European legislation could be established.[32] The tools could range from mutual recognition based on the country-of-origin principle to strict harmonisation by standard setting. In between these two extremes different tools could be applied:

- Legislation allowing for the consideration of alternative less burdensome solutions.
- Legislation focusing on the outcomes, instead of prescribing the exact mechanisms by which compliance is obtained should be considered.
- Legislation including a so-called right to challenge, which enables public authorities, local governments and possibly even Member States to apply for an exemption from an existing rule or regulation.
- Legislation based on benchmarking and best practice, which allows for a comparative evaluation of performance, strategies or processes and the identification of the best approaches which can then become a benchmark.
- Ex-post evaluation of legislation, which allows for taking stock from past experience to correct ongoing policies and assess the need for further or better public action. This tool is similar to the European Commission's Regulatory and Fitness Programme (REFIT), which aims to make EU law simpler and reduce regulatory costs.
- Legislation with so-called Sunset Clauses, which bear resemblance to experimental legislation, because they enable the legislator to try out a new regulatory approach. This can be useful in a situation of great uncertainty and lack of information.

[32] European Commission (EPSC), Towards an Innovation Principle Endorsed by Better Regulation, EPSC Strategic Notes, Issue 13 of 30 June 2016.

3. Third element: Flexibility by Pioneer Groups

According to its (unofficial) motto[33], the EU is 'united in diversity'. Diversity is a strength of the EU, unity the ideal of European integration. If, however, the diversity of the 27 Member States results in interests so widely divergent that it is no longer possible to reach a consensus on the necessary reforms, the EU, trapped in the consequent inability to act, finds itself in a state of **imperial overstretch** that threatens its very existence[34]. The aim, then, is to design a **more flexible (and at the same time more dynamic) architecture** aimed at hindering processes of disintegration.

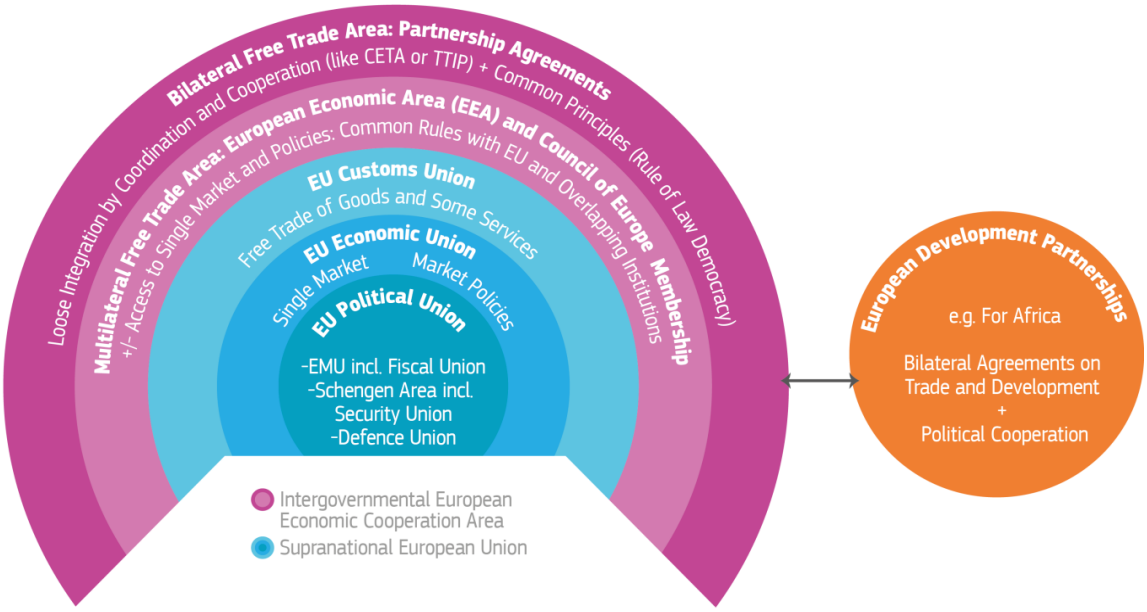
In this regard 'coalitions of the willing' could pave the way to reforms. Their goal is not a static 'multi-speed Europe' that would introduce parallel and separate 'orbits'. The aim is rather for a **pioneer group** to press ahead with deeper integration and create a positive example motivating other Member States to join in by showing them the benefits of membership. Two overarching models could structure the debate.

(a) A new architecture for the EU?

First, a new architecture could be imagined for the EU, built around an inner circle ('core union') of Member States which want to achieve a political union. Based on the principle of subsidiarity, this political union would respond to the challenges of the polycrisis by taking further integration steps. Less integrated areas would crystallise in the shape of **concentric circles** around this core, all of them bound by the European principles of subsidiarity, solidarity and consistency as well as democracy and the rule of law. On this basis the core union shares the tasks and competences of the surrounding circles, which can range from a supranational single market and customs union to intergovernmental cooperation. The Member States' long-term goal remains an ever-closer union. This goal will, however, be achieved by 'interim' differentiation. As this model would **change the architecture of the current EU**, it has to be seen as a highly ambitious and — given the spirit of keeping the EU27 together that characterises the Bratislava Roadmap and the Rome Declaration — politically very challenging option.

[33] Proclaimed by the European Parliament on 4 May 2000 and later inserted in Article I-8 of the Constitutional Treaty.

[34] Term coined by historian Paul Kennedy, The Rise and Fall of the Great Powers, 1987, p. 536 *et seq*.



C. Calliess (2016), published in the journal: integration N° 2/2019, 97 (115).

(b) Flexibility through pioneer groups

Alternatively, one can envisage a rather pragmatic model, which could be described as a **flexible 'Europe of the pioneers'**. On this basis, deeper integration between pioneers would create additional areas in which Member States willing and able to do so can decide on a case-by-case basis — not across the board — to deepen certain policy areas of today's EU or open up new policy areas. This deeper integration could be pursued through a form (ideally, duly modified) of enhanced cooperation under Articles 20 TEU and 326 *et seq.* TFEU (in the area of defence policy under Articles 42(6) and 46 TEU) or, alternatively, through intergovernmental cooperation. The number of these pioneer groups would not be limited, nor would they have to follow a specific model: the number of Member States taking part and the extent and form of such deeper integration could depend on the policy area concerned. Pioneer groups would come together not for a single measure or a single legal act but rather for the dynamic deepening of a whole **policy area** and the creation of **a more efficient single legal area with common rules**. While the resulting advantages — the pioneer group's European value-added — are

available only to the members, they nevertheless provide an incentive for joining the pioneer group.

As every Member State that is willing and able is supposed to join a pioneer group at any moment, coherence demands that the pioneer groups be barred from creating new institutions Instead the appropriate existing EU institutions would be used as appropriate and their procedures and decision-making powers extended for the relevant pioneer group. Majority voting, using the 'passerelle' clause in Article 333 TFEU, would become the norm in pioneer groups. The Commission and CJEU would ensure coherence in the relationship between the EU and pioneer groups while only the members of the relevant pioneer group would decide in the Council and Parliament. Each pioneer group would, however, have its own budget, drawn from the pioneer countries' contributions.

Member States not belonging to a pioneer group would remain in the Union as it is, with all the rights and obligations that derive from membership, without being obliged by the 'constitutional expectation' of Article 1 TEU to participate in further integration towards an ever-closer union[35]. At the same time, however, they would not be able to prevent other Member States from forming pioneer groups. This understanding is expressly stated in the **Rome Declaration**[36].

In contrast to the 'one-way street' represented by today's integration process, a European working method allowing for pioneer groups could help to develop new forms of dynamic flexibility. Just as the EU's doors are fundamentally open to any European constitutional democracy (Article 49 TEU), the pioneer groups, too, would have to admit EU Member States willing and able to realise their ambitious objectives (see also Article 331(1) TFEU).

At the same time pioneer groups would be defined precisely by the fact that they are **not working on the basis of the lowest common denominator** but as an efficient and forward-looking coalition of the willing and able. There could therefore be no carte blanche for the Member States in the pioneer group: once members, they would have to demonstrate their **willingness to achieve the 'pioneer goals' jointly agreed**. **If they were no longer able to do so (e.g. owing to a crisis)**, the institutions could offer them

[35] See European Council Conclusions, EUCO 1/16, 19 February 2016, p. 9, as regards a new relationship with the United Kingdom in the event that the latter were to vote 'remain' in the Brexit referendum: '... [*S*]uch processes make possible different paths of integration for different Member States, allowing those that want to deepen integration to move ahead, whilst respecting the rights of those which do not want to take such a course.'

[36] Rome Declaration, Declaration of the leaders of 27 Member States and of the European Council, the European Parliament and the European Commission, 25 March 2017 (see: https://europa.eu/european-union/eu60_en (14.12.2017)).

financial, technical or administrative assistance from the pioneer group's resources on the basis of the principle of solidarity. Should a member, however, refuse this assistance or if it was no longer willing to achieve the pioneer group's ambitious objectives for other reasons, such as the election of a new government, it would have to **leave the group** and forfeit the additional advantages associated with membership. Every pioneer group would therefore have to have an **exclusion clause**. This could be modelled on **Article 46(4) TEU**, which concerns defence-policy pioneer groups in the framework of permanent structured cooperation (PESCO).

C. Conclusions

Citizens expect the EU and its policies to function properly. If the EU wants to regain their trust, it has to explain the need for reforms and start a transparent debate. The **Conference on the Future of Europe** 2020-2022 can be an important step in this direction.

However, the Member States have so far shown little appetite for reforms. At a time when national interests are increasingly being voiced without regard for the common European interest, when the value added of European integration is taken for granted, inadequately explained and all too rarely defended, it makes sense to hold a Europe-wide debate on the EU's future prospects that culminates in a moment of honesty. Citizen dialogues in all Member States might feed in debates and finally the results of the conference. In this regard the **5 scenarios** presented in the **White Paper on the future of Europe** presented by the Commission on 1 March 2017 is a good starting point for the debate.[37]

In order to provoke a substantive debate, the EU moreover should provide **an overarching narrative** for the Conference on the Future of Europe: It should not be about "more Europe" but about a better functioning EU based on the above described three elements of the **new working method "more efficiently, more citizen-friendly and more flexible"**.

The experiences of the 2004 Constitutional Draft Treaty and the Treaty of Lisbon in 2009 have shown that any treaty revision can be politically fraught. The proposed ne working method as well as most of the above-mentioned reforms can be undertaken in the framework of the Treaty of Lisbon. This is different with the **euro area (EMU)** that is in need for more far reaching reforms. However, there is no need for a fundamental Treaty change based on Art. 48 (2) – (5) TEU. **Reforms to make the euro area** more

[37] European Commission, White Paper on the future of Europe, COM(2017) 2025, 1 March 2017.

resilient by improving its governance could be achieved by a rather technical Treaty change following the example of the Single European Act from 1986.

D. Annex: Towards a more resilient euro area (EMU) - Better governance by a fresh institutional design

1. Where we stand …

The financial and economic crisis has confronted the European Union and more precisely the eurozone with its structural and political deficiencies. Existing mechanisms have failed to provide for collective solutions. Decision-making was shifted to bilateral and international levels. The complex, mostly intergovernmental arrangements that have been reached have been criticised for their lack of democratic and constitutional legitimacy.

The fact that the **Maastricht Treaty favoured the implementation of an Economic and Monetary Union (EMU) over a Political Union explains the lack of competence for common policies in the fields of finance and economics**. It is the reason why the institutional setting for EMU is based on an asymmetric structure: with the introduction of the euro the competences for monetary policy have been transferred to the euro area level (Art. 127 et seq. TFEU), while the competences for economic as well as fiscal policy have largely remained in the responsibility of national policy makers (Art. 4 (1) and 5 (1) and (2) TEU, Art. 5 TFEU, Art. 121 et seq TFEU).

As the Maastricht Treaty of 1992 did not establish a supranational European economic and fiscal policy compatible with the common European monetary policy, Member States agreed on a dual system to defend the stability of the euro and the euro area:

- On the one hand they established – as a "first ring of defence" – a rules-based approach: Art. 121 TFEU contains the preventive measures designed to ensure sound public finances through multilateral surveillance. The key concept of this provision is the coordination of national economic policies within a framework set by the Council, today embodied by the European Semester and Country Specific Recommendations (CSRs). Additionally, Art. 126 TFEU contains the corrective measures implementing the Excessive Deficit Procedure (EDP). The Commission is enjoined to monitor the development of the budgetary situation as well as the stock of government debt in the Member States having regard to the ratio of government deficit and government debt to gross domestic product.

- On the other hand – as a second "ring of defence" – Member States agreed on a market-based approach. The so-called 'No-Bail-Out-Clause' in Article 125 TFEU states that neither the Union nor the other Member States may be made liable for the debts of a particular Member State. The intention of this clause is to ensure that Member States of the eurozone are sanctioned through the financial markets by higher interest rates on their government bonds in the event of rising sovereign debt.

With the crisis in the euro area it has become obvious that both the rules-based and the market-based tools were incapable of fulfilling their function, which was to prevent a systematically relevant excess indebtedness of eurozone Member States. Furthermore, the mere coordination of national economic policies was insufficient to achieve the policy adaptation needed in order to coincide with the common monetary policy of the European Central Bank (ECB).

Against this backdrop, reforms have to address both the rules-based and the market-based tools.

In this regard, the so-called **Five Presidents' Report on Completing Europe´s Economic and Monetary Union from 22 June 2015 (FPR)** and the accompanying communication of the European Commission from 21 October 2015[38] among others point out the urgent need *'to move from a system of rules and guidelines for national economic policy making to a system of further sovereignty sharing within common institutions.'*

The FPR further states that a

„genuine Fiscal Union will require more joint decision-making on fiscal policy. This would not mean centralisation of all aspects of revenue and expenditure policy. Euro area Member States would continue to decide on taxation and the allocation of budgetary expenditures according to national preferences and political choices. However, as the euro area evolves towards a genuine EMU, some decisions will increasingly need to be made collectively while ensuring democratic accountability and legitimacy. A future euro area treasury could be the place for such collective decision-making ".

The proposed Treasury of the euro area (TEA) is to be understood as a placeholder that allows for different institutional concepts to be drawn up. These can range from an intergovernmental approach with the Council and the Eurogroup at

[38] See COM(2015) 600 final.

its heart to supranational concepts based upon the Commission, ranging from a European economic government ("gouvernement économique") as proposed by France to a European finance minister as proposed by Germany and the President of the European Commission Juncker. However, the report does not set out a detailed TEA concept and locates its creation in the second stage (up to 2025) of the completion of Europe's EMU.

Moreover, the FPR might be read as intending a political package deal between the Treasury and the fiscal stabilisation of the Euro Area: The latter standing for more risk sharing, the first standing for more sovereignty sharing. By bringing together both aspects the institutional dimension of the FPR enfolds.

2. Elements of a reform to make the euro area more efficient and resilient

Hereafter, different reform proposals aiming at overcoming the deficiencies outlined above will be compared and analysed in terms of their approaches to the scope, institutional ties, mission and competences as well as democratic accountability and financing of a future TEA.

(a) Competences

The FPR states that Member States will have to accept more and more joint decision-making on elements of their respective national budgets and economic policies. This implies that the **Treasury of the euro area (TEA)** would have to be competent to take all necessary fiscal, monetary and economic measures in order to establish a properly democratic common economic policy. Thus, the TEA would incorporate competences that generally are ascribed to both the finance ministry and the economics ministry at national level. It should have supervisory and managerial functions.

The TEA could have the powers:

- to oversee coordination of fiscal and economic policy, especially to scrutinize and enforce the European Semester
- to support reform processes in the Member States by administrative, technical and financial means (using the experience of the European Structural Reform Service)
- to negotiate reform packages with Member States undertaking structural reforms
- to ensure the provision of euro area public goods by proposing legislation with regard to the envisaged Fiscal- and Economic Union
- to enforce euro area rules

- to manage crises in the euro area and offset asymmetric macroeconomic shocks via a fiscal capacity
- to decide on bank closures
- to chair the European Monetary Fund (EMF), a transformed version of the ESM (European Stability Mechanism)
- to ensure the unified external representation of the euro area

With regard to these competences, the decision to establish a TEA must not exclude the development of the ESM into an EMF. On the contrary, it might be wise for these two institutions to go hand in hand when it comes to the monitoring, implementation and enforcement of the competences of the TEA: National reforms could be politically monitored by the TEA. At the same time, they could be supervised, supported and (and ultimately) enforced by a future EMF, understood as a technical and politically independent institution equipped with the appropriate competences and expertise.

This "re-integration" of the ESM into the EU framework is explicitly mentioned in the FPR. The new EMF could replace the ESM and take over its functions, while simultaneously extending its mission to encompass preventive action. The latter would mainly revolve around financial, administrative and technical support in close cooperation with the Structural Reform Support Service (SRSS), established in 2016 and residing with the Commission's Secretary General.

In addition to a short-term crisis management facility, the Treasury would therefore dispose over the work of the EMF as a long-term support facility in exchange for reduced budgetary sovereignty of Member States. As a result, the TEA, acting via the EMF, would be able to support economic growth and further convergence by supervising and – where necessary – assisting structural reforms in the Member States.

In the event of any infringement of EMU's legal framework, especially the Stability and Growth Pact, the TEA together with the EMF should be equipped with graduated instruments of intervention in national budgets, including – as *ultima ratio* – the preparation and implementation of Member State insolvency. The development of a state insolvency procedure not only represents the last resort when it comes to excessive sovereign debt but is also crucial for the credibility of the whole system. Within the framework of handling sovereign default, the EMF could grant time-limited credits – should debt have proven unsustainable – in order to secure, in the interest of the financial stability of the euro area as a whole, a structured insolvency of the relevant eurozone Member State.

Part of this ("package deal") approach based on more control (sharing sovereignty) would then be more financial solidarity (risk sharing) based on the principle of

conditionality (see Article 136 (3) TFEU). In concrete terms, this would mean that the involvement of the TEA together with the EMF in national reform programs could be backed by a fiscal capacity.

The establishment of a fiscal stabilisation function (for example, some kind of "rainy day fund") as part of the TEA might be complex from a political point of view. Some Member States would fear increased moral hazard, permanent transfers or mutualisation of debts. However, a fiscal stabilisation function could be designed in such a way that net transfers to each Member State remain in the long run close to zero. The definition of transparent criteria for triggering this cyclical support would also go a long way towards meeting moral hazard concerns. Finally, in this context, questions of democratic oversight and legitimacy inevitably arise. Against this backdrop, the FPR emphasised that the establishment of a fiscal stabilisation capacity for the euro area needs to be preceded by a significant degree of economic convergence. Therefore, the convergence benchmarks to define eligibility for the new fiscal instrument would have to be defined.

Finally, any fiscal capacity should contribute to finance European public goods. Therefore, a European investment budget, that provides an incentive for structural reforms identified within the European Semester and Country Specific Recommendations (CSRs), could support investment in European public goods (e.g. in energy infrastructure, border management, security measures or reforms of the labour market). It corresponds to the mission of a euro area stabilisation function as outlined in the FPR.

The deliberate combination of solidarity and conditionality with the objective of safeguarding euro area stability mirrors not only the political package deal found during the crisis in the euro area but also the legal framework agreed with the Treaty of Maastricht in 1992. For the euro area all of these principles are explicitly mentioned in Art. 136 (3) TFEU: the granting of any required financial assistance under a stability mechanism, which may be activated if it is indispensable to safeguard the stability of the euro area as a whole, will be made subject to *strict conditionality.* In its *Pringle* judgment the European Court of Justice stated that "the reason why the granting of financial assistance by the stability mechanism is subject to strict conditionality under paragraph 3 of Article 136 TFEU, (…) is in order to ensure that that mechanism will operate in a way that will comply with European Union law, including the measures adopted by the Union in the context of the coordination of the Member States' economic policies".[39]

[39] ECJ, Case C-370/12, para. 69.

Art. 136 (3) TFEU's full legal effect unfolds in the context of the so-called No-Bail-Out Clause, stipulated in Art. 125 TFEU – serving as another core principle of the euro area. In short, this means that any sort of financial assistance granted by the Union or by the Member States to another Member State is not generally prohibited by Art. 125 TFEU.[40] However, any voluntary assistance is not generally allowed. As the objective of Article 125 TFEU is to prompt Member States to maintain budgetary discipline by remaining subject to the logic of the market when they enter into debt, the provision "prohibits the Union and the Member States from granting financial assistance as a result of which the incentive of the recipient Member State to conduct a sound budgetary policy is diminished".[41] This means that, under Art. 125 TFEU, any financial assistance to a Member State is only compatible with EU law if it is indispensable for safeguarding the financial stability of the euro area as a whole, while the Member State remains responsible for its commitments to its creditors and the strict conditions attached to such assistance are such as to prompt measures to ensure sound budgetary policy.[42]

Beyond these core TEA competences, the FPR also aims at establishing a unified external representation of the Euro internationally, especially in the IMF. The 2004 Constitutional Treaty had already provided for this innovation in its draft Article III-90. On the one hand, this could attribute more political weight to the euro area and ensure that its overall interests are expressed. On the other hand, if the particular interests of the Member States are too varied, there is a risk that the common position drawn up will simply constitute a weak compromise.

(b) Scope

It is essential to determine whether the **Treasury of the euro area (TEA)** should only represent the Member States of the Euro area or, potentially at least, the EU as a whole, including those Member States which do not (yet) take part fully in the EMU. This depends notably on the mission and competences attributed to this institution. Since joining EMU is compulsory for every Member State fulfilling the criteria of convergence (except for those with legal opt-outs), it seems logical to include all Member so as to pave their way towards EMU. Considering the close coordination in both fiscal and economic policy which is to be established by the Treasury, an institution which

[40] ECJ, Case C-370/12, para. 130: "It must be stated at the outset that it is apparent from the wording used in Article 125 TFEU, to the effect that neither the Union nor a Member State are to 'be liable for the commitments' of another Member State or 'assume [those commitments]', that that article is not intended to prohibit either the Union or the Member States from granting any form of financial assistance whatever to another Member State."

[41] ECJ, Case C-370/12, para. 137.

[42] ECJ Case C-370/12, para. 136, 137.

represents euro area Member States only could create a deeper gap between euro and non-euro Member States and make accession more difficult. However, the goal of the reform will ultimately be the establishment of closer solidarity and sovereignty-sharing mechanisms. If a common European approach is chosen, the accountability of – and the benefits for – non-euro states would have to be evaluated separately.

(c) Position of the TEA in the institutional framework

The position of a **Treasury of the euro area (TEA)** in the EU's institutional framework has not yet been defined. However, integration into the existing institutional framework – as opposed to decision-making at an intergovernmental level outside the EU as practised in the ESM or in the Fiscal Compact Treaty – is one of the reform's main goals.

Most proposals share the view that the mechanisms developed during the financial crisis have to be reintegrated within existing structures. The predominance of intergovernmental or supranational elements in the new institution has direct influence on the requirements set out for decision-making (qualified majority vote or veto rights).

There are three principal approaches regarding the TEA's institutional position.

- In the first one, current structures would be left broadly untouched and a new executive authority would be added as part of the Council. This authority could complement or even replace the Eurogroup and raise the profile of economic policy coordination. This approach is based on the understanding that the basis for common decision-making in fields as sensitive as fiscal and budgetary policy has not yet been established. For this reason, the so-called Union Method would be pursued, although with important changes to the principle of unanimity: cooperation in fiscal and economic policy could be modelled on the decision-making process in the EU's Common Foreign and Security Policy (CFSP), as both policy fields are politically highly sensitive. This would mean extending the principle of "constructive abstention" to EMU in order to prevent decisions being blocked by the veto of a single Member State, i.e. the analogous application of Article 28 (2), 31 (1) and 36 TEU to the decisions of economic governance. At the same time, this intergovernmental authority would not have any legislative functions but would be limited to adopting operational measures, after consultation with the European Parliament.

- The second approach is to anchor the future euro area Treasury firmly within the Community Method, with a supranational mechanism and a proper fiscal capacity safeguarding the interests of the EU and the euro area as a whole. The TEA would

then be established inside the European Commission. Here two models could be distinguished: a European Finance Minister or a European economic government ("gouvernement économique"):

(1) The Treasury could comprise just the Commissioner responsible for monetary union, who then would become a kind of European Finance Minister. To enhance his coordinating role, the function could be "double-hatted" by combining his role as Commissioner and President of the Eurogroup. The new institution would be modelled after the office of the High Representative for Foreign Affairs, representing a mixed administration drawn from Commission, the Council and even Member States. This would suggest the European Finance Minister would be elected by the Council by qualified majority vote. Merging the positions of Commissioner and Eurogroup President would give more political weight to the office, particularly in the implementation of the Excessive Deficit Procedure and the Stability and Growth Pact.

(2) Alternatively, in a more expanded set up, the TEA could comprise the five Commissioners dealing with the relevant policy fields (e.g. the four responsible for the Monetary Union, the Internal Market, Trade and Financial Stability) along with the President of the Commission (this expanded alternative would be better described as not just a Treasury but an "European Economic Government" for the monetary union). The Commission would then have to be restructured to create a proper treasury facility endowed with the full spectrum of fiscal, financial and macro-economic functions.

- This version prompts a third approach, combining the TEA on lines set out above with a new EMF. This would create a hybrid model which would see the Treasury emerge as part of the Commission, but with guarantees of institutional independence when it comes to control and enforcement by the EMF. The model for that functionality would be a little bit like that of the Single Supervisory Mechanism, now housed within the ECB. The independent, yet Commission-anchored, Treasury would be primarily responsible for matters of budgetary surveillance and fiscal stabilisation where preventing political interference is particularly important.

(d) Democratic legitimacy

An institution like the TEA has to be elected and scrutinized by a parliament. With regard to its envisaged competences questions of legitimacy and democratic accountability arise. In this context, the predecessor to the FPR, the Four Presidents' Report, already mentioned that '*moving towards more integrated fiscal and economic*

decision-making between countries will (...) require strong mechanisms for legitimate and accountable joint decision-making.'

The role of the European Parliament (EP)

If the purpose of the TEA is narrowed down to the provision of public goods in the euro area as outlined above, allowing MEPs of non-eurozone Member States a vote on matters exclusively regarding the euro area is questionable and should be ruled out.

The body should therefore be staffed with MEPs solely representing eurozone Member States. Altough a Euro Chamber inside the EP might conflict with Art. 10 (2) TEU according to which the EP is the representative body of EU *citizens* and not of EU Member States, the advantage of such a Euro Chamber is that it is based on an existing institution and can be adopted quickly and flexibly

Another possibility would be to create a formally separate parliamentary assembly, made up of directly elected representatives from Member States of the euro area. However, this could further complicate the already complex decision-making mechanisms..

Some concepts also aim at enhancing the role of the EP and/or Euro Chamber in the legislative process and in the European Semester. The FPR emphasizes that the EP's role in the European Semester has to be strengthened. The assignment of appropriate responsibilities to the EP could complement the decision-making process in the European Council and Eurogroup and endow it with fresh legitimacy.

National Parliaments

As certain competences of the TEA (especially proposing legislation with regard to euro area public goods) would interfere with – in a national perspective – very sensitive policy fields such as economic, fiscal, budgetary and social policy, it might be politically wise and – given constitutional constraints in at least some Member States – even necessary to integrate national parliaments into the decision-making process. This would compensate them as well for the implied transfer of parliamentary powers affecting their budget autonomy.

In this context, the FPR emphasizes the need to strengthen inter-parliamentary cooperation and to involve national parliaments more closely in the adoption of National Reform and Stability Programs. There are three different approaches on how to involve national parliaments. All of them would apply only in those policy fields that are affected

by the necessary transfer of new competences (e.g. in the field of fiscal, economic and social policy) to the European level.

- The first approach could be to establish a "Euro Chamber" consisting of Members of national parliaments beside the EU Parliament and the Council. This Third Chamber should get involved only when framework legislation is passed on matters that touch upon new competences transferred to EU level in the field of economic, fiscal, budgetary and social policy. Arguably, such an additional institution would make the EU's decision-making process even more complex. Nevertheless, a Third Chamber would buttress the role of the national parliaments (as it is already funded in Article 10 (2), 12 TEU and Article 13 TSCG) into a further integrated multi-level parliamentarism according to which the EP and national parliaments both contribute to the democratic legitimisation of European decision making. The involvement of national parliaments is necessary to get political and constitutional support for a Treaty Reform that embraces a transfer of powers over economic, fiscal, budgetary and social policy all of them being under scrutiny of national parliaments. Such a Third Chamber would have to come into being through a treaty change. This approach is mirrored in the proposal for a bicameral parliamentary system scrutinizing the proposed European Economic Government. While the right to initiate new legislation would be conferred to the EP (possibly with only euro area MEPs eligible to vote), the second chamber consisting of Members of the national parliaments could take up a role comparable to that of the German *Bundesrat*.

- Another possibility that might even be achieved partly within the Treaty of Lisbon would be to establish a veto (orange or red card) of national parliaments specifically with regard to these sensitive policy fields. The basic idea of such a veto corresponds to the right of national parliaments to raise a subsidiarity complaint (Art. 12(b) TEU). Furthermore, it corresponds to the so-called emergency breaks that exist already in the field of judicial cooperation in criminal matters – another sensitive policy area (Art. 82(3) and 83(3) TFEU). In order to ensure that one national veto cannot block the whole European decision-making-process for an unlimited time, the veto could be suspended for a period. The European institutions would have to consider and take into account the reasoning of national parliament. If a compromise cannot be found after six months, there could be two outcomes: either a minimum of one third of the other national parliaments supports the veto, meaning the proposal is taken off the agenda, or, if this minimum is not reached, the European institutions

could continue with the decision-making-process. This would require a unanimous decision in the Council/Eurogroup.

- A third possibility would be to combine the above-mentioned proposals concerning the Third Chamber and the veto card to the effect that it is not national parliaments but the Third Chamber that would have a veto right with regard to the sensitive policy fields of economic, fiscal, budgetary and social policy. This approach is reflected in the proposal for a Joint Committee comprising 28 delegates from the EP and 56 delegates from national parliaments.

- If a future EMF replaced the ESM, the need for direct decision-making involving the concerned Member States could be met by a co-decision mechanism between the EMF board, voting by the same system of qualified majority as established with the ESM, and the Joint Committee.

- Democratic accountability is even more crucial when it comes to the TEA's authority to intervene in national budgets. There is here a consensus that the budgetary autonomy of national parliaments has to be respected. Therefore, the right to encroach upon national budgetary autonomy would only be possible on the following conditions: as long as Member States comply with their obligations under the common debt rules, only legally non-binding recommendations are possible (as it is the case *de lege lata* or under current law). If a Member State, however, infringes the legally binding stability criteria (and therefore disregards European law), it must be possible to make legally binding but still abstract stipulations about how much that country has to save. These abstract stipulations would allow for the national government and parliament to decide where savings were to be made. Only where a Member State depends upon financial aid from the ESM (or a future EMF), would concrete legally binding recommendations be possible. Here, it is only fair to ask to what extent a national parliament of a eurozone Member State getting money from the ESM (or a future EMF) has given up its budgetary autonomy voluntarily.