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European Sovereignty and Public Goods: An Action Manual

The Bertelsmann Stiftung High-Level Reflection Group brings together decision-makers and experts to provide answers to the EU's internal and external challenges based on the perspective of European public goods.

I: The context: Europe's sovereignty paradox

The European Union was founded more than 70 years ago as a profoundly political project, designed to transform sovereign relations through economic integration. Customs Union, Internal Market, Schengen, and European Monetary Union: all these projects have contributed decisively to deeply integrated societies and markets on our continent. Today, however, a number of internal and external challenges are calling the direction of further travel into question.

Within the EU, internal battles on migration policy and the temporary suspension of Schengen, rule of law violations, and in particular Brexit, have exemplified the dangers of disintegration. Outside of the EU, a more assertive Russia, the rise of China, and a less reliable trans-Atlantic partner point towards a more volatile international system in which the EU needs to rely more on itself. At the

same time, the EU has been unable to take and implement important policy decisions in recent years, such as the further reform of the Eurozone, giving a coherent answer to the influx of refugees, and climate change policies.

Expectation-capability gap

In this context, the EU does not seem capable of projecting and protecting its interests commensurate with its weight as the world's largest internal market and political project – there is a significant gap between what the EU is able to do and what the EU ought to be able to do. On the one hand, this may be due to greater heterogeneity in Member States' preferences brought about by enlargement. On the other hand, management at the highest political level has not been strategic enough to guide – and at times cajole – Member States (MS) into addressing the politically most relevant issues.

This points to a sovereignty paradox in the EU's ability to steer course: to project its interests towards the outside, it requires a significant degree of internal coherence – the internal and external dimensions of European sovereignty are closely interlinked. It is therefore important to identify what issues the EU must deal with in a unified way or risk becoming the laggard of global superpowers. If it is to be an actor on a global scale a strong sovereign Europe is required. If Europe wishes to influence global policies on global problems, and to project the interests of its citizens into the world at large, it needs to be able to act swiftly and decisively, and as one.

To bridge this expectation-capability gap, the EU needs a new impulse to tackle both internal and external challenges coherently: This entails a critical re-reading of EU competences and of their place within the institutional structure of the EU, as well as a new narrative for why, when and how the EU takes action.

II: The aim and approach: Advancing European public goods

One promising way to advance such a critical re-reading is through the lens of European public goods. The frame of public goods (public services, public policy measures) focuses on policies and policy outcomes which are to the benefit of all MS and their citizens. European public goods point to those policy areas where there is a genuine European added value. The lens of European public goods is appropriate because it provides a tool to investigate the need for European action in fields where the EU ought to be sovereign in providing optimal governance.

The concept also enables us to differentiate between different levels of governance/government – be they regional, national, European (or even global). The frame goes beyond the simple centralization-decentralization dichotomy that has dominated the debate on the future of the EU in recent years. Furthermore, the lens of European public goods provides a clear rationale for action at the European level that can be clearly communicated to European citizens.

European public goods and common welfare in European Union law

The concept of public goods is mirrored in legal discourse and jurisprudence by the term of "common welfare." This term underlies the goals of the state and can be understood as the rationale of a community, in contrast to specific private interests of individual legal persons or groups. Again, this is a central rationale of State intervention as the "neutral arbiter" of the common welfare against private interests.

This concept, one that is predominantly used in (German) legal discourse, can be transposed to the EU level. Together with the principle of solidarity, which the European Court of Justice has interpreted widely as conferring the responsibility for loyal cooperation onto the Member States, it allows us to identify a common welfare for which all Member States bear joint responsibility, stemming from their signing up for the Treaty. The Commission, in its position as the "guardian of the Treaty," defends the common welfare against the specific interests of individual MS and groups. At the same time, the principle of subsidiarity limits the application of the logic of centralization. As such, the principles of solidarity and subsidiarity provide the legal frame in which European public goods can be articulated.

The Bertelsmann Stiftung Reflection Group

The Bertelsmann Stiftung has created a Reflection Group as a platform for discussion. Its goal is to energize discussions on how the EU can become an effective and credible voice in a multipolar world. These discussions need to be conducted across all European capitals; however, Germany as the biggest Member State bears a particular responsibility to commit openly and actively to a European Union that delivers on European public goods. The upcoming German Council Presidency in the second half of 2020 may provide an important avenue for this. The Reflection Group therefore begins its work in Berlin, where project managers and members are also in close contact with the relevant German ministries, and will then reach out to other capitals and fellow citizens from there.

The questions that the Reflection Group seeks to answer can roughly be summarized as follows: What are genuine European public goods? How, and within which policy boundaries, can the public good in a given policy area best be provided at EU level? Which legal, constitutional, and institutional settings enable the provision of a European public good? What mechanisms can ensure the implementation of policy and the enforcement of shared responsibilities between Member States? How can a European public good be provided when not all MS are willing or able to commit?

The approach of the Reflection Group can thus be divided into two steps. First, the policy areas are identified in which extended European sovereignty is needed for the EU to properly advance the common welfare of its Member States. The second step is to develop concrete policy guidelines in policy areas where a genuine European added value is given and to place them in a strategic/institutional context so as to open avenues for action. In the following, this paper seeks to contextualize and to further develop the questions that the Reflection Group asks when analysing a policy field with regard to European public goods.

III: Terms of Reference – Putting ideas into action

Identifying European public goods

The first step in the reflection process is to identify (elements of) policies that have a strong public good character. In any neoclassical economic theory textbook, a public good is defined *ex negativo* as a good where the market is unable to provide the good efficiently. This is because of the nature of a public good as non-rivalrous (it does not diminish through consumption) and non-excludable (nobody can be kept from consuming the good). These characteristics lead to an under-provision of a good if left to markets or private actors: individuals do not have to demand a good themselves but can benefit from others demanding the good (free riding), which abrogates the efficiency of the price mechanism, resulting in a suboptimal provision of the good.

This kind of market failure provides a rationale for government intervention to ensure that a good that is beneficial to its citizens is in fact provided (or provided to a sufficient degree).

However, when assessing public goods (or services, infrastructures, policy measures, etc.) in practice, they often do not fulfil the criteria in a clear-cut fashion. Instead, one can often observe partial market failures, as their non-excludability and non-rivalry only apply to certain parts or processes of a given policy area. In such instances, the theory of fiscal federalism allows one to identify the optimal level of government action with regards to the provision of a specific good.

In such cases, provision at a higher level of government provides economies of scale – a clear example is common defence policy in a nation state, which is less costly than if sub-state entities all had to provide for their own defence. When the constituent parts have the same interests (their preferences are homogenous), this provides a pull factor towards centralization – sticking to the defence example: if the threats and requirements for defence may be identified and interpreted in a consistent way, there is greater reason for centralization.

Within this continuum the theory of fiscal federalism posits that the externalities (or spill-overs) of government action at a specific level determine the optimal level of that action. Applied to the example of defence, the spending of one state on common defence spills over into the common defence capabilities of the states in the federation as a whole. Spill-overs are closely related to the concept of public goods: the more spill-overs a certain good provides, the closer it is to a public good – as is the case with defence.

The framework of public goods helps in identifying the optimal level of public provision, and, specifically, those goods qualify as European public goods when the policy has a clear European added value that cannot be provided at a lower level of government. In other words, there is European added value when the benefits in form of economies of scale and spill-over effects exceed the costs it bears in reducing the diversity of policy options available to Member States.

When investigating whether a policy is a European public good, the following questions require answers:

1. Is the issue/policy/policy field/goal under investigation a public good? Or: is it non-rivalrous and non-excludable? Is it well-defined?
2. What is the right level of government for the provision of this good? i.e.: How large are the economies of scale? What are the spill-overs connected to the good? How heterogeneous are the preferences of the Member States?
3. How much European added value is there? i.e.: Which arguments strengthen the case for defining the issue as a European public good? Which speak against? Which level of government does this indicate?

The nature of the public good and the level of government identified in this way may or may not correspond to the current division of competences between the EU and the Member States.

Diagnosis: Matching European public goods with existing EU competences

The conferral of competences and shared competences under the Treaties may (or may not) correspond to the appropriate level of government for the provision of European public goods as defined here. Depending on the relation between the appropriate level of government identified and the actual competences held by the EU, three scenarios arise, which imply different approaches to developing policy proposals.

Scenario 1: When a policy qualifies as a European public good, but the EU does not have the (sufficient) competence to act in this policy field, there is a strong rationale for upgrading the EU's competences. The "classical"/traditional way to match tasks and competences at EU-level would be via treaty revisions. However, in recent years, this route towards change has been increasingly considered as closed – or very difficult to achieve. It is therefore important to look at extant treaty provisions, such as passerelle clauses to introduce more QMV into EU decision-making in a given policy field; or by finding alternative legal bases (such as non-treaty provisions). If it proves

impossible to find agreement among all MS, it might be expedient to explore policy alternatives with varying degrees of MS participation.

Scenario 2: When a policy qualifies as a European public good and the EU has exclusive competence to act in this policy field, the public goods approach indicates that the form of governance of the policy field is appropriate. However, if decisive action at the EU level has proven difficult in spite of its appropriate competence, this points to a potential political, rather than a legal or institutional, problem. When in such a case the provision of the public good is crucial to the functioning of European sovereignty, the question arises whether the political deadlock is so acute as to justify exploring policy alternatives with varying degrees of participation of the Member States.

Scenario 3: Finally, when a policy field does not qualify as a European public good, but the EU has competences in this policy field, the logic of European public goods points towards a reversion to Member State or regional level. This is an important element in the analysis, as it entails "doing politics" as close to the citizen as possible, and thus resonates strongly with the principle of subsidiarity.

To summarize, in terms of identifying the degree to which actual EU competences overlap with the level of government as the framer of European public goods, the following questions need to be answered:

1. How is the policy field currently governed at EU level? On what legal basis and how is the competence defined? Through which decision-making mechanism is the policy field governed? Which bodies/structures are involved in the governance of the policy field?
2. Can the European public good be provided within this competence structure? Which of the three scenarios outlined above best describes the current relationship between optimal and actual level of government?
3. Does this indicate the need for action to bring the de facto level of competence in line with the level identified as optimal?

When the discussion of optimal and actual division of competences indicates the need for action (question 3), the Reflection Group seeks to develop concrete policy guidelines and proposals to reinvest the European public goods agenda and to provide linkages for decision-makers.

Developing policy guidelines and proposals

When moving from the discussion of competences to developing policy alternatives and proposals based on the frame of European public goods, three questions need to be answered: How – and by whom at which level – should the policy be implemented? How can enforcement be ensured in the event that a Member State is unable or unwilling to provide the public good? And, finally, who participates?

Reform substance: the what

The question of reform substance concerns the content of the policy proposal – which elements of the policy field need to be included in the proposal for the policy to work smoothly and coherently; and whether these correspond to how the policy boundaries are currently set. If there is a need to move beyond the current policy framework, the question of reform substance also concerns the most relevant (political, fiscal, legal, constitutional) requirements for coherent policy-making.

1. Which elements need to be included in policy formulation to ensure coherence?
2. Do these correspond to the current formulation of the policy boundaries in EU policy? Where would the policy field need to be deepened (closer cooperation) or broadened (including a wider set of policy elements)?
3. What are the most relevant political, fiscal, legal and constitutional requirements to progress coherent policy?

Implementation: the how

The agents of implementation may be both national as well as European bodies, and a policy proposal ought to delineate how implementation

is shared between these agents. In terms of efficiency of the decision-making mechanisms, there is a strong case for implementation to require Qualified Majority Voting. Finally, this also concerns the incentive structure through which compliance can be ensured where a MS is unable or unwilling to provide the public good; that is, through which incentives does cooperation become rewarding, while non-cooperation incurs costs.

1. How does implementation in the policy field currently work? How do Member States and the EU cooperate in implementation? Is this form of implementation successful in ensuring it takes place across all Member States?
2. How should the policies be implemented? With which institutional structure and decision-making procedure? What responsibility does this entail for MS (solidarity)? What responsibility does it entail for the EU to respect Member States' prerogatives (subsidiarity)?
3. Through which incentive structure can compliance of the Member States be ensured?

Participation: the who

The question of “who participates” is relevant when action at the European level has been lacking despite appropriate competences being available at EU level; or when it proves politically unfeasible to move forward with all Member States on board. Here, the diversity of MS preferences limits the EU's ability to act in its own interest. Any proposal including variable geometry must therefore clearly identify the mechanisms through which those that do not wish to participate are barred from free-riding, as there would be little incentive for participation. At the same time, any such proposal must also address how the proposal relates to the EU-27 as a whole.

1. Are all Member States willing and able to advance in this policy field with the EU-27? Are the preferences homogenous enough?
2. If this is not the case: What form of variable geometry – of a club of the willing – may allow for moving forward in this policy field? Under which governance structure?

3. How can those not willing to commit be excluded and barred from free-riding on the commitments of the others? How can they nevertheless be provided with an opportunity to opt-in at a later point when their preference changes?

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