Berliner Online-Beiträge zum Europarecht
Berlin e-Working Papers on European Law

herausgegeben vom
edited by

Lehrstuhl für Öffentliches Recht und Europarecht
Chair of Public Law and European Law

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Nr. 120

11.09.2020

Christian Calliess:

The Future of Europe after Brexit
The Principles of Efficiency, Subsidiarity, Solidarity and Flexibility as Drivers for the Reform of the European Union and its Euro Area

Zitiervorschlag:
VerfasserIn, in: Berliner Online-Beiträge zum Europarecht, Nr. 120, S. XX.

This article will be published in Oxford Yearbook of European Law 2020.

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A. Under Pressure: The EU After Brexit

The European Union (EU) is under pressure. Crises, undesirable developments, and loss of confidence are mixed up into a diffuse picture of justified criticism, unease, ignorance, and populist rejection. Paradoxically, perhaps the fact that the EU, with all of its advantages, is so naturally present in the everyday lives of citizens today implies a risk for future of European integration. What is taken for granted may suddenly dissolve, not overnight, but in a creeping process that will only be realised in a historical retrospective.

The EU has been in a crisis mode for several years now,[1][2] culminating in a "poly-crisis" in 2016. With the global financial crisis and the crisis in the Euro Area fueled by it[3], as well as the migration and security crisis in the "area of freedom, security and justice" (the so-called Schengen Area)[4], it became evident that two of the integration steps initiated with the Maastricht Treaty in 1992 had led to "fair weather areas" that were not sufficiently prepared for stormy times. In addition, Brexit confronts the EU for the first time with the challenge of dealing with the withdrawal of a member state in organisational (Art. 50 TEU) and – behind the curtain – in political terms: The impression of an EU in constant crises, not able to deliver solutions and stability is supposed to be one of the – many – reasons for the negative result of the British referendum in 2016.[5]

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[1] See Kirchhof/Kube/Schmidt, in: this. (Ed.), Von Ursprung und Ziel der EU, 2017, p. 56 (60 et seqq.); Giegerich (Ed.), Herausforderungen und Perspektiven der EU, 2012; see from a political perspective the Humboldt speeches of various European politicians in: Pernice (ed.), Europa-Visionen, 2007.

[2] Cf. President Juncker, speech delivered in Athens on 21.6.2016, available at http://europa.eu/rapid/press-release_SPEECH-16-2293_de.htm (last visited: 2.4.2019).

[3] See Calliess, Finanzkrisen als Herausforderung der internationalen, europäischen und nationalen Rechtsetzung, in: Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (VVDStRL), 71, 2012, pp. 153 et seqq.; idem, Perspektiven des Euro zwischen Solidarität und Recht – Eine rechtliche Analyse der Griechenlandhilfe und des Rettungsschirms, in: Zeitschrift für europarechtliche Studien (ZEuS) 2011, pp. 213 et seqq.; see also: Ruffert Common Market Law Review 2011, pp. 1777 et seqq.; De Witte European Constitutional Law Review 2015, pp. 434 et seqq.

[4] On the migration crisis: Hailbronner, in: Giegerich (ed.), Herausforderungen und Perspektiven der EU, 2012, pp. 195 ff; Thym, Common Market Law Review 2016, pp. 1545 et seqq.; Heijer/Rijpma/Spijkerboer Common Market Law Review 2016, pp. 607 et seqq. On the security crisis: European Commission (EPSC), Towards a Security Union, EPSC Strategic Notes, Issue 12 of 20.4.2016.

[5] See the "famous" letter of David Cameron, 'A new settlement for the United Kingdom in a reformed European Union', November 10th, 2015.

There can be no doubt that European integration has been a successful project of peace, which started in 1951 with the creation of a common market for coal and steel (ECSC Treaty). It was in this spirit that the Treaty on the European Economic Community (EEC Treaty) of 1957 emphasised in its preamble the goal of an "ever closer union", in the course of which the integration of the national economies into a single market was to serve to secure peace and motivate Europe's states and peoples subsequently to pursue political integration too. With the EEC Treaty and the 1985 White Paper on the completion of the internal market, including the limited 1986 reform treaty (the Single European Act), a European single market gradually came into being. Implementation of the single market brought in its wake the Europeanisation and partial harmonisation of flanking policies, resulting in the development of European environment, health, consumer protection and — in part — social policies.[6] This made the EU a European community of values, a process reinforced by the 1992 Maastricht Treaty: drawing lessons from the dictatorships of the 20th century, it guarantees human rights, democracy and the rule of law.[7]

However, what has been achieved threatens to erode: A common and efficient response to the crises is made difficult by the fact that there is no consensus, either among the 27 Member States or among European citizens, on the desired role, tasks and future prospects of the EU after Brexit. This is due not least to the fact that reforms in the Euro Area touch on such sensitive domestic issues as the further Europeanisation of financial and budgetary policy, with implications for national social policy. In the Schengen Area, too, no less sensitive challenges are at stake in the area of a European asylum, refugee and immigration policy including internal security ("Security Union"). Even with regard to the European internal market, the shape of which is set to change disruptively as a result of digitalisation and the innovations associated with it (platform economy, block chain, artificial intelligence) and decarbonisation in the areas of energy and transport, a consensus seems difficult to reach. In short, an EU that has become more diverse with every enlargement round is now having to deepen in areas that are highly sensitive domestically.

[6] In detail Calliess, Die neue Europäische Union nach dem Vertrag von Lissabon, 2010, pp. 15 et seqq.; but see also the narratives in Schorkopf, Der europäische Weg, 2010, pp. 70 et seqq.; Haltern, Europarecht I, 2017, pp. 40 et seqq. with partly different emphases and conclusions.

[7] Calliess, Europe as Transnational Law – The Transnationalization of Values by European Law, in: German Law Journal Vol. 10 No. 10, 2010, pp. 1367 et seqq; sceptical about this coupling Volkmann, in: G. Kirchhof/Kube/R. Schmidt (eds.), Von Ursprung und Ziel der EU, 2017, p. 56 (60 et seqq.).

At the same time enlargement has made the EU ever more culturally, socially, and politically heterogeneous. This applies not only to economic and social conditions in the Member States but to their governance[8]: in Europe's multi-tier system of governance ("multi-level constitutionalism"), the European level depends on the national governments, administrations and courts competent for transposing, enforcing and applying Union law ("composite administration") Shortcomings in implementation, which have always been a problem in European law, are on the increase: the result is that European law is not being uniformly transposed and applied. The goal of the uniform application of European law, achieved by virtue of its primacy, is coming up against the effective heterogeneity in the Member States.

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.[9] 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. The positive and optimistic narrative of European integration[10] is under a pressure, in practice as well as in academia. Looking back, it is still worrying that many signs of these different crises have not been noticed for a long time, even in the political arena.[11]

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.[12]

[8] See 'European Governance – A White Paper', COM(2001) 428 final of 25 July 2001.

[9] 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.

[10] Rifkin, The European Dream, 2004.

[11] On this subject with open words (still as Prime Minister of Luxembourg) Juncker in: Pernice (ed.), Europa-Visionen, 2007, p. 144 (146 et seqq.).

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

B. European Integration after more than 60 Years: A Phasing Out of Integration Through Law?

I. European Values and the Rule of Law

According to Article 2 of the Treaty on the European Union (TEU), the EU "is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights." As these values are at the same time "common to the Member States", the countries of the EU form a "community of values".[13] While accepted and confirmed by all member states as a prerequisite for their accession to the EU (Art. 49 TEU), the fundamental values of Article 2 TEU form the basis of their national constitutions and their membership in the Union. The assumption of the Treaties that all member states share a certain degree of homogeneity in terms of the rule of law, democracy, and fundamental rights highlights the importance of unity, solidarity, and mutual trust for the proper functioning of the EU.

While accepted and confirmed by all EU Member States with accession to the EU (see Art. 49 TEU), these values form the basis of their national constitutions and accordingly also shape the common order of European 'multilevel constitutionalism'[14] towards a 'community of values'.[15] According to this constitutional framework European and national values are interlocked with each other and share a two-way relationship, in the context of which substance is not only given to the abstractly acknowledged European value, but where *vice versa* the European value also helps fertilise and shape the national ones. In daily life of European integration this is taking place in the process of legislation that is shaping the European interest. As a last resort the sanctioning procedure of Article 7 TEU stipulates a political procedure, by which the European values of Article 2 TEU can be enforced.

[13] Calliess, 'Europe as Transnational Law – The Transnationalization of European Values', German Law Journal (2009), Vol. 10 No. 10, 1169.

[14] Pernice, 'The Treaty of Lisbon. Multilevel Constitutionalism in Action', *Columbia Journal of European Law*, 15 (2009), 346-407; see also Mayer, Wendel, 'Multilevel constitutionalism and constitutional pluralism: qeurelle allemande or querelle d'allemand?', in M. Avbelj and J. Komárek (eds.), Constitutional Pluralism in the European Union and Beyond, 2012, 127–51; Calliess, Die neue Europäische Union nach dem Vertrag von Lissabon, 2010, pp. 47 et seqq.

[15] Calliess, 'Europe as Transnational Law – The Transnationalization of European Values', German Law Journal (2009), Vol. 10 No. 10, 1169.

II. The European Rule of Law: State of Play and Challenges

The European rule of law is at the heart of European values. By virtue of the rule of law the EU is a 'community of law'. It was the European Commission's first president, Walter Hallstein, who coined the notion 'community of law' ("Rechtsgemeinschaft") to describe that the authority of European law is a precondition and a tool for integration[16]: Law is creating reliable common rules between the Member States, compliance with which is supervised by the Commission and Court of Justice of the European Union (CJEU). Accordingly, as early as 1986 it has described the then European Economic Community as *"a community based on the rule of law of the kind [...] in which neither the Member States nor the Community institutions are exempt from monitoring whether their actions are in conformity with the Community's constitutional instrument, the Treaty"*.[17] Therefore law serves as a confidence-building bridge between economically, culturally and politically different Member States. In the words of the Court[18]:

"In permitting Member States to profit from the advantages of the Community, the Treaty imposes on them also the obligation to respect its rules. For a state unilaterally to break, according to its own conception of national interest, the equilibrium between advantages and obligations flowing from its adherence to the Community brings into question the equality of Member States before Community law and creates discriminations at the expense of their nationals, and above all of the nationals of the state itself which places itself outside the Community rules. This failure in the duty of solidarity accepted by Member States by the fact of their adherence to the Community strikes at the fundamental basis of the Community legal order."

This duty of procedural solidarity, rooted in European law – most prominently in the principle of loyal cooperation in Article 4 (3) TEU –, therefore is a major tool to achieve unity in an ever more culturally, socially and politically heterogeneous Union. This applies as well to European governance[19]: While in Europe's multi-tier system of governance ('multilevel constitutionalism'), the European level depends on the national governments, administrations and courts competent for transposing, enforcing and applying Union law ('composite

[16] Hallstein, Der unvollendete Bundesstaat, Econ Düsseldorf Vienna 1969, pp. 33-38.
[17] CJEU, C-294/83 – Les Verts, ECLI:EU:C:1986:166 para. 23.
[18] CJEU Case 39/72 *Commission* v *Italy*, ECLI:EU:C:1973:13 (paragraph 24 et seq.).
[19] See 'European Governance – A White Paper', COM(2001) 428 final of 25 July 2001.

administration'), mutual trust among the Member States in equal implementation and law enforcement is a precondition for unity in the EU and credibility of the EU among its citizens.[20] With regard to the rule of law this was lately underpinned by the CJEU[21]. The European judges stated that the implementation of the European arrest warrant and, therefore, the principle of mutual trust, may be suspended in case of a serious and persistent breach of the values of Article 2 TEU as determined by a decision under Article 7 (2) TEU.[22] Moreover the Court took the chance to confirm that Article 19 (1) TEU gives concrete expression to the value of the rule of law affirmed in Article 2 TEU[23].

Nevertheless, there are two challenges to this pre-requisite for the proper functioning of the EU:

- First, national politicians tend to describe unpopular decisions or criticism from the EU as the foreign rule of "Brussels' bureaucrats". Despite the duty of solidarity that requires a member state to comply with European law even if it is not to its advantage, the Brexiteers' politically effective sound bite, "We can have our cake and eat it"[24], sums up the attitude in many Member States. More and more EU countries tend to welcome the advantages of the single market, the Euro Area, or the freedom of movement for their own citizens within the Schengen Area, but they do not want to bear the associated burdens and responsibilities for the 'European goods'[25] entailed by the rules of the Treaties and expressed by the duty of solidarity.

- Second, governance incapacity in some member states leads to an implementation and enforcement gap regarding European law that throws into question the principle of uniform application, mutual trust among member states, as well as the credibility of the EU as a whole. EU action occasionally is still hampered by a lack of EU competence

[20] See Scenario 4 "Doing less more efficiently" in : European Commission, "White Paper on the Future of Europe, Reflections and scenarios for the EU27 by 2025", COM(2017) 2025 of 1 March 2017; in depth analysis Calliess, Christian, "Bausteine einer erneuerten EU", Neue Zeitschrift für Verwaltungsrecht 1-2/2018, pp. 1-9.

[21] CJEU Case 216/18 PPU *LM* para 61.

[22] CJEU Case 216/18 PPU, *LM* para 70-73.

[23] CJEU Case 216/18 PPU, *LM* para 50.

[24] See POLITICO 8/31/17, A brief history of having cake and eating it, How an old expression became one of the key phrases of Brexit, by Paul Dallison: Cake is a recurring theme of Brexit, chiefly thanks to Boris Johnson laiming that the U.K. could "have our cake and eat it" as it leaves the European Union. He's also given the phrase a slight twist, saying, "My policy on cake is pro having it and pro eating it."

[25] See Calliess, in: Brugger/Kirste/Anderheiden (eds.), Gemeinwohl in Deutschland, Europa und der Welt 2002, p. 173.

but mostly by the lack of a full operationalisation and implementation of the competence.

This mismatch between promises by the EU and expectations of its citizens, on the one hand, and delivery, on the other, is linked to the gap between strong legislative action and little enforcement or implementation efforts, which, in principle, remain in the hands of the member states due to the EU's system of "executive federalism".[26] The car emission scandal (so called Diesel-Gate)[27], mentioned as an example in the White Paper, illustrates this disparity, which stems from a lack of EU enforcement powers, insofar as the direct application/execution and implementation of EU law is still largely in the hands of member states, who must ensure compliance by private parties. This situation is clearly different in the United States, where a federal agency fulfils this task. Examples may also be found in the context of the so-called migration crisis, where the EU has been heavily criticised for its slow reaction, often due to the division of responsibilities between the EU and the member states particularly in the context of implementation and enforcement.

Unity, solidarity and mutual trust as a precondition of European integration are based on the assumption that all Member States have a certain degree of underlying homogeneity in terms of the rule of law, democracy and fundamental rights (see Articles 49 and 2 TEU), the polycrisis has nevertheless fuelled the conflict over the importance of the law and compliance with it in a European Union conceived as a community of law. Nevertheless the main sanction mechanism stipulated in Article 7 (2), (3) TEU as well as the preliminary mechanism Article 7 (1) TEU in the case of Hungary, Poland and Rumania are generally considered a failure.[28]

[26] See Chamon, EU Agencies: Legal and Political Limits to the Transformation of the EU Administration (Oxford, OUP, 2016), at 48 et seqq.

[27] See e.g. the request for a preliminary ruling: CJEU, Case C-693/18, still pending.

[28] Overview from Scheppele; Pech: Didn't the EU Learn That These Rule-of-Law Interventions Don't Work?, VerfBlog, 2018/3/09.

C. In Search of a New Working Method for the EU

I. Introduction

The political climate outlined makes it difficult for the Member States to reach a consensus on the reforms needed and the future of the EU. This is why the White Paper on the future of Europe presented by the European Commission[29] – unlike earlier white papers – did not include a roadmap with specific reforms. Deliberately eschewing institutional matters and questions of competence[30], it instead tabled for discussion five possible paths for the EU-27's development up to 2025. In certain policy areas these are supplemented by reflection papers on the issues of globalisation and trade policy, the social dimension, reform of the economic and monetary union (EMU), defense and the budget[31].

The time-frame is that used in the roadmap of the Five Presidents' Report on deepening the Economic and Monetary Union. A White Paper was to table proposals for Stage 2 as to how the monetary union could, by 2025, be completed by a democratically and institutionally stronger and genuine economic and fiscal union[32]. Meeting a lack of enthusiasm for reform on the part of the Member States, which simply took note of the report in the European Council[33], this initiative ran out of steam. This is one of the reasons why the White Paper on the future of the EU did 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.

[29] European Commission, White Paper on the Future of Europe: The EU of 27 in 2025 – Reflections and Scenarios, COM(2017) 2025, 1.3.2017.

[30] In addition to the White Paper on the future of the EU as a whole, see the following: Editorial Comments, Common Market Law Review 2017, 681 (687 et seq.).

[31] 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.

[32] See Commission Communication COM(2015) 600 final of 21 October 2015.

[33] European Council, conclusions of the meeting of 25 and 26 June 2015, EUCO 22/15, p. 8.

'Carrying On' — Scenario 1

Scenario 1 is based on the pragmatic process of muddling-through[34] decided at the Bratislava Summit in the crisis year of 2016. In the wake of the UK referendum, the Member States and EU institutions agreed the 'Bratislava Agenda'[35] in order to tackle the challenges facing the EU and thereby demonstrate a capacity for action. While preserving the unity of the EU against the backdrop of Brexit, the Community *acquis* could nevertheless be eroded in the event of serious differences of opinion over the measures needed. If, for instance, there is no improvement in border management at the EU's external frontiers and if Europe's asylum and refugee policy does not gain efficiency and solidarity or if no account is taken of the European dimension of internal security, there is a risk that controls on the internal borders might be maintained on a long-term basis and become the new normal.

'Nothing But The Single Market' — Scenario 2

Scenario 2 reduces the EU to the single market and therefore to an – ostensibly – purely economic project. This would make the single market the 'market without state' feared by some in the wake of the 1985 White Paper.[36] The market-flanking policies on the environment, consumer protection, health and the protection of workers would be called into question as would competition policy and regional policy. Not only would such a development run counter to the objective of a social market economy set out in Article 3 TFEU, it would also, in the absence of European legislation, create new scope for deregulatory forces to undo the directly applicable fundamental freedoms and the national legislation enshrining them. This would not only raise "old" questions of democratic legitimacy,[37] but would also reopen and widen the

[34] For a positive take on this, see Emmanouilidis/Zuleeg, EU@60, European Policy Centre, Brussels, October 2016 (available online).

[35] European Council, Bratislava Declaration and Roadmap (see: http://www.consilium.europa.eu/media/21250/160916-bratislava-declaration-and-roadmapen16.pdf (13.12.2017)).

[36] Joerges, in: Wildenmann (ed.), Staatswerdung Europas?, 1991, p. 225 et seqq.

[37] Kingreen, in: v. Bogdandy/Bast (eds.), Europäisches Verfassungsrecht, 2009, pp. 705 (718 et seqq.); Calliess, in: Franzius/ Mayer/Neyer (eds.), Strukturfragen der Europäischen Union, 2010, pp. 231 et seqq.; kritisch Joerges/Rödl KJ 2008, 149 (152); Grimm ZSE 2017, 3 (10 f.).

frequently stated and rightly criticised "gap between democratic limitation and economic delimitation",[38] which[39] only the EU can close democratically.[40]

'Those Who Want More Do More' — Scenario 3

Scenario 3 employs the term 'coalitions of the willing' to take up aspects of a multi-speed Europe for the EU27, which could range from enhanced cooperation under Article 20 TEU to the concept of a 'core Europe' with concentric circles.[41] In this scenario, the other Member States would retain their status and would be free to join those pressing ahead at any moment.

'Doing Less More Efficiently' — Scenario 4

In Scenario 4 the EU would focus on a number of key policy areas, set the political priorities and would be given greater powers in those areas, in order to "be big on big things and small on small things".[42] At the same time its powers in other policy areas would be reduced or yielded up completely. This approach is intended not least to counter the omnipresent criticism that the EU is losing itself in the "small-minded" and is not delivering in terms of the major European challenges. A key theme in this scenario is to close the frequent gap between what the EU promises and delivery that often disappoints the expectations of European citizens.[43] This would offer a way to counter the ever-present criticism that the EU gets lost in the fine detail and fails to deliver on the major, Europe-wide challenges[44].

[38] Recently Di Fabio again, in: G. Kirchhof/Kube/R. Schmidt (eds.), Von Ursprung und Ziel der EU, 2017, p. 44 et seqq. (47).

[39] See Calliess, in: Heinig/Terhechte (eds.), Postnationale Demokratie, Postdemokratie, Neoetatismus Tübingen, 2013, p. 77 (79 et seqq.).

[40] Di Fabio, in: G. Kirchhof/Kube/R. Schmidt (eds.), Von Ursprung und Ziel der EU, 2017, p. 44 et seqq. (47) fails to recognise this.

[41] On the different forms Thym, Ungleichzeitigkeit im europäischen Verfassungsrecht , 2004, 28 et seqq.; using the example of the EMU, Piris, The Future of Europe: Towards a Two-Speed EU? Cambridge 2012, p. 61 et seqq.; using the example of European environmental policy Calliess EurUP 2007, 54.

[42] See Commission President Juncker's (as candidate) speech opening the EP plenary session, A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change, 15 July 2014 and the Juncker Commission's homepage.

[43] European Commission, White Paper on the future of Europe, COM(2017) 2025, 1 March 2017, p. 22.

[44] For an illustration of this criticism, which is often heard at national level, see: Bittner, So Nicht Europa! Die drei großen Fehler der EU [Not this way, Europe! The EU's three big mistakes], 2010.

‘Doing Much More Together’ — Scenario 5

Scenario 5 reflects the traditional integration method (the ‘Monnet method’) of ‘in for a penny, in for a pound’. Under this method existing shortcomings are remedied through the recognition by all Member States of the need to complete and deepen all European policies.[45] The EU is given the powers it needs to develop a genuine European economic and fiscal policy in the Euro Area, a comprehensive European migration and security policy in the Schengen Area and a European foreign and defense policy.

Member States responded to this roadmap proposed by the Commission with the so-called “Leaders Agenda” decided by the European Council. According to the two agendas, the heads of state and government were to meet monthly on the challenges for the future addressed in the White Paper and the reflection papers, so that the European Council in Sibiu on 9 May 2019 was supposed to decide on a reform package for the EU27 to be implemented by 2025. This did not come about in the end, as the tugging over the Brexit and its postponement, the disagreement over finances (specifically: the agreement on the Multiannual Financial Framework, MFF), migration policy and the stabilisation of the Euro Area blocked such a reform perspective.

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.

[45] See the EP’s Verhofstadt Report: European Parliament, Report on possible evolutions of and adjustments to the current institutional set-up of the European Union. (2014/2248(INI)); see also Spinelli Group/Bertelsmann Stiftung, A Fundamental Law of the European Union, 2013.

II. A New Working Method for the EU defined by 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.[46] 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 implications for all other policies, see Art. 11 TFEU) and digitisation, trade policy[47] as well as safeguarding the stability of the euro by closer political coordination of economic and fiscal policy with monetary policy.[48] In addition, the free movement of Union citizens in the "area of freedom, security and justice" is to be guaranteed within the framework of sustainable border management together with a functioning migration and security policy.[49] This is to be rounded off externally by the development of a genuine European foreign, security and defense policy.[50]

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[46] 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.

[47] 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/ (last visited on: 2.7.2020).

[48] CJEU, Opinion 2/15, ECLI:EU:C:2016:992; see also the Commission's reflection paper, "Mastering Globalisation", COM(2017) 240 of 10.5.2017 and the "Trading Together Declaration", available at https://www.trading-together-declaration.org/ (last visited on: 2.7.2020).

[49] European Commission (EPSC), Towards a Security Union, EPSC Strategic Notes, Issue 12, 20.4.2016, available at https://ec.europa.eu/epsc/sites/epsc/files/strategic_note_issue_12.pdf (last visited on: 2.7.2018)

[50] European Commission (EPSC), In Defence of Europe, EPSC Strategic Notes, Issue 4, 15.6.2015, available at https://ec.europa.eu/epsc/sites/epsc/files/strategic_note_issue_4_en.pdf (last visited on: 2.7.2020)

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:[51]

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.[52]

In concrete terms, the top candidates for the office of President of the Commission could, in the run-up to the European Parliament elections, identify political priorities for which they would then have a mandate if elected. Furthermore, the office of President of the European Commission and the office of President of the European Council would be combined under a double hat.[53] 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.[54]

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. This merger would 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.

[51] 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.

[52] 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.

[53] Cf. on this possibility the open wording of Art. 15 (6) , 17 (7) TEU as well as the proposal in this regard in the speech by Commission President Juncker on the State of the Union of 14.9.2017; also: Calliess, in Calliess/Ruffert, EUV/AEUV, Commentary, 2016, Art. 15 TEU, marginal 25 with further references.

[54] 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.

As European democracy is based on dual legitimation (see Art. 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.

If this double hat were combined, in the context of the European Parliament elections, with the top candidate process and the transnational lists proposed by President Macron (and supported by Commission President Juncker[55] and Chancellor Merkel[56]), the result would be a presidency at the head of the EU that combines the ability to act with strong democratic legitimacy.[57] 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. 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.

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.[58] Nonetheless the management and harmonisation of appointment procedures between the European Council on the one hand and the European Parliament on the 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.

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[55] European Commission, President Junckers' State of the Union 2017 Speech, SPEECH/17/3165, 13.9.2017.

[56] See the Meseberg Declaration "Renewing Europe's promise of security and prosperity", 19.06.2018, press release 214.

[57] European Commission (EPSC), EPSC Note, Building on the Top Candidate Model, Road to Sibiu Issue 1, 16.02.2018 (available at https://ec.europa.eu/epsc/sites/epsc/files/epsc_-_road_to_sibiu_-_building_on_the_spitzenkandidaten_model.pdf (last visited on: 18.4.2019) in conjunction with EPSC Note , A Double-Hatted President, Road to Sibiu Issue 2, 16.02.2018, available at https://ec.europa.eu/epsc/sites/epsc/files/epsc_-_road_to_sibiu_-_a_double-hatted_president.pdf (last visited on: 18.4.2019).

[58] 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.

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[59], merging the functions of the responsible Commissioner and the President of the Euro-Group[60], combined with the transformation of the European Stability Mechanism into a European Monetary Fund.[61]

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 more efficient procedures could be envisaged:[62] 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. In the area of the internal market and tax policy, for example, the general 'passerelle' clause of Article 48 (7) TEU is available for this purpose, in the Common Foreign and Security Policy (CFSP) Article 31 (3) TEU allows for the transition to majority decisions and in energy policy Article 192 (2) TFEU could be activated.[63] All these reforms would be feasible without formal Treaty change.[64] 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 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.

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[59] For the creation of an "EU Ministry of Finance" "as a result of a gradual transfer of the ESM into the Union framework and increased financial monitoring by the Commission": Selmayr, in: Müller-Graff (ed.), Encyclopedia Europarecht: Europäisches Wirtschaftsordnungsrecht, vol. 4 § 23, 2014, p. 1387 (1619 f.); differentiating Calliess, DÖV 2013, 785 et seqq.

[60] Böttner, ZEuS 2018, 70, 72et seqq.; Jacquemain, ZEuS 2015, 27 et seqq. and 46 et seqq.

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

[62] See also European Commission, President Junckers' State of the Union 2017 Speech, Proposals on the Future of Europe Feasible on the Basis of the Lisbon Treaty, available at https://ec.europa.eu/commission/sites/beta-political/files/soteu-explained_de.pdf (last visited on: 2.4.19).

[63] European Commission (EPSC), EPSC Brief, A Union that Delivers, Making Use of the Lisbon Treaty's Passerelle Clauses, 14.01.2019, available at https://ec.europa.eu/epsc/sites/epsc/files/epsc_brief_passerelles_2.pdf (last visited on: 18.4.2019)

[64] See 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.

To tackle the described implementation and enforcement gap, the EU is in need of a new method of cooperative enforcement. As a consequence of this the EU and its Member States should understand the implementation of agreed rules as a joint responsibility.

From a constitutional perspective the method of cooperative enforcement should be based on the principle of subsidiarity (Article 5 TEU), expressing a rebuttable presumption of member states' responsibility, on the one hand, and the principle of solidarity, on the other.[65]

In this regard the division of labour in competition policy could serve as a model.[66] The Merger Regulation[67] divides competence for merger control between the Commission and national competition authorities, providing for guidance in the event of separate enforcement. Regulation 1/2003[68] establishes a model of joint enforcement in the anti-trust field, whereas the previous Regulation 17/62[69] 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 example highlights that the method of cooperative enforcement requires a clear legal framework and well-equipped national authorities in terms of institutions, staff, and technology to work together and to be able to effectively apply and enforce Union law.

According to the method of cooperative enforcement, national authorities and the Commission therefore would build up a network of governance with regard to an efficient implementation of European rules. Where national authorities lack the needed capacities, these would have to be built up with European assistance. In this respect, the network would develop a tool box of cooperation, similar to the one in competition policy. This would range from the exchange of

[65] See in-depth Calliess, Christian, Subsidiaritäts- und Solidaritätsprinzip in der EU, Baden Baden 2nd edition 1999 and in practice Report "Active Subsidiarity, A new way of working" of the Task Force on Subsidiarity, Proportionality and 'Doing Less, More Efficiently' from 10 July 2018 as well as the hereon based Communication "The principles of subsidiarity and proportionality: Strengthening their role in the EU's policymaking", COM(2018) 703 final from 23 October 2018 and the Declaration of Bregenz by the Austrian Presidency of the EU, "Subsidiarity as a building principle of the EU" from 16 November 2018.

[66] 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.

[67] 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.

[68] 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.

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

information to professional, personnel or technical support from the European level, for example along the lines of the Structural Reform Support Service (SRSS)[70] that recently was upgraded to a Directorate General of the European Commission.

In addition, there must be control mechanisms that provide for European options for action in the sense of a catch-all responsibility in the event that national authorities are not able or willing to implement or apply the common goals and objectives with the consequence that the European common good ("European goods") is endangered.[71] 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, a European agency could step in when a member state proves unable or unwilling to implement European goals.

First examples of cooperative enforcement could be detected in proposals for the Schengen Area, where the shortcomings in border management, asylum procedures, as well as the need to enhance efficient cooperation in the area of counterterrorism and cybersecurity, became key issues[72].

In particular the in 2016 newly established European Border and Coast Guard Agency (EBCG)[73] offers a perfect blueprint for this kind of 'agencyfication'. Given the shortcomings exposed during the migration crisis in 2015, the EBCG creates a model of joint responsibility for an 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 interest of not only the member state with an external border but of all EU countries which have abolished controls on internal borders in the Schengen Area. In applying the principle of solidarity, this means that whenever a member state is unable or unwilling to effectively protect its national external borders, thereby undermining the 'European good' (for example of effective border management), the EU acquires a fall-back responsibility.

[70] This is a Commission department set up in 2015 on the basis of experience of the crisis, especially in Greece.

[71] Glienicker Group, Towards a Euro-Union, ZRP 2013, 248.

[72] See as well Scenario 4 "Doing less more efficiently" in: European Commission, "White Paper on the Future of Europe, Reflections and scenarios for the EU27 by 2025", COM(2017) 2025 of 1 March 2017; in depth analysis Calliess, Christian, "Bausteine einer erneuerten EU", Neue Zeitschrift für Verwaltungsrecht 1-2/2018, pp. 1-9.

[73] 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.

With regard to the Member States' sovereignty, the application of any means of cooperative enforcement should be progressive. In a first instance, the agency could/should issue recommendations and provide financial, personnel, or technical support to countries in need. If national authorities are not willing to cooperate, the agency should have the competences and capabilities to intervene by complementing or taking over the responsibilities of national authorities in implementing and enforcing jointly agreed European objectives. As this would be possible without the specific request of the member state concerned and therefore probably against the latter's will, this intervention would have to be based on a Council decision adopted by qualified majority. If the Member State concerned would not be ready to accept this intervention, it would be excluded from certain European benefits. In the example of the Schengen Area, this would mean that the member state concerned would face internal border controls and its citizens would lose their right of free movement (Art. 21 TFEU), which is inevitably linked to a proper functioning of the Union's external border management.

Apart from the example of the European Border and Coast Guard Agency already established in 2016, the Commission proposed a European Asylum Agency, a European Public Prosecutor for counter-terrorism[74], 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.

However, based on the relatively restrictive *Meroni* doctrine[75], which the CJEU has admittedly opened up a bit with the recent *ESMA* ruling[76], 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. According to the *ESMA* ruling, direct supervisory and enforcement powers, including the power to impose fines, may be delegated to an agency under Article 114 TFEU. Nevertheless there remain no grounds for conferring autonomous powers on an agency: its discretion must be clearly defined by the underlying act.[77] However, if an agency's decisions are linked with the European

[74] 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.

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

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

[77] See in Detail Orator, Möglichkeiten und Grenzen der Einrichtung von Unionsagenturen, Tübingen 2017, pp. 185 et seqq. and 459 et seqq.

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.

The above described working method of cooperative enforcement is mirrored to a certain extent in Scenario 4 of the Commission's White Paper on the Future of Europe:[78] As a result of "Doing less more efficiently", the EU would be able to act faster and more decisively in its chosen priority areas. For these policies, stronger tools are given to the EU to directly implement and enforce collective decisions, as it already is the case today in competition policy or banking supervision.

2. Second Element: In Search of Ways of Working more Citizen-Friendly by Doing Less

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) Repatriation of European Competences?

Consideration could be given to transferring powers conferred on the EU by the Treaties back to the Member States.[79] 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 could serve as a model. If, by analogy, a return to the EU's core competences would be defined along these lines, then only the common customs tariff, international trade, foreign and defense 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

[78] European Commission, "White Paper on the Future of Europe, Reflections and scenarios for the EU27 by 2025", COM(2017) 2025 of 1 March 2017, p. 22; available at <ec.europa.eu/commission/white-paper-future-europe_en>; in-depth analysis Calliess, Christian, "Bausteine einer erneuerten EU", Neue Zeitschrift für Verwaltungsrecht 1-2/2018, pp. 1-9.

[79] Instructive from an economic perspective: Bertelsmann Stiftung, How Europe can deliver, 2017; legal: Zbíral Common Market Law Review 2015, 51.

'[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'[80]. While the US Supreme Court 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).[81]

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[82].

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.[83]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:

[80] 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'.

[81] In more detail Cuyvers, The EU as a Confederal Union of Sovereign Member Peoples, 2013, insbes. S. 95 et seqq.

[82] 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?, 2015 (available online).

[83] In depth analysis: Calliess, Subsidiaritäts- und Solidaritätsprinzip in der EU, 2nd ed. 1999, p. 243 et seqq.

- *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 Art. 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 Art. 2 (2) TFEU).[84]

- *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). This common framework of reference with regard to the subsidiarity and proportionality test[85] should be elaborated on the basis of Article 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.[86]

Notwithstanding a better application of subsidiarity and proportionality depends on procedure. Therefore, based on the subsidiarity grid, proposals should follow the decision-making process of the European institutions[87]:

[84] Cross, Common Market Law Review 1992, pp. 447 et seqq.; Soares, European Law Review 1998, pp. 132 et seqq.

[85] See the example in: Calliess, Subsidiaritäts- und Solidaritätsprinzip in der EU, Baden-Baden, 2nd edition, 1999, pages 271 et seqq. and 279 et seqq.

[86] European Commission, Annex II to COM(2018) 703 final, The principles of subsidiarity and proportionality: Strengthening their role in the EU's policymaking, COM(2018) 490 - COM(2018) 491, Strasbourg, 23.10.2018.

[87] See in detail: Calliess, Subsidiaritäts- und Solidaritätsprinzip in der EU, Baden-Baden, 2nd edition, 1999, pp. 279 et seqq.

- *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).

- *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 eight-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.[88] 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.

This approach has been put into practice 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

[88] 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.

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.[89] 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.

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

c) A First Step: The Proposals of the Timmermans Task Force of 10 July 2018 and the Declaration of the Austrian Presidency of the Council of Bregenz

In political terms, all these options have been discussed and examined by a Task Force set up by Commission President Juncker in November 2017 entitled "Subsidiarity, proportionality and less but more effective action". Chaired by the European Commission's Vice-President Timmermans and comprising members of national parliaments as well as the Committee of the Regions this Task Force received the mandate to examine (1) the role of local and regional authorities in policy-making and implementation of European Union policies, (2) the place of subsidiarity and proportionality in the work of the Union's institutions and bodies, and (3) whether responsibility for certain policy areas should be returned to the Member States.

On the basis of its meetings in Brussels from January to July 2018, including a public hearing as well as input from a wide range of stakeholders, the Task Force presented a report entitled "Active Subsidiarity" on 10 July 2018 that embodied nine recommendations and concrete measures for implementation. In particular the report proposed a new way of working for the EU, more in line with the principles of subsidiarity and proportionality, allowing local and regional authorities and national parliaments to contribute more effectively to European policy-making, especially when drafting new legislation. In the course of this, the requirements of Article 5 TEU, i.e. the competence of the EU, the principles of subsidiarity and proportionality, are to be examined in all institutions and at all levels on the basis of a common subsidiarity grid binding for all institutions and national authorities. This way, a common understanding and thus a common language on subsidiarity should be enhanced.[90] The Task Force also recommended flexibility in the eight-weeks period within which national parliaments must give their opinions on draft EU legislation and puts forward for discussion a possible future extension of this period to 12 weeks. The Task Force also recommends that the three EU institutions agree on a multi-annual priority programme to refocus the work of the EU in a number of policy areas, which would lead to more effective implementation of existing legislation without the need for new legislation. Moreover, the Task Force considered that the new approach should be applied to the existing body of EU legislation and to all new policy initiatives.

[90] In detail: Calliess, Subsidiarity and Solidarity Principle in the EU, 2nd ed. 1999, pp. 271 et seqq., 279 et seqq. and 389 et seqq.

The recommendations of the Task Force are addressed to national parliaments, national, regional, and local authorities, the European Parliament, the Council, the European Committee of the Regions, and the European Commission. The latter has taken on board the report's suggestions in its Communication of 23 October 2018 and intends to make the grid the basis for the preparation of proposals, integrating it into its Better Regulation guidelines, impact assessments and explanatory memoranda.[91] This is in the expectation that the European Parliament and the Council will integrate the grid into their procedural rules, thus paving the way for a common understanding of subsidiarity in the EU. An important step in this direction was taken by the Austrian EU Presidency in November 2018 with a subsidiarity conference on "Subsidiarity as a Building Principle of the EU", which involved the EU institutions and stakeholders. The so-called Bregenz Declaration of 16 November 2018 takes up the proposals of the Task Force as well as the Communication of the Commission and, in explicit implementation of the guideline of a "Less, but more efficient", calls for a common test grid based on the test criteria of the Amsterdam Subsidiarity Protocol (which are taken into account in this contribution), an evaluation of legislation and more legislative transparency by means of an inter-institutional database.

d) Further Steps

These are valuable first steps towards a better balance of the European competence order. However, in order to establish this part of the new working method of the EU in the medium term, a continuous process is required, which should make the test grid binding via an inter-institutional agreement and establish a permanent inter-institutional subsidiarity platform, within the framework of which a continuous exchange between EU institutions and Member States on suitable methods for the effective implementation of the requirements of the subsidiarity and proportionality principles can take place.

[91] European Commission, COM(2018) 703 final, The principles of subsidiarity and proportionality: Strengthening their role in the EU's policymaking, COM(2018) 490 – COM(2018) 491, Strasbourg, 23.10.2018 with the subsidiarity grid of the Task Force in Annex II.

Finally, by not exercising competences at European level or, alternatively, by limiting European legislation to minimum standards, the EU could end up "doing less" without major changes to the legal framework. In addition, "opting-up" clauses, which allow greater flexibility in the implementation of European legislative acts, would enable member states to introduce tailor-made solutions for specific policy areas. European legislation in certain policy areas would then be characterised by a multi-level approach based on the division of labour and on common political objectives.[92]

3. Third Element: Flexibility by Pioneer Groups

According to its (unofficial) motto[93], 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[94]. 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. This term covers the many forms of a more flexible EU, which can range from enhanced cooperation and differentiated integration to asymmetric integration, a Europe with different speeds or variable geometry.[95] Coalitions of the willing should not aim at a static 'multi-speed Europe' that would introduce parallel and separate 'orbits'. They rather intend a pioneer group leading by positive example. The pioneers are supposed 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.

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[92] In detail Calliess, Subsidiaritäts- und Solidaritätsprinzip in der EU, Baden-Baden, 2nd edition, 1999, pp. 213 et seqq.

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

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

[95] For an overview, see Thym, Ungleichzeitigkeit und europäisches Verfassungsrecht, 2004, 28 et seqq.; Della Cananea, in: Pernice/ Guerra Martins (eds.), Brexit and the Future of EU Politics, 2019, pp. 45 et seqq.; using the example of the EMU, Piris, The Future of Europe, 2012, p. 61 et seqq.; using the example of European environmental policy Calliess, EurUP 2007, 54.

a) A New Architecture for the EU driven by Brexit?

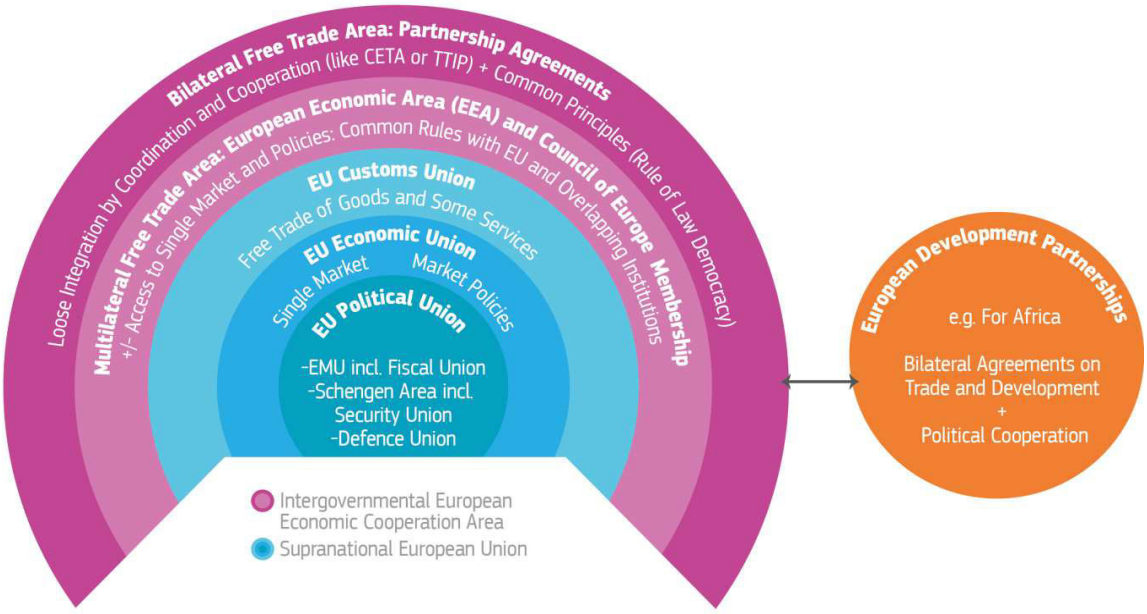

***Figure 1**: C. Calliess (2016), published for the first time in the journal: integration N° 2/2019, 97 (115).*

A new architecture for the EU would be built around an inner circle ('core union') of Member States that agree on deeper integration. In order to respond to the current crises and challenges those Member States' that are willing and able would be allowed to integrate further towards an ever closer union create a European Political Union (Orbit 1). Membership will be based on two pillars: The necessary completion of the Economic and Monetary Union and a more resilient Area of Freedom, Security and Justice comprising efficient border management and migration policies as well as a genuine Security Union. Additionally, a Defence Union would be established, open to cooperation with outer "orbits". Those Member States not willing to integrate any further would not be able to hold the Member States back in deepening integration but share with them the single market in essence constituting thus a European Economic Union (Orbit 2). A third circle could then be added to allow for a looser form of integration which could be offered to countries that do not fulfil the criteria for full single market integration or do not wish to fully participate in it, which could be termed European Customs Union (Orbit 3). Intergovernmental (economic) cooperation outside the circles of the EU should be similarly graded: from a Multilateral Free Trade Area (Orbit 4) involving access to the EU single market

to looser forms of cooperation in Bilateral Free Trade Agreements (Orbit 5), and finally Development Partnerships with economically underdeveloped countries.[96]

All circles would share common principles and rules: Based on the principle of subsidiarity, the core political union would respond to the challenges of the polycrisis by taking further integration steps. Less integrated orbits 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 political 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.

At least in the first three inner supranational circles the long-term goal of EU Member States' would remain an ever-closer union. This goal will, however, be achieved by 'interim' differentiation in the supranational circles. 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.

Although the process of the UK's withdrawal is moderated by the uniqueness of the British position as well as the country's lack of a clear post-Brexit agenda, the departure of a sizeable and important Member State is a watershed moment for the EU.[97] What this means is that the EU must remain committed to its guiding principles and political foundations, including the internal market defined by the four economic freedoms.[98] In particular the EU cannot afford to sacrifice a number of important principles on which its functioning is based, including the rule of law and loyal cooperation. In this respect the UK cannot expect that it can preserve the rights of membership without being willing to fulfil its obligations.[99] In the longer term, this will be the only way of preserving the delicate equilibrium in the EU and preventing the Union's fragmentation. At the same time, the EU cannot have an interest in applying punitive measures to the UK, which should remain a close political and economic partner. It is in mutual interest

[96] Sceptical towards such a model in general Della Cananea, in: Pernice/Guerra Martins (eds.), Brexit and the Future of EU Politics, 2019, p. 45 (85 et seq).

[97] See the contributions in: Dougan (ed.), The UK after Brexit, Legal and Policy Challenges, 2017 and in: Fabbrini (ed.), The Law and Politics of Brexit, Oxford University Press 2017.

[98] Vaz Freire, in: Pernice/Guerra Martins (eds.), Brexit and the Future of EU Politics, 2019, pp. 133 et seqq.

[99] Craig, in: Dougan (ed.), The UK after Brexit, Legal and Policy Challenges, 2017, p. 302.

to preserve a high level of regulatory convergence in order to minimise "behind the border" barriers to trade. It is equally important for both sides to preserve strategic dialogue on important issues of foreign and security policy and seek a high level of alignment.[100]

With the referendum and the notification of the withdrawal the UK made clear that it no longer wishes to participate in a supranational European project. The EU's future relationship with the UK[101] therefore would have to be one of intergovernmental (economic) cooperation. There are, basically, two models to structure such an intergovernmental relationship: The first is in the form of a Multilateral Free Trade Area, as currently represented by the European Economic Area (EEA) according to Orbit 4. Secondly, it can be based on an individual partnership agreement for a Bilateral Free Trade Area, illustrated by the Comprehensive Economic and Trade Agreement with Canada (CETA) according to Orbit 5. These two forms of EU intergovernmental cooperation differ in a number of closely interrelated aspects, most notably its scope and institutional setup as well as the issue of contributions to the EU budget.[102]

However, the debate in the UK right from the start was (and still is) trapped in a dilemma characterised by conflicting expectations, in particular concerning the status of Northern Ireland and the so called Good Friday Agreement.[103] In this regard from a legal point of view three options are conceivable: Either the UK presents a workable solution to avoid a hard border between Northern Ireland and the Ireland, something what has not been done to date. Or it accepts that there is a permanent customs union between Northern Ireland and Ireland (and therefore the EU). This would then indeed mean that the customs border would run through the Irish Sea between Ireland and the UK. This is something that critics of the deal have so far refused to accept with regard to the unity of Northern Ireland and the UK.[104] Nevertheless, the "deal" achieved by Prime Minister Johnson can be interpreted in this sense.

The political problems associated with these two options would be avoided by a third option whereupon the UK as a whole would remain in a European Customs Union with the EU

[100] Rangel de Mesquita, in: Pernice/ Guerra Martins (eds.), Brexit and the Future of EU Politics, 2019, pp. 201 et seqq.
[101] For a general overview Craig, in: Dougan (ed.), The UK after Brexit, Legal and Policy Challenges, 2017, p. 302.
[102] Vaz Freire, in: Pernice/ Guerra Martins (eds.), Brexit and the Future of EU Politics, 2019, p. 133 (139 et seqq.).
[103] See Cox, Attorney General's legal advice to Cabinet on the Withdrawal Agreement and the Protocol on Ireland/Northern Ireland from 5.12.2018 and the development of the withdrawal negotiations: Louis, in: Pernice/ Guerra Martins (eds.), Brexit and the Future of EU Politics, 2019, pp. 201-210.
[104] Louis, in: Pernice/ Guerra Martins (eds.), Brexit and the Future of EU Politics, 2019, pp. 201 (204 et seq.).

according to Orbit 3.[105] However, on the one hand the British critics of the deal would not accept this ("Brexit means Brexit"), on the other hand it is far from clear whether the EU would be ready to accept this as a permanent solution. Because, in the view of many Europeans, this would mean that the principle of the indivisibility of the internal market would be infringed: According to Art. 26 (2) TFEU, the free movement of goods (including the customs union) is an essential part of the internal market.[106]

In the constellation of the customs union according to Orbit 3, a distinction can be made between two options: Firstly, an option inspired by the EU-Turkey Customs Union, promoting tariff dismantling and the free movement of goods on an intergovernmental basis without membership in the EU. However, the EU-Turkey Customs Union highlights the practical limitations. On the one hand, agricultural products are excluded and, on the other hand, the free movement of goods suffers from the fact that product standards between the EU and Turkey are not fully harmonised, which means that controls and inspections are still necessary when goods cross borders. However, from the UK's point of view another aspect is likely to be decisive: Without having a say in the matter, Turkey is bound by EU trade agreements and must implement the tariff reductions agreed by the EU, but in return does not automatically gain better access to the markets of the EU's respective contracting partners.

Therefore, a basic "grassroot" membership, whereby the UK would remain a permanent EU Member State at the level of the European Customs Union according to Orbit 3, without having to deepen its membership further, could become an attractive option. Any border controls between the Republic of Ireland and Northern Ireland on the one hand and the UK and Northern Ireland on the other would be avoided in such a full customs union (including agricultural goods). Although membership of this customs union would be supranational the UK would retain influence (unlike Turkey) over existing and future EU trade agreements, including market access. This would prevent the UK from concluding new Free Trade Agreements in the field of goods, but not in services.

[105] Regarding such a "Soft Brexit" rather sceptical: Della Cananea, in: Pernice/Guerra Martins (eds.), Brexit and the Future of EU Politics, 2019, p. 45 (87 et seq).

[106] See in the context of the withdrawal negotiations: Louis, in: Pernice/Guerra Martins (eds.), Brexit and the Future of EU Politics, 2019, pp. 201 (202 et seq.); and in general terms: Vaz Freire, in: Pernice/ Guerra Martins (eds.), Brexit and the Future of EU Politics, 2019, pp. 133 et seqq.

Initiated by Brexit this way a new and more flexible architecture for Europe would emerge that comprises various supranational and intergovernmental levels (circles or orbits) of integration.

b) Flexibility through Pioneer Groups

Apart from this demanding and sophisticated model, flexibility inside the supranational EU could be achieved by a 'Europe of pioneers' that is based on the current status of the EU as described by Scenario 1 of the Commissions White Paper on the Future of Europe. 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 defense policy under Art. 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 time, 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. By using the 'passerelle' clause in Article 333 TFEU majority voting would become the normal in all 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.

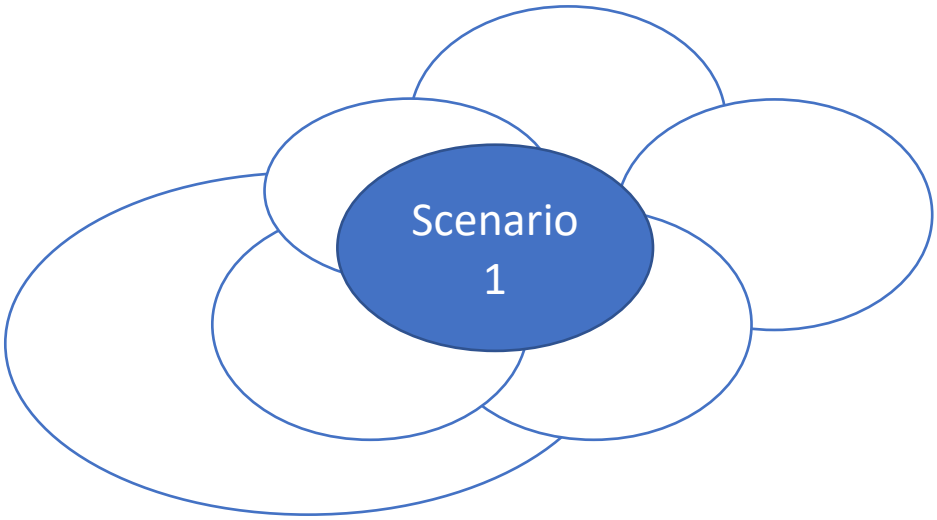

***Figure 2**: C. Calliess: Europe of pioneer groups*

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[107] to participate in further integration towards an ever-closer union[108]. 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[109].

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 (Art. 49 TEU), the pioneer groups, too, would have to admit EU Member States willing and able to realise their ambitious objectives (see also Art. 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-

[107] See Calliess, in: Calliess/Ruffert, EUVAEUV, 5th edition 2016, Art. 1 marginal 9 et seqq.

[108] 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.'

[109] 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 (14.08.2020)).

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 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 defense-policy pioneer groups in the framework of permanent structured cooperation (PESCO[110]).

D. The Example of the Euro Area – Efficiency by a Fresh Institutional Design

I. Introduction

The financial and economic crisis that led to a depth crisis in the Euro Area has confronted the European Union and more precisely the Economic and Monetary Union (EMU) with its structural and political deficiencies.[111] Despite all the reform steps taken in recent years, it has not yet been possible to secure the stability of the Euro Area on a sustainable basis, i.e. to make it more resistant to internal and external crises.[112] This is mainly due to the fact that the Maastricht Treaty favoured the implementation of an economic and monetary union over a political union. As a consequence EMU suffers from 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).[113]

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[110] In more detail: Scheffel, NVwZ 2018, pp. 1347 et seqq.

[111] Adamski, National Power Games and Structural Failures in the European Macroeconomic Governance. Common Market Law Review, Vol. 49, 2012, pp. 1319.

[112] On this from an economic point of view: Feld, in: G. Kirchhof/Kube/R. Schmidt (eds.), Von Ursprung und Ziel der EU, Tübingen 2017, pp. 155 et seqq.; Calliess, The Governance Framework of the Eurozone and the Need for a Treaty Reform, in: Fabbrini, Hirsch Ballin, Somsen, (eds.), What Form of Government for the European Union and the Eurozone? Oxford 2015, pp. 37 et seqq.; De Gregorio Merino, Legal Developments in the Economic and Monetary Union during the Debt Crisis: the Mechanisms of Financial Assistance, Common Market Law Review, Vol. 49 2012, pp. 1613 et seqq.

[113] See Enderlein, Solidarität in der Europäischen Union – Die ökonomische Perspektive, in: Calliess (ed.), Europäische Solidarität und nationale Identität, Tübingen 2013, pp. 83 et seqq. sowie Altmaier, Die Ergänzung

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: Article 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, Article 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.[114] Furthermore, the mere coordination of national economic policies[115] was insufficient to achieve the policy adaptation

der Währungsunion durch die sogenannte „Fiskalunion": Europarechtlicher Irrweg oder europäische Notwendigkeit?, ibid., pp. 171 et seqq.

[114] Adamski, National Power Games and Structural Failures in the European Macroeconomic Governance. Common Market Law Review, Vol. 49, 2012, pp. 1319; Ruffert, The European Debt Crisis and European Union Law. Common Market Law Review, Vol. 48 2011, pp. 1777 et seqq.

[115] In depth analysis: Schoenfleisch, Integration durch Koordinierung, Tübingen 2018, S. 77 et seqq.

needed[116] in order to coincide with the common monetary policy of the European Central Bank (ECB).[117]

The steps taken so far to reform EMU in order to strengthen the Stability and Growth Pact (cf. the so-called European Semester, Six- and Two-Pack, Fiscal Treaty, ESM) further intensify this tension by not only entailing a reshaping of national budgetary, fiscal and, in the course of this, social policies, but also by taking place outside the treaties and thus largely intergovernmental.[118]

Against this backdrop 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[119] 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.'

In concrete terms, the report envisaged a two-stage approach in this respect[120]: Stage 1 is formulated relatively specifically in the report and proposes measures to achieve a union of banking and capital markets, to improve economic convergence and to reform fiscal policy. For stage 2, which is only roughly sketched out in the Five-Presidents' Report, a White Paper on the completion of EMU should develop proposals on how this could be supplemented by the

[116] From an economic perspective: Enderlein, Solidarität in der Europäischen Union – Die ökonomische Perspektive, in: Calliess (ed.), Europäische Solidarität und nationale Identität, Tübingen 2013, pp. 83 et seqq.; from a legal perspective: Calliess, Finanzkrisen als Herausforderung der internationalen, europäischen und nationalen Rechtsetzung. Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (VVDStRL) Vol. 71, 2012, p. 113 (153 et seqq.); idem, Das europäische Solidaritätsprinzip und die Krise des Euro - Von der Rechtsgemeinschaft zur Solidaritätsgemeinschaft? Zeitschrift für Europarechtliche Studien (ZEuS) 2011, 213 et seqq.; De Witte, European Constitutional Law Review 2015, p. 434; critical: Ruffert, The European Debt Crisis and European Union Law. Common Market Law Review, Vol. 48 2011, pp. 1777 et seqq.

[117] In depth analysis: Selmayr, How political are the institutions of Economic and Monetary Union? The cases of the European Central Bank and the European Commission, in: ECB (ed.), From Monetary Union to Banking Union, on the way to Capital Markets Union. New opportunities for European integration (ECB Legal Conference 2015), Frankfurt am Main 2015, pp. 261 et seqq.

[118] See for a detailed overview: Calliess, From Fiscal Compact to Fiscal Union? New Rules for the Eurozone, in: Cambridge Yearbook of European Legal Studies, Vol. 14, Oxford 2012, p. 101 et seqq.; Häde in: Müller-Graff (ed.), Enzyklopädie Europarecht: Europäisches Organisations- und Verfassungsrecht Vol. 1 § 17, p. 891 et seqq.; Selmayr, in: Müller-Graff (ed.), Enzyklopädie Europarecht: Europäisches Wirtschaftsordnungsrecht, Vol. 4 § 23, 2015, p. 1387 (1600 et seqq.); de Streel, EU Fiscal Governance and the Effectiveness of its Reform, in: Adams, Fabbrini, Larouche (eds.), The Constitutionalization of European Budgetary Constraints. Oxford 2014, pp. 85 et seqq.

[119] COM(2015) 600 final.

[120] See Communication from the Commission, COM(2015) 600 final of 21.10.2015; sceptical Schorkopf, ZSE 2015, 335; positive Cremer, EuR 2016, 256.

year 2025 with a democratically and institutionally strengthened, genuine economic and fiscal union.

However, this White Paper did not come about because the European Council only "took note" of the Five Presidents' Report.[121] Thus, unlike the Delors Commission's 1985 White Paper on completing the internal market,[122] which the European Council had explicitly requested from the Commission on several occasions[123], there was no mandate for a White Paper on completing EMU. Instead, in the context of the White Paper on the future of Europe, the Commission presented a reflection paper that included options for the reform of EMU with reference to the five scenarios.[124] With the so-called Santa Claus Package of 6 December 2017 the Commission made an attempt to introduce reforms without amending the Treaty.[125]

The complex, mostly intergovernmental arrangements that have been reached represent important reform steps, but are not sufficient to make the euro area more resilient. Moreover, they have been criticised for their lack of democratic and constitutional legitimacy as decision-making was shifted to bilateral and intergovernmental levels of policy making.[126] A crisis of comparable severity to that of 2009 would challenge the stability of the euro area by overstretching its safety mechanisms again.[127] Therefore the Euro Area still is in need of completion. Although the UK was not a member of EMU, Brexit will affect the Euro Area and change the political landscape regarding reforms as well.[128]

[121] European Council, Conclusions of the meeting of 25 and 26 June 2015, EUCO 22/15, p. 8.

[122] European Commission, Completing the Internal Market: White Paper from the Commission to the European Council, COM(85) 310 final, 14.6.1985.

[123] Cameron, in. Sbragia (ed.), Euro-Politics 1992, pp. 23 et seqq.

[124] European Commission: Reflection Paper on deepening Economic and Monetary Union, COM(2017) 291, 31.5.2017.

[125] European Commission, Communication of 6.12.2017 (so-called Santa Claus Package), COM(2017) 821 final.

[126] Pernice., et al., A Democratic Solution to the Crisis. Reform Steps towards a Democratically Based Economic and Financial Constitution for Europe, Baden-Baden 2012; Calliess, From Fiscal Compact to Fiscal Union? New Rules for the Eurozone, in: Cambridge Yearbook of European Legal Studies, Vol. 14, Oxford 2012, p. 101 et seqq. and idem, The Governance Framework of the Eurozone and the Need for a Treaty Reform, in: Fabbrini, Hirsch Ballin, Somsen (eds.), What Form of Government for the European Union and the Eurozone? Oxford 2015, pp. 37 et seqq.

[127] See Glienicker Group, Towards a Euro Union, http://www.glienickergruppe.de/english, published in German by DIE ZEIT on 17 October 2013.

[128] Louis, in: Pernice/Guerra Martins (eds.), Brexit and the Future of EU Politics, 2019, pp. 201 et seqq.

II. Guiding Principles of Euro Area Reform

Any reform of the Euro Area must be guided by the guiding principles of the Treaty. These guiding principles include not only the constitutional principles of solidarity, subsidiarity and democracy already mentioned above, but also the specific Treaty guiding principles of EMU, namely stability and conditionality. These define the framework within which any reform proposal must fit in a fruitful interaction with the other guiding principles of EMU.

The Treaties construct the Euro Area based on the principle of stability.[129] As the German Federal Constitutional Court rightly emphasized in its *Maastricht judgment* this principle forms a founding principle and fundamental basis ("Geschäftsgrundlage") of EMU ("Stabilitätsgemeinschaft")[130] In the light of this principle, solidarity is allowed and – at least from a European law perspective – even required if the stability of the Euro Area as a whole is threatened. However, any aid based on solidarity is only permissible in this context if it serves to restore the stability of the Euro Area threatened by a Member State. At this point, the principle of conditionality has a bridging function by shaping the interaction between the stability and solidarity principles. Conditionality ensures that financial assistance is used solely to facilitate reforms that will ensure the stability of the Euro Area in the medium term. It is no coincidence, however, that the implementation and application of European guidelines is also a case of applying the solidarity principle in its procedural dimension, namely loyalty to the Union. From the point of view of mutual solidarity, it is therefore legitimate for the EU to support and facilitate fundamental reform processes in the Member States by means of financial incentives as a supplement to a rule-based approach, while at the same time linking these to compliance with agreed conditions, requirements and rules. These basic ideas are expressed not only in the case law of the European Court of Justice on the understanding of the no bail-out clause,[131] but also in Article 136 (3) TFEU, the legitimation basis of the ESM.[132]

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[129] H.H. Klein, Die Stabilitätsgemeinschaft des Masstricht-Urteils. Aspekte zwischen Fiskalunion und Budgetrecht des Bundestages, in: Calliess (ed.), Europäische Solidarität und nationale Identität, Tübingen 2013, pp. 179 et seqq.

[130] See BVerfGE 89, 155 – Maastricht.

[131] CJEU, C-370/12 - Pringle, ECLI:EU:C:2012:756; Calliess, NVwZ 2013, 97 et seqq.; Ioannidis, EU Financial Assistance Conditionality after „Two Pack", Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, Vol. 74 2014, pp. 61 et seqq.

[132] Calliess, Das europäische Solidaritätsprinzip und die Krise des Euro – Von der Rechtsgemeinschaft zur Solidaritätsgemeinschaft? Vortrag an der Humboldt- Universität zu Berlin am 18. Januar 2011 (FCE01/11), http://www.whi-berlin.eu/tl_files/FCE/Rede_Calliess.pdf.

III. More Efficiency in the Euro Area Without Treaty Change

Compliance with the common rules of EMU is a crucial aspect of stability and an important step towards restoring mutual confidence in the Euro Area as well as sending a clear signal to the financial markets. In general terms the principle of conditionality can be complied with simply by linking any access to solidarity instruments to compliance with the rules of EMU and the EU (specifically the Stability and Growth Pact, the European Semester and minimum standards regarding the implementation of the rule of law).

If, for example, financial resources from European funds within the new working method described above are directed towards the implementation of political priorities (as in the Commission proposal for the Multiannual Financial Framework) or the implementation of structural reforms in Member States, a partnership agreement between the Member State and the EU should be concluded. As a link between European solidarity and stability my means of conditionality it should provide for clarity regarding the objectives of the financial support on the one hand and the necessary technical and personnel support on the other. As the above mentioned Commission's services responsible for structural reform support reveal institutional control is not only about supervision, but also about information, communication and cooperation, aspects which create a relationship of trust and cooperation and which can thus be expected to improve ownership of the necessary reforms at Member State level.

In this respect, two institutional networks already mentioned in the Five-Presidents' Report could contribute to this purpose without amending the Treaty:

- The first is that of the so called "Competitiveness Authorities", which should help to improve economic policy coordination and hence convergence in the Euro Area. In response to resistance from Member States, the Commission did not sufficiently exploit their potential in its recommendation on this subject. In this respect, the Member States should be obliged to create functioning institutions which are then coordinated at European level under the umbrella of an independent institution.

- On the other hand, the potential of the "European Fiscal Board" mentioned in the Five-Presidents' Report is far from exhausted. Rather, in the area of fiscal policy it could ensure that the work of the national fiscal councils is better coordinated so that a European perspective on fiscal policy can take shape on this basis.[133]

Both networks, which could be brought together under the umbrella of a European Stability Committee, must be able to act independently of the political sphere. For reasons of democratic legitimacy, the results of their work cannot be politically binding. Their primary purpose is to make the institutions (Commission, Eurogroup[134]), which are decisive in the political process and have (at least indirectly) democratic legitimacy, subject to the duty to justify and justify their work. It would nevertheless be conceivable to link the deviation from their expertise to qualified majorities under certain conditions in the political process. In any case, their reports provide a solid and robust basis for the decisions to be taken on the financial market and thus strengthen the role of the no bail-out clause (Art. 125 TFEU)[135].

IV. More Efficiency in the Euro Area by Completing EMU

In addition to these first steps, which could be taken without amending the Treaty, more fundamental institutional reforms would be necessary for the completion of EMU.[136] In this respect, the Five-Presidents' Report of June 2015 states still correctly 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."

[133] Critical of the proposal of a European Fiscal Committee: Fabbrini, in: Daniele/Simone/Cisotta (eds.), Democracy in the EMU in the Aftermath of the Crisis, 2017, pp. 128 f.

[134] Jacquemain, ZEuS 2015, 27 et seqq.

[135] For a detailed legal analysis: Calliess, Das europäische Solidaritätsprinzip und die Krise des Euro – Von der Rechtsgemeinschaft zur Solidaritätsgemeinschaft? Vortrag an der Humboldt- Universität zu Berlin am 18. Januar 2011 (FCE01/11), http://www.whi-berlin.eu/tl_files/FCE/Rede_Calliess.pdf.

[136] On the modalities of a reform of the EMU with or without treaty change Pernice, et al., A Democratic Solution to the Crisis. Reform Steps towards a Democratically Based Economic and Financial Constitution for Europe. Baden-Baden 2012, pp. 67 et seqq.

The proposed Treasury of the Euro Area (TEA) should 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 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.

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.

1. Competences of Treasury of the Euro Area (TEA)

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 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 monitor the 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 (cooperating with the services of the Commission in structural reforms)
- 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 by means of graduated intervention rights
- to manage crises in the euro area and cushion asymmetric macroeconomic shocks via a fiscal capacity (in strict compliance with the principles of subsidiarity and conditionality)
- 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 and single external representation of the euro area

2. Treasury of the Euro Area (TEA) and European Monetary Fund (EMF)

In view of these responsibilities, close cooperation and division of tasks with the ESM, which should be developed into an EMF, would appear to be appropriate.[137] Beyond the ESM's current function as a crisis response instrument, an EMF could implement national reforms in cooperation with the Member States. Such a preventive arm of the EMF would correspond to the already established reactive role of the ESM.[138] The "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), which was established in 2016 and has now become a Commission's Directorate General.

[137] Keppenne, in: Neergaard/Jacqueson/Danielsen (eds.), The Economic and Monetary Union: Constitutional and Institutional Aspects of the Economic Governance within the EU, 2014, S. 179 (213).

[138] In favour of a EMF already Calliess, VVDStRL 71 (2012), 113 (171); see in detail Forsthoff, EuZW 2018, 108 et seqq.; Pilz, Der Europäische Stabilitätsmechanismus: Eine neue Stufe der Europäischen Integration, 2016.

With regard to these competences, the decision to establish a TEA must not exclude the development 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. In this respect, close cooperation, or even institutional networking with the aforementioned European Stability Council, bringing together the expertise of the "European Fiscal Board" and the aforementioned "Competitiveness Authorities" are united, is obvious.

Based on its technical-administrative expertise the EMF would propose structural reforms to the Member States and, if these infringe the Stability and Growth Pact, would also initiate them. However, the TEA, being the body democratically legitimised, could override the proposed intervention for political reasons. In this case any deviation from the expertise of the EMF on the part of the TEA must trigger a detailed and transparent explanatory statement. This, together with the expertise of the EMF, could then be the basis for political debate and market reactions. This would take into account both the principle of democracy and the no bail-out clause of Article 125 TFEU.

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.[139] The development of a state insolvency procedure not only represents the last resort when it comes to excessive sovereign debt but is

[139] See Pfleger, Unionsrechtliche Rahmenbedingungen der Restrukturierung von Staatsschulden, 2018; from an economic perspective: Herzog, Die Zukunft der Wirtschafts- und Währungsunion (I) – Eine staatliche Insolvenzordnung für den Euroraum, 2018, available online: http://www.kas.de/wf/doc/kas_48769-544-1-30.pdf sowie Feld, in: G. Kirchhof/Kube/R. Schmidt (eds.), Von Ursprung und Ziel der EU, 2017, p. 155 (174 et seq.).

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 Art. 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 joint involvement of the TEA (political) and the EMF (technical-administrative) in national reform programs would be supported by a fiscal capacity (e.g. in the form of a "Rainy Day Fund" or a "European reinsurance for national unemployment insurance" modelled on the US). Such a fiscal policy stabilisation function as an expression of the solidarity principle would, however, have to be consistently linked to structural reforms secured by the conditionality principle, in view of the stability principle, and would only be able to step in temporarily in view of the no bail-out clause of Article 125 TFEU and the idea of Member States' own responsibility as expressed in the subsidiarity principle. The establishment of a fiscal stabilisation function as part of the TEA might be complex from a political point of view.[140] 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.

[140] See Fabbrini, in: Adams/Fabbrini/Larouche (eds.), The Constitutionalization of European Budgetary Constraints, 2014, p. 399 et seqq.; Duff, The Protocol of Frankfurt: a new treaty for the eurozone, p. 22 et seq.

Finally, in accordance with the above described new working method any fiscal capacity should contribute to finance European public goods. Therefore its resources should operate as a European investment budget, providing incentives for structural reforms identified in the European Semester and the country-specific recommendations (CSRs), while at the same time enabling investment in European public goods (e.g. in cross-border infrastructure, management of external borders, labour market reforms, restructuring of training systems, improvement of governance structures).

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 by the Treaty of Maastricht in 1992. For the Euro Area all of these principles are explicitly mentioned in Article 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 Court of Justice of the European Union 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".[141]

Article 136 (3) TFEU's full legal effect unfolds in the context of the so-called No-Bail-Out Clause, stipulated in Article 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 Article 125 TFEU.[142] 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".[143] This means that, under Article 125

[141] CJEU, Case C-370/12, para. 69.

[142] CJEU, 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."

[143] CJEU, Case C-370/12, para. 137.

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.[144]

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.

3. Position of a Treasury of the Euro Area (TEA) in the Institutional Framework

The position of a 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[145] – is one of the reform's main objectives.[146]

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).

[144] CJEU, Case C-370/12, para. 136, 137.

[145] Dimopoulos, in: Adams/Fabbrini/Larouche (eds.), The Constitutionalization of European Budgetary Constraints, 2014, S. 41 et seqq.

[146] Pernice., et al., A Democratic Solution to the Crisis. Reform Steps towards a Democratically Based Economic and Financial Constitution for Europe, Baden-Baden 2012; Calliess, The Governance Framework of the Eurozone and the Need for a Treaty Reform, in: Fabbrini, Hirsch Ballin, Somsen (eds.), What Form of Government for the European Union and the Eurozone?, Oxford 2015, pp. 37 et seqq.

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

(1) In the first one, current structures would be left broadly untouched and a new executive authority would be added as part of the Council.[147] This authority could complement or even replace the Eurogroup and raise the profile of economic policy coordination.[148] 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.

(2) 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"):

- The Treasury could comprise just the Commissioner responsible for monetary union, who then would become a kind of European Finance Minister.[149] To enhance his coordinating role, the function could be "double-hatted" by combining his role as Commissioner and President of the Eurogroup.[150] As described already above the merging of the offices under one hat would increase the efficiency and enhance

[147] Cromme, EuR 2017, 206 (225 et seqq).

[148] Jacquemain, ZEuS 2015, pp. 27 et seqq. and 46 et seqq.

[149] Selmayr, in: Müller-Graff (ed.), Enzyklopädie Europarecht: Europäisches Wirtschaftsordnungsrecht, Bd. 4 § 23, 2014, p. 1387 (1619 et seq.); Calliess, Die Reform der Wirtschafts- und Währungsunion als Herausforderung für die Integrationsarchitektur der EU, Die Öffentliche Verwaltung, Vol. 66 2013, pp. 785 et seqq. and idem, The Governance Framework of the Eurozone and the Need for a Treaty Reform, in: Fabbrini, Hirsch Ballin, Somsen (eds.), What Form of Government for the European Union and the Eurozone? Oxford 2015, pp. 37 et seqq.

[150] See already Pisani-Ferry/Aghion/Belka/von Hagen/Heikensten/Sapir, Coming of Age: report on the euro area, Brussels 2008, p. 105 f.

democratic legitimacy. This new institution would then 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.

- 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, Budget and Reform) along with the President of the Commission. This expanded alternative would then be better described as not just a Treasury but an "European Economic Government" for the monetary union.[151] 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.[152]

(3) 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.

[151] In depth analysis Herrmann, in: Giegerich (ed.), Herausforderungen und Perspektiven der EU, 2012, pp. 51 et seqq.

[152] See Calliess, The Governance Framework of the Eurozone and the Need for a Treaty Reform, in: Fabbrini, Hirsch Ballin, Somsen (eds.), What Form of Government for the European Union and the Eurozone? Oxford 2015, pp. 37 et seqq.

IV. Subsidiarity, European Control, and Sovereignty of National Parliaments

The principle of subsidiarity reflects first of all the principle of financial responsibility. This is expressed in particular by the so-called No-Bail-Out Clause of Article 125 TFEU. While a complete centralisation of economic and fiscal policy even in federal states is not an option, a major challenge in the EU is to define ways of strengthening fiscal responsibility and enhancing "ownership" of national governments. In this respect, the above-mentioned new working method with its approach of cooperative enforcement paves the way: Networks between European and national institutions – like the ones working under the umbrella of the proposed "European Stability Committee" – should be established. They would develop forms of cooperation, which can range from the exchange of information to professional, personnel or technical support from the European level, for example by the Commissions services for structural reform.

Nevertheless, in case a Member State does not cooperate, according to the new working method the European level must have the possibility to intervene in the European interest. As mentioned above, in this regard the TEA together with the EMF would have graduated rights of intervention and control in national budgetary policies. In this respect it is important to ensure that these are proportionate. Therefore, it is important to differentiate.[153] If the legally binding criteria of the stability and growth pact are infringed, the responsible European institutions can set binding targets for the national budget, provided these remain **abstract** and do not call for specific interventions in certain national budget titles. On the other hand, even **concrete** guidelines are permissible with regard to those Member States of the Euro Area whose budget situation has deviated so far from the stability criteria that emergency aid from the EMF will become necessary. This is because an over-indebted member state that slips under the EMF (so-called programme state) ultimately has only the choice between national bankruptcy and receiving emergency aid from the EMF. By opting for conditional emergency aid from the EMF, the recipient state and its parliament thus agree autonomously to a restriction of their budgetary sovereignty. In other words, the greater the financial dependence of a country on European financing, the deeper the transfer of sovereignty and thus the European Union's scope for intervention.[154]

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[153] See Calliess, Die Reform der Wirtschafts- und Währungsunion als Herausforderung für die Integrationsarchitektur der EU, in: Die Öffentliche Verwaltung 2013, p. 785 et seqq.

[154] Calliess, Die Reform der Wirtschafts- und Währungsunion als Herausforderung für die Integrationsarchitektur der EU, in: Die Öffentliche Verwaltung 2013, p. 785 et seqq.; Enderlein, in: The Governance Report 2015, p. 59.

VI. 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.[155] In this context, the predecessor to the FPR, the so called Four Presidents' Report[156], 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.*'

1. 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. Although a Euro Chamber inside the EP might conflict with Article 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.

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[155] In this regard compare the one message of the many different contributions in: Papadopoulou/Pernice/Weiler (eds.), Legitimacy Issues of the European Union in the Face of Crisis, Baden-Baden, 2018.

[156] Towards a Genuine Economic and Monetary Union, Report by President of the European Council Herman Van Rompuy, EUCO 120/12, Brussels 26 June 2012.

2. 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.[157]

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 Art. 10 (2), 12 TEU and Art. 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

[157] Compare in this regard the in depth analysis by Calliess/Beichelt, Die Europäisierung des Parlaments, Gütersloh 2015.

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 receiving financial support from the ESM (or a future EMF) has given up its budgetary autonomy voluntarily.

E. The Corona Crisis and the Recovery Plan and (Next Generation EU): A Lost Opportunity for the Reform of the EU and its Euro Area

Since today there is no consensus on further reform steps, neither regarding the EU nor the euro area. With view to the international financial markets, the ECB filled the gap with its legally controversial purchase programs. Through the OMT- and PSPP-program, the ECB explicitly wanted to buy time for Member States during the crisis in the Euro Area, in view of the speculative financial markets, so that they could agree politically on the necessary reforms to stabilise the Euro Area. Instead of taking up, for example the Commission's reform proposals tabled with the so-called 5-Presidents' Report of June 2015[158] or – beyond mere announcements in speeches and declarations[159] – preparing substantial reform proposals, the responsible political actors of all Member States rested in the warming sunshine of the ECB's programs and postponed the agreement on a reform package time and again. At the same time the constant purchase of government bonds by the ECB led, among others, to severe conflicts of jurisdiction in the EU, in particular between the European Court of Justice and the German Federal Constitutional Court.[160] These have their origins in the above described competence gaps not closed politically by the Member States.

[158] Communication from the Commission, COM(2015) 600 final, 21.10.2015; sceptical *Schorkopf* ZSE 2015, 335.

[159] See for example the so called Meseberg Declaration agreed by Germany and France "Renewing Europe's promise of security and prosperity", 19.06.2018, press release 214.

[160] See Calliess, The Future of the Eurozone and the Role of the German Federal Constitutional Court, in: Yearbook of European Law 2012, Oxford 2012, p. 402 et seqq.; idem, Struggling About the Final Say: The ECB Ruling of the German Federal Constitutional Court, in: Oxford Business Law Blog, 25 June 2020 (online available);

Surprisingly, the corona crisis did not become a catalyst for reform due to the fact that the political compromise reached by the European Council in mid-July 2020 avoided the necessary coupling of the recovery plan with completing EMU. As a consequence, financial aid by transfers, which were previously not considered possible without any reform obligations ("conditionality" as a prerequisite for solidarity, cf. Art. 136 (3) TFEU), are at stake that leave the Euro Area without any substantial reforms. After five days the Heads of State and Government agreed on a special budget of €750 billion called "Next Generation EU" (NGEU) and a new financial framework for the period 2021 to 2027 totaling €1,074.3 billion.[161] NGEU as an expression of European solidarity will increase the financing of six existing EU programs and funds and will provide a new instrument, the Recovery and Resilience Facility (RRF). To the RRF €672.5 billion will be allocated. Out of this total, the EU can grant € 360 billion in loans and € 312.5 billion in lost grants. The remaining €77.5 billion will also be distributed to the Member States as grants through the already existing European programs and funds. With regard to the time horizon the financial assistance on the basis of a specific allocation key calculated for each Member State will have to be allocated until the end of 2023 and disbursed by the end of 2026 at the latest.[162]

The crucial question of which Member States should benefit from the financial assistance amounts to the question what are the conditions for their eligibility. According to the proposal it is answered by procedural rules which focus on national development and resilience plans, which are to be drawn up by the Member States and will be examined by the Commission.[163] Assessment criteria are supposed to be consistency with the country-specific recommendations from the European Semester, strengthening of growth potential, job creation and economic and social resilience of the Member State. In addition, the projects should make an effective contribution to the green and digital transition, which is a prerequisite for a positive assessment. On this basis payment applications will be decided by the Council acting by qualified majority. In this regard there was a dispute in the European Council: With view of the nature of the grants as financial transfers, the group of net contributor states did not want to leave implementation control to the Commission on an exclusive basis and therefore claimed a say in the effective

Sarmiento, Hartmann, European Monetary Union and the Courts, in: Amtenbrink, Hermann (eds.), EU Law of Economic & Monetary Union, Oxford 2020, pp. 526 et seqq.

[161] European Council, Conclusions from 21.07.2020, EUCO 10/20.

[162] For an overview see European Commission, COM (2020) 442. In more detail: European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a Recovery and Resilience Facility, COM (2020) 408.

[163] See European Commission, COM (2020) 575.

use of funds. As a compromise an emergency brake mechanism was agreed.[164] It provides for the right of political referral to the European Council. While confirming the legal position and leaving the legal consequences unregulated the mechanism contains traces of the Luxembourg compromise. However, the legal consequences of the emergency brake remain unregulated. A further conflict, which has not been resolved for the time being, concerns the linking of financial aid to compliance by the Member States with the rule of law – in concrete terms, this concerns the disputes with Poland, Romania and Hungary.[165]

Regarding the legal framework there remain some questions that concern the legal bases for the two secondary acts which are to create the special budget.[166] Article 175 TFEU, which the Commission is proposing for the establishment of the reconstruction and resilience facility, provides for the operation of the well-known Structural Funds, seems not problematic. It allows, in paragraph 3, for a new provision on "specific actions outside the Funds". However, the legal basis for the reconstruction instrument does not comply with the principle of conferral (Art. 5 (1) TEU). In its proposal, the Commission refers to Article 122 TFEU without specifying any of the paragraphs. The Council's legal service considers that Article 122 (1) TFEU is relevant because the distribution of budgetary resources is not a financial assistance within the meaning of paragraph 2.[167] However, the wording of the article shows that for financial aid, paragraph 2 is more specific than paragraph 1, an interpretation confirmed by the Court of the EU.[168] Therefore Article 122 (2) TFEU might be applied as the appropriate legal basis insofar as the financial aid is targeted at coping with the impacts of the corona epidemic. Regarding the No-Bail-Out Clause Article 122 TFEU is interpreted as an exception to the rule of Article 125 TFEU. As long as the recovery tool is based on Article 122 TFEU therefore in principle there must be no legal problem in this regard.[169] Nonetheless, paragraph 2 does not refer to all Member States, but only to "one", and provides for financial assistance in a crisis situation. And what is more, the presupposed crisis connection raises the question whether Article 122(2) TFEU is overstretched when it comes to financials transfers that intend a general

[164] European Council, Conclusions from 21.07.2020, EUCO 10/20 para A 19.

[165] European Council, Conclusions from 21.07.2020, EUCO 10/20 para A 23; on the case and legal background: Koen Lenaerts, German Law Journal 21 (2020), 29 ff.

[166] Council of the EU, Opinion of the Legal Service on Proposal Next Generation EU from 24.06.2020, Document Nr. 9062/20: „The budgetary construction of the NGEU and its financing is unprecedented and raises novel and delicate legal issues of a budgetary nature" (para 7).

[167] Council, Opinion of the Legal Service on Proposal Next Generation EU from 24.06.2020, Document Nr. 9062/20: „The budgetary construction of the NGEU and its financing is unprecedented and raises novel and delicate legal issues of a budgetary nature" (para 7).

[168] CJEU, Case C-370/12, ECLI:EU:C:2012:756, para 116 – Pringle.

[169] Calliess, ZEuS 2011, 213 (239 et seq.) CJEU, Case C-370/12, ECLI:EU:C:2012:756, para 116 – Pringle.

economic recovery over several years. More precisely it raises the question whether the allocation of NGEU financial resources can be carried out in the intended thematic breadth and whether there does not have to be an expenditure programme limited to direct crisis damage: EURI will pursue objectives outside the pan-demic context, such as environmental and digital change and the transition to a climate-neutral economy. The European Parliament's say in the budgetary procedure will also further politicise the allocation of funds.

Apart from these questions regarding the legal framework the recovery package raises also questions of a systemic nature: It neglects that the above described conception of the Euro Area with the No-Bail-Out clause of Article 125 TFEU in principle precludes joint liability for national debt. Moreover, it introduces – beside the structural funds and the ESM (Art. 136 (3) TFEU) – a third pillar of solidarity into the Treaties.

As explained above the EU the principle of solidarity is not a foreign body to EU law. In terms of content, jurisprudence can receive suggestions from social philosophy, according to which solidarity obligations stand between morally owed and voluntary benefits: If one causes the need of another, one is obliged to help; if the other person causes his own need, one helps voluntarily; if he gets into need by chance or through the fault of a third party, one helps out of solidarity. However, the content and concrete scope of European solidarity obligations are undefined and require clear references in the EU Treaties. Against this backdrop the treaties suggest about three stages and forms of solidarity which should have been distinguished politically.

The first stage of European solidarity can be defined by mutual support in an current emergency situation through no fault of one's own: And indeed, the pandemic defines a situation which, like a natural disaster, brings all Member States into an emergency situation by chance, in this respect everyone is "in the same boat". This kind of solidarity is expressed and addressed by the general solidarity clause in Article 222 TFEU and the solidarity clause relating to the Euro Area in Article 122 (2) TFEU, which, as an exception to the No-Bail-Out-Clause in Article 125 TFEU, allows for concrete emergency aid from the EU to directly combat the crisis, for example to strengthen the health sector. Instead of loans, money could therefore flow from the existing Solidarity Fund, which could then have been topped up by a corona line, or from a new "Corona Fund" supporting Member States in need. This first stage would also include emergency aid to

cushion the economic shock directly and closely linked to the crisis, like for example the agreed SURE regulation intended to support the labour markets by financial assistance to

A second stage is about a medium-term form of European solidarity. The majority of economists have good reason to fear that the euro area could once again become the target of the financial markets as a result of the "Corona crisis", especially in the wake of the massive national debt that it will require to "wake up" the European economy. In this respect, Member States whose national debt exceeded the stability criteria agreed in the Treaty even before the Corona crisis are particularly at risk. In this respect, the additional debt could become an accelerant and threaten the stability of the euro area as a whole. Against this background, emergency assistance from the European Stability Mechanism (ESM) is the appropriate form of European solidarity. According to Article 136 (3) TFEU, this can, of course, only be granted under "strict conditions", i.e. it is linked to structural reforms in the respective recipient states.

Why this conditionality is branded a "stigmatization" by some voices is not evident. After all, the funds are used to bring the recipient state back to the concept of financial stability, which was jointly agreed in the EU Treaty and which can be described as the operating basis of Economic and Monetary Union (EMU) agreed in the Maastricht Treaty in 1992. In this respect, solidarity is not a one-way street, but rather the well-known musketeer principle of "all for one, one for all". Moreover, the former "troika", criticised in the Greek crisis for being a new kind of "occupying power", is long since a thing of the past: apart from the fact that this view has always been a polemical exaggeration in view of the personnel and technical assistance provided on many occasions, there is a lesson to be learned from the Greek experience. The reform programme for Portugal, for example, was already implemented in a much more cooperative, dialogue-based process, in the course of which the expertise of the national actors was better integrated and thus the special features and sensitivities in the recipient country were better taken into account. On this basis, the Juncker Commission has established the above mentioned Structural Reform Support Service, nowadays a Directorate-General for Reform, which advises the Member States and provides technical and personnel support and expertise for reform processes, thereby initiating reform processes in close cooperation with them. There can therefore be no question of stigmatisation.

If European solidarity is expressed by a joint European liability for sovereign debt, let it be corona bonds or common loans, a third stage is addressed. As this form of solidarity might pave the way for a Fiscal Union, the reform of Euro Area by completing EMU by means of the options described above is on the agenda. There is no doubt that the Corona pandemic has once again shown that, despite all the reform efforts of recent years, the euro area is still a "fair weather" area which, in the event of a storm, does not yet have the capacity (and therefore the resilience) to deal with a crisis without jeopardising its stability. If forms of joint liability for sovereign debt without conditionality are introduced, the above described system of the Euro Area based on the interplay of the principles of solidarity and the guiding principles of EMU, namely stability and conditionality, is supplemented by elements of a Fiscal Union. Such a leap forward for systematic reasons must be coupled with the above described options for completing EMU. Moreover, such a reform cannot and for democratic reasons should not be introduced through the backdoor.

F. Conclusion with regard to the Conference on the Future of Europe 2020-2022

The very first and most fundamental article of the Lisbon Treaty reads: "This Treaty marks a new stage in the process of creating an ever-closer union among the peoples of Europe".[170] To this end, Europe is said to be – according to its (unofficial) motto[171] – 'united in diversity'. The level of diversity in the Union has greatly increased as the number of Member States has grown from 15 to 28 – and with Brexit back to 27. It has become apparent that the current architecture of the Union is not adequately equipped to reconcile the two main goals of deepening integration[172] and widening by enlargement[173]. On the one hand, integration has stagnated at a time when two of the most important European projects, the Euro Area and the Schengen Area remain half-finished, and major crises in both areas have readily exposed the fatal flaws of unfinished integration. Incremental steps have been taken to consolidate the Euro and Schengen Areas under the imminent threat of a potential break-up of the Union, but Member States are still resisting further steps towards more necessary integration in order to create the institutional resilience that is required to survive further shocks. On the other hand, the EU enlargement process has greatly increased the disparities in Member States' abilities and willingness to

[170] Art. 1 subpara. 2 TEU.

[171] Proclaimed by the European Parliament on 4 May 2000, later included in Art. I-8 of the Treaty establishing a Constitution for Europe.

[172] Art. 1 TEU.

[173] Art. 49 TEU.

proceed towards closer integration and will continue to do so with the possible accession of the Balkan states and beyond. While diversity is one of the core strengths of the European project, too much economic, political, and cultural heterogeneity can threaten Member States' cohesion and solidarity. In such a scenario, the EU runs the risk of suffering from an 'imperial overstretch'. Without a shared sense of purpose and direction, the EU will degenerate into a transaction-based intergovernmental organisation. The Fiscal Compact and the ESM are two examples of this, and this kind of intergovernmentalism in crisis poses a substantial threat to the democratic supranational governance of Europe and EU integration itself. Already, some Member States rather openly favour a model of the EU which more closely resembles the pre-Maastricht European Economic Community than the post-Lisbon EU. At the same time, populist, anti-EU sentiment is on the rise in many countries. This risk of disintegration is real, and the British referendum to leave the EU is only the latest and most extreme example of this.

The most fundamental challenge of the future EU architecture will thus be to (1) create a resilient Economic and Monetary Union and a genuine Area of Freedom, Security and Justice, (2) foster cohesion among all Member States, while (3) addressing the fundamental socio-economic and ideological-cultural differences between them, (4) preventing an uncontrolled process of disintegration and finally (5) remaining attractive and open to all European states who share the Union's fundamental values.[174]

In order to solve all of these challenges at the same time, the natural trade-off between deepening and widening (integration and enlargement) must be resolved while recognising that both are inherent to a successful European Union. As in the wake of globalisation the world grows bigger and more interdependent and Europeans will, by 2050, represent only 5% of the world's population, a larger EU will have a louder voice on the world stage – provided it will be able to speak with one voice. This, however, becomes increasingly difficult the greater the disparities and divisions among Member States' become, leading to less solidarity-based, common goal-oriented and more transactional, nation-oriented compromises and inaction.

[174] Art. 2, 49 TEU.

The above described reforms would provide the Union with a clear sense of direction while addressing some of its most pressing challenges. It accommodates different levels of ambition and capacity amongst Member States, better respects their national identities[175] and thus allows for a variable EU narrative tailored to their specific wants and needs. In this manner, it can counter disintegrationist tendencies and even increase cohesion through increased acceptance of different levels of EU rules. As a matter of fact, flexibility and differentiation are already a real part of the EU legal system. The new working method including models for a more flexible EU proposed above would provide more legal certainty by placing what is today a *de facto* differentiation on solid institutional footing.

With regard to the further enlargement of the EU, a delinking of automatic eventual Eurozone accession from the general perspective of EU accession may help to retain the (geo-)political promise of EU enlargement while serving as a safeguard against the instabilities resulting from the mechanisms of enlargement without true convergence. Finally, differentiation is the only way to advance integration inside the EU framework in a situation where Member States have markedly different ambitions and capabilities. If it is not afforded an orderly framework, integration will stagnate, inevitably seek structures outside the EU treaties and lead finally to fragmentation and disintegration.

European citizens expect the EU and its policies to function properly. If the EU wants to regain their trust, Brussels as well as the capitals have to explain the need for reforms and start a transparent debate. 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. The Conference on the Future of Europe 2020-2022 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.

In order to provoke a substantive debate, the EU should provide for 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, closer to citizens and more flexible".

[175] Art. 4 (2) TEU.

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. In this regard it is important to realise that the above proposed new working method as well as most of the above-mentioned reforms can be undertaken in the framework of the Treaty of Lisbon, occasionally using the so called 'passerelle' clauses. 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 Article 48 (2) – (5) TEU. Reforms to make the Euro Area more resilient by improving its governance could be achieved by a rather technical Treaty change following the example of the Single European Act from 1986.