Reform the European Union for Enlargement!

Proposals to Prevent an 'Overstretch in Integration'

Christian Calliess

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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'. To this end, Europe is said to be – according to its (unofficial) motto– '**united in diversity**'. The level of diversity in the Union has greatly increased as the number of Member States has grown from 6 in 1958 over 15 in 1995 to 27 in 2023. It has already become apparent that the current architecture of the Union is **not adequately equipped to reconcile** the two main goals of **deepening integration** and **widening by enlargement**. With the Balkan States and Ukraine, further accession candidates are on the doorstep. Their accession is advocated in politics for geopolitical reasons. To date, however, the EU still is not prepared, neither for enlargement nor for external shocks. Therefore, a widening without reform would expose the EU to the threat of an "imperial overstretch" (see Paul Kennedy, The Rise and fall of the Great Powers, 1987), which will lead in the long run to a process of European disintegration. Advocates of enlargement are therefore right to call for a prior reform of the EU to strengthen its capacity to act. In this respect, however, it will not be enough to switch from unanimity to qualified-majority-voting in some additional areas. For the challenges are of a greater nature, the EU is already currently under great pressure in the course of its ongoing "polycrisis". It is becoming increasingly clear that with the Euro Area and the Schengen Area, the EU is administering "fair-weather areas" that were not and still are not sufficiently prepared for stormy weather. External shocks such as the financial and migration crises, the Coronavirus pandemic, as well as internal and external security threats from terrorism as well as Russia's war against Ukraine emphasise that the EU, which has developed to be more heterogeneous, has become increasingly fragile. In line with a reduced willingness and ability of Member States to integrate further, the EU is becoming incapable of action and therefore is in danger of losing the trust of its citizens. Against this background, it is important not to gloss over the problems and to develop constructive solutions.

Strengthening the EUs capacity to act: Doing less, but more efficient and flexible

The EU promises its citizens a lot but cannot keep up with these promises according to its competences, procedures, resources and capacities. In this respect, it is a matter of the EU concentrating its actions on **cross-border** tasks that deliver a recognisable **European added value**. In accordance with that the EU must define political priorities. In these areas, however, the EU must also become **more capable of acting by doing less more efficiently.** In this respect, various measures (see The Future of Europe after Brexit, in: Yearbook of European Law 2021, p. 1-53) can be considered:

Legislative proposals should focus on the political priorities and be adopted by qualified majority in the Council – if necessary, using the so called *passerelle*-clauses which allow a transition from unanimity to majority voting without amending the Treaty (cf. e.g. Art. 48 para. 7 TEU, Art. 31 para. 3 TEU, Art. 192 para. TFEU). Furthermore, the office of the President of the European Commission and the office of the President of the European Council (without amending the Treaty) could be combined in one person under a "**double hat**". If this double hat were to be coupled with the lead candidate process and transnational lists in the context of the European Parliament elections, a presidential office would emerge at the top of the EU

that combines the ability to act and rests on strong democratic legitimacy. If all "Spitzenkandidaten" were to stand for election to the EP on a transnational list, this would make it possible **for a European President to be elected directly by the citizens of the Union**. Such a bold move might call for Treaty Change according to Art. 48 TEU. Nevertheless Art. 17(7) TEU does not exclude the President of the Commission and the President of the Council to be the same person and the procedures for the appointment of both with some political will appear compatible (see the proposal by the Commission's European Political Strategy Centre).

The EU's ability to act also means that the implementation and enforcement of the agreed and adopted European legislation in the Member States is improved. **Deficits in enforcement** prevent a reliable and coherent functioning of common policies and undermine the EU as a "community of law" as well as the mutual trust based on it. Models of cooperative law enforcement could be developed along the lines of European competition law.

This presupposes functioning national authorities which, if necessary, would have to be established with European assistance. In addition, forms of cooperative enforcement would have to be developed, which could range from the exchange of information to professional, personnel or technical support from the European level (e.g. by the Commissions DG Reform or a special European agency). This support should be obligatory where financial support is provided by the EU. Above all, however, control mechanisms must be in place that provide for European possibilities of action in the sense of an alternative responsibility in the event that national authorities are not able or willing to implement or enforce the objectives and rules with the consequence that the European public good is endangered. A good example for this approach of cooperative enforcement is the reorganisation of the management of external borders by the European Border and Coast Guard Agency (see The Future of Europe after Brexit, in: Yearbook of European Law 2021, p. 1-53).

Improved control of competences by the EU and scope for action by the Member States

Subsidiarity is recognised in EU law (Art. 5 TEU) as a legal principle guiding the exercise of shared competences (see Art. 2 (2) and 4 TFEU). The aim is to protect social, cultural, economic and political diversity. This diversity allows **room for "experimentation"** in solving political challenges. However, if the principle of subsidiarity is to be more effective in practice, there is a need for a common language of subsidiarity, which would be promoted by a common **subsidiarity test grid for** all actors at the European level. In conjunction with a way of working guided by the principle of "less, but more efficient and more flexible", a European subsidiarity culture would be promoted which would give the Member States and their national parliaments room for maneuver by dispensing entirely with European measures or limiting them to European minimum standards. In the sense of a proportionate regulatory density, a "legislative toolbox" could create **scope for innovative regulation** ("better regulation") in the Member States (see The Future of Europe after Brexit, in: Yearbook of European Law 2021, p. 1-53).

Judicial control of competence in the constitutional court network

Whether a European Court of Competences could help to avoid conflicts between the **European Court (ECJ) and national constitutional courts** seems doubtful in view of its acceptance: After all the role of the ECJ as a federal court of jurisdiction would only be passed on. In this respect, an **obligation of the ECJ to make a reverse referral would** appear to be more expedient, in the course of which the Luxembourg Court would involve the national constitutional courts by way of a referral in cases of serious conflicts of jurisdiction, which possibly affect the primacy of Union Law on the one hand or the constitutional identity of the Member States secured by Article 4 (2) TEU on the other. Such a demand of the ECJ for interpretative assistance would proactively start a cooperative dialogue with the national constitutional courts and in this way sensitise the Luxembourg Court to the consti-

tutional concerns of a Member State. In addition, a **European Constitutional Council** could be created, within the framework of which the presidents of the ECJ and national constitutional courts exchange views with national experts from academia in order to discuss competence and constitutional conflicts and to defuse them by means of an opinion. The competence of this dialogue platform should be limited to questions of constitutional identity (Art. 4 (2) TEU) and European values (Art. 2 TEU) including the rule of law. Its opinion could be used as an interpretative guideline in practice (see here).

Taking the European dimension of security seriously

The so-called Schengen area is defined by Art. 67 TFEU as an "area of freedom, security and justice". In this respect, **freedom and security** belong inseparably together as two sides of the same coin: "Without security there is no freedom" (Wilhelm von Humboldt). Security is a multi-layered concept. In the digital society, it encompasses cyber security and ecological security in addition to "classical" physical security in its domestic and foreign policy dimension.

If the free movement of citizens made possible by the abolition of internal borders is to be maintained, a functioning European **asylum, refugee and immigration policy** is required that is consistent not only with the values (Art. 2 TEU) but also with the capacities of the EU and its Member States. In this respect the effective management of the EU's external borders plays a pivotal role. This includes among others, in implementation of the principle of solidarity (Art. 80 TFEU) that European authorities (so-called agencies) are required to provide targeted financial, technical and personnel support to the Member States in case they are overloaded. For example, the European **border and coast guard** must be put in a position to effectively support and, if necessary, supplement the Member States external border management in compliance with the subsidiarity principle. Moreover, a genuine European **asylum agency** should be created to relieve overburdened Member States in a crisis situation by carrying out asylum procedures in the "hot spots" with European officials. If desired, "branches" of the European Asylum Agency could also be established in the particularly affected Member States, which would work in cooperation with the national authorities (and courts).

Moreover, apart from Art. 4 (2) TEU the emergence of a European dimension of internal security, which the abolition of internal borders between Member States inevitably entails, must be understood and realised. First and foremost, it is a matter of remedying the increasingly visible deficits in the **cross-border fight against terrorism and organised crime**. In this respect, Member States must be obliged to share the security-relevant information available to them. In addition to the existing Schengen Information System, this requires that all information on entry into and exit from the EU be linked with police information systems on the basis of common technology and according to uniform content criteria. **Operationally**, the personnel and technical competences of the existing authorities Europol and Eurojust should be strengthened and the competences of the European Public Prosecutor's Office expanded. Joint European Investigation Teams (JITs) working under their guidance must become the new normal in cross-border cases. From a **strategic** point of view, a European platform should be established where all national and European actors in the field of internal security, including intelligence services and European bodies like the European Union Intelligence Analysis Centre (INTCEN), can exchange information in a spirit of trust and develop European strategies, which are then implemented in close cooperation by the Member State authorities.

A sustainable **digital single market** (Industry 4.0; AI) requires an efficient protection shield for cyber security. In this respect, the EU as a whole is as weak as its weakest Member State. Therefore, there is a need to develop today's European Union Agency for Cybersecurity ENISA into a **comprehensive cybersecurity agency with** strategic and – if there are failures at national level – also operational powers in conjunction with national authorities. In order to fight disinformation and fake news and to make European democracy more resilient, a **European public service broad-**

caster should be established, based on independence and strict neutrality.

In the area of **external security,** foreign policy must become more efficient by majority decisions. This can be achieved by a prudent use of the *passerelle* clause of Art. 31 (3) TEU (see here).

The development of a common European defence policy as a European pillar of NATO should be strengthened by the new format of a **Council of Defence Ministers** and a **European Security Council** that brings together the expertise of national and European experts at the European level and prepares recommendations for the European Council.

Not only in climate protection, but also in other areas of the environment, States are nearing or even exceeding planetary boundaries and so-called tipping points, which can trigger irreversible ecological crises and subsequently cause economic and social instability. In this respect, the EU and its Member States have a duty to protect the **ecological security** of citizens. This is reflected in the ecological minimum subsistence level of fundamental rights, which is at risk. The transformation of the internal market that was begun with the EU's Green Deal must – as Art. 11 TFEU demands – be secured by a consistent integration of environmental concerns into all policies. With this aim, the EU's Economic and Social Committee, which is involved in European legislation, should be transformed into a Sustainability Committee (see here).

Solidarity is not a one-way street

S**tability** is the guiding principle of Economic and Monetary Union (EMU) that all Member State agreed upon. At the same time, it is an expression of sustainability and intergenerational justice. Against this backdrop, solidarity-based financial aid is only permissible if it serves to restore the stability of the Euro area that has been endangered by an economic or financial crisis in a Member State. In this situation, the **conditionality principle** has a bridging function. It ensures that financial transfers serve to enable structural reforms in the respective Member State that guarantee in the long run the stability of the Euro Area. This has been confirmed by the ECJ and is clearly expressed in Article 136 (3) TFEU for the European Stability Mechanism (ESM) with regard to the No-Bailout-Clause of Art. 125 TFEU (see here).

With the European reconstruction plan **Next Generation EU,** established in the course of the Corona pandemic crisis, a third pillar of solidarity has emerged, financed by joint debt, which stands between the project-related transfer payments from the European structural funds and the emergency aid of the ESM. If the EU now incurs debt within this framework, it must also be put in a position to repay it. Therefore, Member States must be prepared to grant the EU fiscal competence in a narrowly defined area by Treaty Change. Moreover, the principle of conditionality should be met by linking any access to solidarity instruments to a basic willingness to comply with the agreed rules of EMU, specifically the Stability and Growth Pact, the requirements of the European Semester and the minimum standards of the rule of law (see here).

In the course of these Treaty reforms, the proposals for a **European Finance Minister,** who (together with an independent advisory institution like the ESM developed towards an European Monetary Fund together with a renewed Fiscal Board) would ensure that debt and financial responsibility do not diverge, also come back into play. To strengthen his coordinating role, he could be given a "**double hat**" under which his role as a member of the European Commission and as President of the Eurogroup would be combined. Finally, a **joint representation of the Eurogroup at the global level** could help to represent the interests of the Euro area more effectively vis-à-vis third countries such as the USA and China (see already here).

Enlarging the EU without "overstretching" it

In the course of enlargement, the EU has already become **increasingly heterogeneous** in economic, cultural, social and political terms. But if heterogeneity results in such different interests that consensus on necessary measures can no longer be reached within the framework of European policies, then the EU, trapped in a resulting inability to act, falls into a state of "imperial overstretch" that threatens its existence.

"United in diversity" as a mission statement of the EU therefore implies a **more flexible architecture of European integration** on the basis of different "orbits". If, due to their domestic political preferences, not all Member States are willing or able to participate in the necessary measures and integration steps, the future architecture of the EU should be made more flexible by "coalitions of the willing and able" and thus at the same time more dynamic in order to prevent processes of disintegration**.**

A static "**Europe of different speeds**" that establishes parallel and separate orbits with different levels of integration is rejected not only by the candidate countries but also by many Member States. In this respect, there is a fear of becoming "**second-class Europeans**". As a **solution, a new architecture** for the EU could be envisaged, with an inner circle ("core union") of Member States at its centre. In contrast to former proposals for a core Europe (e.g. the Schäuble-Lamers proposal), this core of the EU should **not** be defined by deeper **political** integration, but by the **minimum economic consensus of** the EU, the internal market, together with the policies that flank it. Consequently, **membership in the EU** would essentially mean **membership in the internal market**.

Even if at first glance this proposal seems to contradict the historical narrative of European integration, it should be considered that the internal market and its cohesion policies financed by the structural funds is still the driving motive for membership in the EU. Moreover, this new architecture of the EU would not only defuse many of the EU's conflicts, which primarily revolve around European limitations on national sovereignty. In this regard, this new approach would reduce the aforementioned enforcement problems, since the internal market is about politically less sensitive and complex policy areas that are at the same time strongly enforced by civil society together with the ECJ (p 359 et seq).

Overlapping with this core of the EU, defined by the internal market, more integrated political orbits comprising willing and able Member States will be established. Those orbits of Member States that want to realise more (political) integration, e.g. a fully-fledged Euro Area or Schengen Area or a Defence Union, could do so in **pioneer groups** closely connected with the core union defined by the internal market. The pioneer groups are open to all Member States of the core union. The different orbits (including the economic core) would all be based on the European principles of democracy and the rule of law, as well as subsidiarity, solidarity and coherence. The existing EU institutions sharing the same decision-making procedure will build an interface that guarantees a smooth functioning of the EU.

More flexibility in membership

Membership in the EU is – as the withdrawal clause of Art. 50 TEU highlights – based on voluntariness. The pioneers lead the way with the goal of deeper integration and in this respect create a positive example displaying the advantages associated with membership that might attract other Member States to join. The respective pioneer groups are only open to Member States that are **willing and able to live up** to their more ambitious goals. In case a Member State is overburdened and does not accept the support offered to it or after an election faces a change to a government that is no longer willing to consent to the ambitious goals of a pioneer group, the capability to act of the pioneer group must be safeguarded. In this case a mechanism must be provided (analogous to Art. 46 para. 4 TEU) that enables the exclusion a Member State from the pioneer group. This Member State would then fall back into the economic core of the EU, the internal market, losing at the same time all benefits connected with the pioneer group.

ABOUT THE AUTHOR

Christian Calliess

Christian Calliess is Professor of European Law at the Free University of Berlin. From 2015 till 2019 he was on leave from university and Legal Adviser to the Strategy Team (EPSC) of Commission President Jean-Claude Juncker.

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