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## Public goods in the debate on the distribution of competences in the EU

**Public goods reflect a complex construct between the principle of solidarity and the principle of subsidiarity in European Union law. This policy brief concisely contextualises public goods in European law and shows that they can act as a point of reference for the distribution of competences between the EU and the Member States, thus contributing to the upcoming Conference on the Future of Europe.**

### **European crisis and European public goods**

The European Union (EU) promises its citizens quite a bit, but is often not capable of “delivering” because of its competences. The EU is committed to a stable eurozone (Art. 119 para. 2 TEU), but cannot guarantee this – as the shocks in the course of the global financial crisis in 2008 and the related sovereign debt crisis showed – due to its lack of economic and fiscal policy competences. The EU promises its citizens freedom of movement without border controls in an “area of freedom, security and justice” (Art. 67 TEU), but cannot ensure this, as border management during the migration crisis and the lack of cross border cooperation regarding

security after the terrorist attacks in Paris, Brussels and Berlin made clear. Furthermore, the EU is pursuing a European health policy (Art. 168 TEU and Art. 35 of the EU Charter of Fundamental Rights), but has been limited to the coordination of Member States during the European-wide pandemic. Consequently, the EU is viewed by citizens as incapable of acting and is losing credibility. Nonetheless, there is no consensus among the Member States on the EU reforms necessary in this regard. It is becoming increasingly clear that a consensus will not be achieved until there is an answer to the question of what “kind” of EU the Member States and their citizens want and what tasks this EU should assume. Against this backdrop, it is not farfetched to say that the EU crises are to be

understood as European consensus crises over the provision and achievement of European public goods. At the Conference on the Future of Europe commencing in 2021, it will be necessary to hold a European debate on the future direction of the EU. The concept of public goods should be adopted there to explain and justify why certain tasks must be located and handled on the European level in the interests of all Member States and why others can remain within the remit of the Member States.

### **The concept of European public goods**

The term “public goods” is not a familiar one in politics and the public sector. It is also not established in the European treaties defining the framework for political action in the EU and its Member States, and, accordingly, is not used in legal texts. The term originally appeared in economic theory to describe goods that the market usually does not produce itself because these goods – to put it simply – do not have any market price and are usually characterised a priori by so-called market failure. From this market failure follows that a collectively binding decision is needed for the provision and achievement of public goods. In this regard, economic theory argues that the provision and guarantee of public goods require institutions possessing sovereign powers (such as those provided on the national level by the state). Being guardians of the public interest state authorities have to decide on the nature and extent to which public goods can be used. This is usually done by regulation that must be enforced by the state with its sovereign power. In short, public goods are dependent on a neutral state, being the guardian of the common good, which protects these goods against individual interests.

The central aspects of the economic debate on public goods are discussed under the label of common good or public interest in policy and law. All concepts are closely linked to state theory and the debate on the legitimacy of government action. In this framework, these concepts establish tasks and competences for the state. In other words, they function like a state theory-based order for sovereign action.

In the context of the EU, the term of public goods – similarly to that of the common good – is seldom discussed or used systematically. In legal discourse, the concept of the common good is usually reserved for nation states. By contrast, globalisation and internationalisation clearly show how the state reaches its limits in the achievement of the common good and thus the provision of public goods. It is exactly this issue that French President Emmanuel Macron addressed in his “Sorbonne speech” in 2017, as did Jean-Claude Juncker, former President of the European Commission, in his State of the Union address in 2018, when they spoke about European sovereignty calling for action in certain policy areas corresponding to the concept of European public goods.

### **European public goods in EU law**

The new kind of federation that the EU and its Member States collectively form is based on voluntariness, as the withdrawal clause (Art. 50 TEU) underscores. To deliver on European public goods laid out in the treaties and their objectives, it requires sincere cooperation between the EU and its Member States as well as the mutual trust of the Member States among each other. In this respect, common rules are a central instrument to manage the permanent integration process necessary for achieving European public goods.

From a legal perspective, European public goods are reflected in the objectives and tasks that the Member States transfer to the EU (Article 3 TEU). The EU’s system of competences (Art. 5 TEU in conjunction with Art. 2 et seqq. TEU) makes it clear that although European public goods have been emancipated from the respective national public goods, they remain closely intertwined with each other. A characteristic aspect of European multilevel constitutionalism is the interlocking of European and national political levels and the general exercising of competences based on this. Such an arrangement requires a bridge that both levels use to connect to each other in combining and bundling their competences into a European public good.

In this regard, it is possible to draw on the Union law principle of solidarity in its procedural dimension, i.e. the obligation of the Member States to cooperate sincerely with regard to the objectives and tasks of the EU (see Art. 4 para. 3 TEU). This procedural principle of solidarity to be understood in the sense of mutual responsibility for the European common good is based on the shared objectives of both political levels, as defined by the European treaties (Art. 3 TEU). Accordingly, this principle initially favours the handling of tasks on the European level. As a result, the achievement of European public goods becomes a question of competence: if a competence is assigned to the EU through the Treaties and the EU exercises its competence, then the European regulation takes primacy over national law. This blocks Member States action by “occupying” the policy field, which no longer have the opportunity to implement the European public in a different manner.

Consequently, there is tension between the principle of solidarity and the principle of subsidiarity (Art. 5 para. 3 TEU). The criteria that need to be checked in this regard result in – and this should be emphasised here – numerous points of intersection in the economic debate on the achievement of European public goods: when a check of these criteria concerns whether Member State action alone is “not sufficient” to achieve an objective of the treaties (and thus a European public good), the matter primarily involves the “spillover” criterion. Should a check of these criteria aim to determine whether the European level can achieve the objective “better”, numerous aspects of European added value are taken into account here.

In practice, this means that in the exercising of competence (above all in European legislation), the principle of subsidiarity protects the competences of the Member States in the achievement of the public goods laid down in the objectives of the EU. At the same time, the principle of solidarity becomes the corrective of the principle of subsidiarity in the implementation of the respective European public goods. Consequently, the provision and achievement of European public goods in the EU largely consists of a division of labour. The necessary combination of national and European public

goods in European legislation represents the specification and fine-tuning of Community solidarity with a view to the European common good and the specific European public goods behind it. In this regard, it is important to differentiate between two sets of questions:

- On the one hand, whether and how a competence already transferred to the EU should be *exercised*. In the course of answering this question, it is necessary to use the criteria for the principle of subsidiarity and the principle of proportionality (Art. 5 TEU) to decide whether and to what extent the provision of a European public good should take place on the European level.
- On the other, whether a competence for the provision of a European public good should be *transferred* from the Member States to the EU. This is done by a political decision and is implemented in law by Treaty change according to the procedures laid down for such (Art. 48 TEU). In this regard, the applicable criteria for the exercising of a competence falling under the principle of subsidiarity, but transferred to the EU can also be drawn on analogously for the question of whether a new competence should be transferred from the Member States to the EU.

### European public goods as a guide for the future of the EU

In the context of the European debate on the future direction of the EU, the term of European public goods can act as a compass with a view to European tasks and accordingly provide important motivation for reform in the EU as part of the Conference on the Future of Europe. A critical factor in this regard, however, is the path of development that the Member States and their citizens would like to see the EU take in the future.

Against this backdrop, the “White Paper on the Future of Europe” presented by the European Commission in 2017 serves as a helpful starting point. It deliberately avoids institutional questions as well as competence issues and sets in motion

a reflection process that should let national governments, parliaments and citizens gain an understanding of the options for the European path to be embarked on. The paper focuses on five possible scenarios for the EU27 through 2025. However, these should not be (mis)understood as proposals by the Commission, but rather reflect the paths in the political debate on the development of the EU in the future: *Scenario 1 (“Carrying On”)* assumes the continuation of the pragmatic process of “muddling through” by handling problems as they arise, similar to what was agreed at the Summit in Bratislava in the crisis year of 2016 to demonstrate the EU27’s ability to act after the British referendum. *Scenario 2 (“Nothing but the single market”)* reduces the EU to a single market and thus an – allegedly – purely economic project. *Scenario 3 (“Those who want more do more”)* takes up the issue of a Europe moving at different speeds for the EU27, where the options range from greater cooperation (in accordance with Art. 20 TEU) to a core Europe concept of concentric circles. In *Scenario 4*, according to the motto of “*Doing less more efficiently*”, the EU concentrates on some central policy areas according to the US model and gains more competences there. Other competences are repatriated to the Member States or alternatively no longer exercised or only exercised in the form of European minimum standards with much leeway for the Member States. *Scenario 5 (“Doing much more together”)* ultimately reflects the classical integration method of using the political argument of “spill overs”. This would eliminate the existing shortcomings, with all the Member States agreeing on the necessary completing of European policies by adding new competences by Treaty change.

In the context of these scenarios, there are numerous points of reference in regards to the provision and achievement of European public goods: particularly scenario 4 of the white paper, “*Doing less more efficiently*”, focuses on priorities in policy areas of the EU that must be strengthened. These priorities can be defined through the concept of European public goods. Based on this approach it is possible to determine those areas in which measures on the EU level would bring the greatest European

added value and strengthen European sovereignty accordingly. In line with the requirements of the principle of subsidiarity (Art. 5 para. 3 TEU), the focus of European action must be on the areas in which the Member States cannot act sufficiently alone in regards to the provision and achievement of European public goods on account of “policy spillovers” and in which the EU has more suitable and more effective economies of scale at its disposal. This approach provides for a comprehensive narrative on the one hand and a rational benchmark for the political determination of European priorities on the other can be provided for.

Wherever the sum of all Member States makes a difference (the so-called “Brussels effect”) or common European action promises added value, there is a European public good in regards to which the EU must be capable of functioning and acting. Examples that are repeatedly mentioned on this basis are the securing of the functionality and viability of the single market together with energy and trade policy in the context of globalisation, digitalisation and decarbonisation as well as the securing of the stability of the euro by means of politically connecting economic and fiscal policy more closely to monetary policy. In addition to this, there is the guarantee of freedom of movement for Union citizens in the Schengen area based on an efficient border management together with a functioning migration and security policy. These two policy fields are to be rounded out by the development of a real European foreign policy, security policy and defence policy.

If the European priorities are defined accordingly in the first step, the second step is to demonstrate ways of making the EU more capable of acting in these regards. In order to deliver on European priorities a new working method is necessary that is based on the division of labour and the cooperative enforcement of rules. The goal is to make the EU more capable of acting and functioning in the prioritised policy fields. In this regard, the EU should provide for financial incentives and develop forms of cooperation that extend from the exchange of information to professional and technical support by the European level. If this is not sufficient, functioning administrative structures must be built up in Member States (“capacity building”)



with due respect of the principles of subsidiarity and proportionality on the one hand and solidarity on the other. In addition to this, control mechanisms must be established to facilitate the European action in the event that national authorities are not capable or willing to enforce the collectively adopted rules to protect a European public good. If for example a Member State cannot effectively protect its national borders to a non-EU country and jeopardises this way the European public good of freedom of movement within the Schengen area, the European level, specifically the Commission or a European administrative authority (so-called agency), must be able to assume supplementary responsibility for border management. In applying the principle of solidarity, it could initially make recommendations and provide financial, human or technical support. If, however, the national authorities do not cooperate, then the European agency must also be in a position, to take over responsibility for a limited period to ensure the European public good. This shift of power to the European level must be legitimised by a Council resolution by qualified majority.

In other areas such as environmental policy, for example, it is important to develop a model for exercising competences by a division of labour. Based on the principle of solidarity Union-wide minimum rules must ensure the proper functioning of the single market on the one hand and – with due regard of the principle of subsidiarity – to facilitate the necessary national and regional differentiation on the other. The EU could exercise its competence, for instance, to define general environmental policy framework standards, to develop criteria and mechanisms for a cost allocation of pollution using the polluter-pays principle for orientation, and issue minimum standards for environmentally relevant procedural requirements, emissions and product standards. Member States (and regions) assume primarily the task of implementing and applying the Union rules. Wherever possible, they should be entitled to the competence to round out, refine and increase the European framework and minimum requirements according to the needs of their respective local environmental situation and the resulting requirements by adopting regionally adapted concepts in the sense of strengthening protection. This collaborative approach based on

the division of labour establishes a new kind of complementary flexibility for achieving a European public good.

If there is a lack of European competence, this raises the question of whether the European division of competences should be supplemented by a treaty amendment. This is necessary in particular if there is a discrepancy between the objectives of the Treaties (and thus already recognised European public goods) and the competences to which the EU is entitled in this regard; i.e., it is not possible for the EU to act at all or to act in a sufficiently efficient manner to achieve the European public good. This is for example the case with regard to the pandemic prevention and crisis management, where the competence of the EU allows only for a non-binding coordination of Member States (Art. 168 TFEU).

Every treaty amendment requires a consensus of all 27 Member States by law (Art. 48 TEU). If, however, no political consensus can be reached on the achievement of a European public good, Scenario 3 of the White Paper offers a path for pursuing various forms of differentiated integration under the term “coalition of the willing”. This could take the form of enhanced cooperation (according to Art. 20 TEU or, in the area of defence policy, according to Art. 46 TEU), but also intergovernmental cooperation. Pioneer groups would band together for the purpose of providing and achieving a European public good, e.g. in the area of pandemic prevention and crisis management. In the pioneer groups, all decisions would be adopted by qualified majority (according to Art. 333 TEU).

The European added value of a pioneer group is only open to its members, but simultaneously creates an incentive to join the pioneer group. In this way, these pioneers of efficient achievement of European public goods lead by example so that hesitant Member States become convinced of the European added value and come aboard. The members of the pioneer group must constantly prove their will to fulfil the jointly adopted ambitious “pioneer objectives”. If they are no longer capable of this, e.g. due to a crisis, then the European institutions can offer them financial, technical or administrative assistance

based on the principle of solidarity, financed by the financial resources of the pioneer group. If a member of the pioneer group does not accept this assistance or no longer wants to fulfil the ambitious objectives of the pioneer group, e.g. due to an election with a change in government, then it must leave the group. To be prepared for the case that this does not occur voluntarily, each pioneer group must have an exclusion clause.

## **Outlook**

The ongoing European “polycrisis” has shown that there is need for reform in the EU. During times in which national interests are increasingly being voiced without consideration for the common European interest and in which the added value of European integration is taken for granted, explained too little and defended too rarely, it appears that European reassurance on the aims and tasks of the EU is necessary. In this context, European public goods and the economic and legal criteria defining them serve as a compass and barometer. A reform of the EU does not have to involve “more Europe” across the board, but rather should pursue a functional EU that efficiently achieves European objectives and tasks and can “deliver” this wherever citizens expect it.

## About the Project

In the *Vision Europe* project of the "Europe's Future" programme, we make and promote innovative proposals to rethink the European Union together with partners and high-level experts from all over Europe. At the same time, we develop new tools to help better communicate Europe.

This Policy Brief was written within the framework of the Reflection Group on European Public Goods and is based on the publication "Öffentliche Güter im Recht der Europäischen Union". You can find the corresponding study [here](#).

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### Author | Contact

**Prof. Dr. Christian Calliess, LL. M. Eur.**  
Chair for Public Law and European Law  
Freie Universität Berlin, Department of Law  
Boltzmannstr. 3, 14195 Berlin  
Telephone +49 30 83851456  
[europarecht@fu-berlin.de](mailto:europarecht@fu-berlin.de)

### Stiftung | Contact

**Natascha Hainbach**  
Junior Project Manager  
Program Europe's Future  
Bertelsmann Stiftung  
Carl-Bertelsmann-Str. 256, 33311 Gütersloh  
Telephone +49 5241 81-81843  
[Natascha.Hainbach@bertelsmann-stiftung.de](mailto:Natascha.Hainbach@bertelsmann-stiftung.de)  
[www.bertelsmann-stiftung.de/europa](http://www.bertelsmann-stiftung.de/europa)