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### ■ German Visions for the Future of Europe

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Ten years have passed since the Treaty of Lisbon entered into force on December 1st 2009. and as the EU today stands facing a new decade, calls for reforms across the Union once more are growing strong (European Parliament 2020). As a press statement released by the European Parliament on June 18, 2020 puts it: “the number of significant crises that the Union has undergone demonstrates that institutional and political reforms are needed in multiple governance areas”(European Parliament 2020). A brief overview of such crises shall provide a better understanding of the issues the EU has dealt with over the past decade, and particularly of how its handling of the crises produced demand for structural reform of the Union.

#### The troubled decade of 2010-2020

At the very beginning of the decade, the aftermath of the Global Economic Crisis of 2008 sparked off a series of financial crises that affected several EU-Member States, with Greece hit particularly hard and brought to the brink of insolvency. The Union’s response was met with criticism from various sides with multi-billion bail-out packages prompting questions on the limits of solidarity among EU-members and the struggling states of southern Europe denouncing the austerity measures imposed on them.

Divisions among the Member States regarding the limits of EU regulation and international solidarity widened further in 2015 as a massive influx of migrants and refugees arriving (primarily) at Greek and Italian borders overextended these states’ capacities to handle them, effectively making it impossible to uphold

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the Dublin III agreement under which only the state in which a person is first registered can grant him/her asylum. Immigration and refugee redistribution among the Member States, disputes within the EU and rising concerns over the Union's (in)capacity to respond to crises led to the temporary reestablishment of border controls within the Schengen-area.

In 2016, the United Kingdom's decision to leave the European Union (Brexit) marked a historical turning point in the EU's history leading to what would become a prime example of growing opposition among the Member States against the design and politics of the EU.

Since then, amidst on-going Brexit negotiations, it has become increasingly clear that, despite a widespread desire to remain united, there is little consensus among the 27 remaining Member States on the direction in which the Union of 27 should proceed.

However, recent disputes between the Member States and the EU show that it is not only the future of the EU, but also the powers that the EU currently holds that are under debate. A prominent example of this is the on-going legal dispute between the Polish government and the European Union regarding a series of judicial reforms being implemented in Poland which the European Commission condemned as being contrary to EU Law, prompting the CJEU's legal inquiry against Poland (The Chancellery of the Prime Minister 2018). The Polish Government, in its turn, has condemned CJEU interventions as interference with national affairs.

Similar struggles for the upper hand in legal decisions were observed in Germany earlier this year, when the Bundesverfassungsgericht (Federal Constitutional Court) ruled on May 5, 2020 that "ECB decisions on the Public Sector Purchase Programme exceed EU competences" (Bundesverfassungsgericht 2020). The ruling is contrary to an earlier judgement of the CJEU on the same matter (Court of Justice of the European Union 2018).

As these past and on-going events in the European Union have demonstrated, disagreements within the EU concern not only the powers that the Union *should wield going forward but also* the ones *it presently holds*. Such disagreements have produced the aforementioned calls for structural reform.

In order to better understand how such uncertainties could even arise in the first place, it is helpful to examine in detail the existing European Legal Structure, as established under the *Lisbon Treaty*, the original visions for European Integration enshrined in the *Treaty on European Union (TEU/Maastricht Treaty)*, and the reforms implemented in the intervening years between these two treaties.

## The Legal Structure of the European Union

The conclusion of the *Treaty on European Union* in Maastricht on 7 February 1992 constituted the founding of the European Union and thus an important step towards European integration. By signing the Treaty, the Member States committed themselves to "forming an ever closer union among the peoples of Europe".

The *Maastricht Treaty* laid the foundation for a European Monetary Union facilitating the subsequent adoption of the Euro as a common currency in 1999. Shared initially by 11 Member States, the Euro is today legal tender in 19 members of the EU's 27.

After the first amendments were made to the TEU in 1997 (by *Amsterdam Treaty*) and in 2001 (*Treaty of Nice*), a Convent on the Future of Europe was convened in the early 21<sup>st</sup> century, ahead of the impending EU enlargement, to discuss structural reforms of the European Union. The Convent drafted the *Treaty for a Constitution of Europe* whose ratification was prevented by its rejections in referendums in France and the Netherlands.

Subsequently, a new treaty was drafted in the form of an amendment to the Treaty on European Union and the Treaty on European Communities. The new treaty retained the key provisions of the Constitution Treaty without being called a "constitution" and without featuring such state-like symbols as a flag and an anthem. It is known as the *Treaty of Lisbon*, named so after the venue at which it was signed on December 13, 2007. After its ratification by all Member States, the Treaty came into effect in 2009. To the present day, it is the latest fundamental amending treaty.

The Lisbon Treaty endows the EU with a complete legal personality and well-defined powers distinguishing clearly between exclusive, shared and supporting competences. The competence-conferring power (meaning the authority to transfer new powers to the EU-level) remains with the Member States, which may transfer competences to the EU by the principle of subsidiarity. National Parliaments have the power to counteract perceived breaches of the subsidiarity principle, either by registering a "subsidiarity objection" with the European Commission or by filing a complaint before the CJEU. Within the scope of its competence, the Union now acts as a supra-national entity, with the Commission assuming an executive role, entrusted with the sole right of initiative, with the European Parliament and the Council of the European Union empowered to adopt legislation by qualified majority. The TEU, the TFEU and the Charter of Human Rights, made legally binding by the Lisbon Treaty, constitute the legal framework in which the CJEU may operate. The European Council (which is composed of Heads of State and Government) is now recognized as the EU institution at the intergovernmental level that is responsible for "defin[ing] the political direction and priorities of the European Union".

## EU Reforms

Today, the EU again faces structural reforms, with a *Conference on the Future of Europe* set to begin later this year and last until 2022.

In view of the above and of the developments of the past few years, possible EU reforms have been widely discussed within the framework of German legal doctrine. A number of possible paths have been recommended that the EU should follow going forward.

## Five Scenarios

While the conference on the Future of Europe is yet to take place, the European Commission published a White Paper in 2017 that presents five scenarios for the future of the EU.

These scenarios, all of which are fairly generic, are the latest contribution to the reform debate. They either directly refer to the White Paper or offer models that correspond to one or more of the scenarios suggested in it.

An outline of each of the scenarios and an assessment of their reception by the German scientific community will provide the insights needed to understand the position of the Germans in the debate on the future of Europe.

**Scenario 1: “Carrying On”:** In the scenario, the EU stays its current course without significant structural reforms. The governance framework remains as it is, the time needed for each decision-making process depends on the States’ willingness and ability to reach an agreement even if their positions may differ.

Unsurprisingly, this scenario has not received much support from German legal theorists. On the contrary, *Hatje* and *Schwarze* denounce it as “illusionary”, “non-reflective” and even dangerous (Hatje, Schwarze 2019: 154). As has been observed, the past few years have seen the EU struggle in the face of crises due to irreconcilable disagreements among the Member States. Scholars are doubtful that the situation will improve without clearer guidelines and even fear that should the EU continue to “muddle through” successive crises, its prior accomplishments could be unintentionally eroded, leaving it, for instance, with closed borders, unable to restore normality due to its inability to reach agreements on migrant and refugee burden sharing.

The view that the achievements of the EU’s political integration are of value and deserve to be protected prevails as appeals continue not to let them slip away amidst current problems.

It is therefore not surprising that Scenario 2 of the White Paper - and the related ideas - have received little backing.

**Scenario 2: “Nothing but the Single Market”** foresees political disintegration that will reduce European cooperation to mainly economic projects (such as the European Single Market). The idea is criticized as impractical as a consensus even on issues directly related to market such as common standards and control measures, would be significantly harder to achieve without broad political cooperation (Calliess 2020: 268).

The scenarios that either explicitly propose rolling back integration or pose the risk of incidental rollbacks resulting from the pursuit of other objectives, have been rejected. This is because the general German position is that European integration continues to be of value and should be further tightened going forward.

Ideas and models vary on how to proceed with integration. The shared concern is that European integration goals should be set in a realistic framework. A number of

warnings have been given that clinging to the idea of an “ever closer Union” while disregarding the concerns of the Member States about being excessively deprived of their sovereignty (Hatje, Schwarze 2019: 163) may do more harm than good.

The key conclusion seems to be to continue integration while ensuring that no (further) Members are lost along the way.

**Scenario 3** of the White Paper: “**Those who want more do more**”, is a blanket description that covers numerous ideas and models developed by German legal theorists. A “Europe of two speeds” would provide legislation to allow the states that are willing and capable of further integration to expand their mutual cooperation while providing the others with the option of “catching up” at their own pace.

Prof. Dr. *Calliess* outlines two specific models for “Europe of two speeds”. One of his models involves a group of states forming a “core-Europe” that agrees on very close cooperation on a supranational level in order to form a political union. The other can be represented as rings around the “core of Europe” signifying a descending order of integration levels in the direction from inner to outer rings. All states, no matter which “ring” they occupy, would share the European principles of subsidiarity, solidarity, cohesion, democracy and rule of law. Over time, states in the outer “rings” could move inward and deepen their integration until ultimately all member states would reach the innermost “core” integration level thus fulfilling the original vision of an “ever closer union”. *Calliess* considers this an ambitious and challenging option for the realization of a two-speed Europe, especially when compared to his other model, which proposes a more flexible approach.

In that model, groups of Member States agree on closer cooperation in selected political fields in which “pioneer groups” would be established. Different pioneer groups could have overlapping members, essentially making European integration a non-linear process, but allowing for each Member State to develop in its own individual way. By prohibiting pioneer groups from forming separate institutions, belated accession to a pioneer group would remain an option for all EU states, enabling the entire EU to ultimately converge at a common level of integration with every Member State having joined every pioneer group.

Without making direct references to *Calliess*’ models, other legal theorists have accepted the concept of individually-paced European integration as a feasible option for goal-oriented progress within a realistic framework, some even claiming that “differing speeds” (Blanke, Pilz 2020: 298) of integration are the only feasible way for the EU to advance.

**Scenario 4** of the White Paper, “**doing less more efficiently**”, lays out a slightly different course for the European Union to follow. While not suggesting differing integration speeds for individual Member States, it instead more critically assesses the scope of the matters on which the EU should reach joint decisions. It also mitigates the concern that the EU may grow too powerful and consequently infringe upon the national sovereignties of the Member States.

In theory, the EU is generally committed to adhere to the principle of subsidiarity in its functioning. This means that the only matters that are better resolved through a unified response rather than an individual response by single nations should be

decided at the EU level. This concept is widely supported despite recent criticism of the subsidiarity principle as being too vague and calls for more specific legislation to ensure it is properly applied in practice. Views vary on where the line should be drawn between matters of EU interest and those with which the union should not be concerned. The overall agreement is that the EU would benefit from prioritizing certain political fields, such as monetary and security union, and from expanding its power to act (more efficiently) in them. On the other hands, more powers should be returned to the national states in fields that are a lower priority for the EU.

However, the scenarios of a multi-speed Europe and of a Europe that prioritizes greater efficiency are not necessarily mutually exclusive, at least not in a strict sense. Many scholars suggest a two-pronged approach in which Europe would be both more flexible and more efficient.

Arguably opposed to Scenario 4 is **Scenario 5, “doing much more together”**. Scenario 5 would entail having all Member States agree on much closer cooperation, the shared intent being to achieve the ultimate goal of forming an “ever closer union” within Europe. While, as shown above, Germany generally supports further integration, scholars strongly warn that ignoring the concerns about excessive integration voiced by some member states in blind pursuit of idealistic goals could have an adverse effect and even threaten the very survival of the EU.

## Summary of approaches in German legal doctrine

The reception of the above scenarios demonstrates the prevailing view among German legal scholars which is that European integration has produced valuable achievements and that such achievements merit protection. Such scholars support continued integration. However, they warn that it would be unwise and even dangerous to pursue integration with disregard for the protection of national identities of the EU Member States. Derived from these common tenets are the following standpoints of individual contributors to the reform debate, as shown below.

*Calliess*, currently Professor, former Legal Adviser to the European Political Strategy Center (EPSC), strongly emphasizes that the EU should be made more efficient by having more of the relevant competences transferred thereto, including a closer financial union, while having the EU return powers in other fields to the Member states. *Calliess* essentially calls for a stricter application of the subsidiarity principle in the spirit of the EU commission’s Scenario 4. He also advocates a more flexible European integration to be pursued e.g. by forming pioneer groups to allow the Member States to expand their cooperation at different speeds and select their individual areas of focus.

*Hatje* and *Schwarze* propose a goal oriented and realistic approach. This could include a multi-speed Europe, stricter regulation of the subsidiarity principle and better legitimization of the EU by giving its citizens better tools to influence the actions of the EU. They also address the need to put in place better control mechanisms to ensure that European Law is properly implemented. To that end, instead of sanctions, they advocate invoking solidarity among the Member States.

*Blanke* and *Pilz* echo some of the aforementioned ideas: they, too, advocate allowing multi-speed integration, an approach of “doing less more efficiently” focused on common policies on human rights, climate change and environmental protection with emphasis on properly involving citizens in the EU’s democratic structures.

## The implications

Against this background, it is vital to ensure that the proposed measures are compatible with EU treaties. For example, a “Europe of two speeds” could be seen as contrary to Article 4 (2) TEU, which guarantees “*the equality of Member States before the Treaties*”. However, to avoid this breach, *Calliess*, in particular, emphasizes that a pioneer group system would work only on the conditions that (1) pioneer groups are prohibited from establishing new institutions and required to interact solely with the existing, central EU institutions, and (2) that all Member states be allowed to join any pioneer groups at any time.

The “*doing less more efficiently*” element, which is perfectly compliant with the principle of subsidiarity, as laid out in Article 5 TEU, may lead to problems regarding “*higher efficiency*”. If higher efficiency is to be reached by establishing stricter control measures to ensure that the Member States properly implement EU law and/or by extending the principle of qualified majority voting to cover areas that are currently of intergovernmental concern, such as foreign and security policy, then despite “doing less” in other areas, the move could spark outrage and resistance in some Member States.

## Current developments

The Covid-19 pandemic has confronted the EU with another crisis, giving new momentum to the reform debate. As this is a very recent and ongoing development, few scientific publications are available that address the pandemic’s impact on debates on EU reform. However, current press coverage offers some insights into the matter. Former German Chancellor *Schröder*, for example, uses the pandemic to plead for a more united Europe (*Schröder 2020*), specifically proposing a security Union and coordinated economic, financial and social policies among Eurozone members, with the Union’s own budget and its own minister of finance. Acknowledging that not all EU member states might be open to such a high level of integration, he too suggests multi-speed integration. Calls for more integration amidst the coronavirus pandemic have also come from the likes of *Franziska Brantner* of the *Grüne* party, a former member of the European Parliament:, who demanded “*unleashing Europe*” by “completing” cooperation on foreign and migration policies and the monetary union (*Brantner 2020*).

## Conclusion

The European Integration project has been generally well received by German legal theorists. However, they agree that in its current state, the EU lacks efficiency in crisis handling and needs to reform its capabilities. Such reforms should be goal-oriented as well as realistic, respecting national identities and the diversity of the EU's Member states. Specifically, jurists advocate establishing stricter guidelines for the application of the principle of subsidiarity, possibly transferring sovereignty back to the Member states in selected fields and focusing on selected European issues of critical importance on which the EU would be empowered to act more efficiently. This includes, specifically, closer cooperation in the monetary Union and a common foreign and security policy. However, one should recognize that not all Member states are open to such integration at the present time. Hence the suggestion that a pioneer group system be put in place to allow for a more flexible, multi-speed integration enabling certain states to advance their cooperation while leaving others the option of joining the groups at a later stage. In order to comply with the Treaties, all Member States must be allowed to join any pioneer group at any time.

The current pandemic has only strengthened calls for reform, with the crisis being considered an excellent opportunity to implement change.

The views expressed in this publication belong solely to its author.

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