A battle-tested community

The Europeans have plenty of experience of dealing with crises. If we take a look at the history of the community of European states, one thing becomes clear: more or less heated controversies have been a regular occurrence over the decades. However, it has always been possible to find strategies for overcoming them, as the team headed by **Stefan Vogenauer** at the **Max Planck Institute for European Legal History** in Frankfurt/Main is finding out in the course of its research. During the process, the researchers have also gained new insights into the current state of the European Union.

TEXT **MECHTHILD ZIMMERMANN**

A summit with new delegates: in October 1972, the six founder states of the European Community were joined for the first time by Great Britain, Ireland and Denmark at a meeting of the European heads of state and government. In the years that followed, vetoes by individual members repeatedly blocked agreements on a large scale.

Brussels, in the summer of 1965: *"Three minutes after midnight, the lights went out in the Palais de Congrès. The ministers gathered in Brussels (…) were sitting in the dark. Anyone who might have regarded this as a bad omen would soon see their fears confirmed: after the short circuit had been repaired, it only took another 107 minutes for the negotiations to fail. On 1 July, shortly before 2 o'clock in the morning, the most severe crisis yet to hit the Common Market began."*
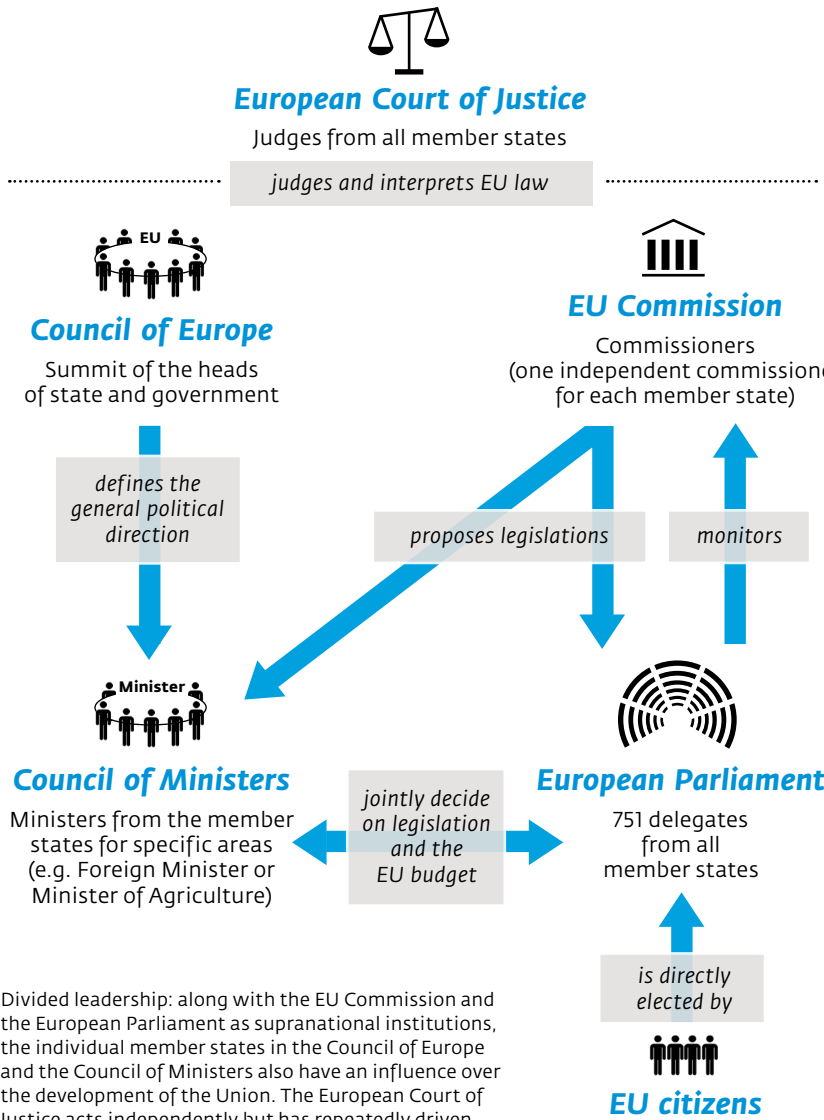
The night of 9 July 1965, the bitter end of which was described by the weekly newspaper Die Zeit, marked the beginning of the use of the empty chair policy. According to Stefan Vogenauer, Director at the Max Planck Institute for European Legal History, this phase was marked by the most severe crisis in the history of European integration. As an act of protest, the French government at the time recalled its permanent representative in Brussels, refused to attend the meetings of the Council of Ministers, and in so doing, blocked the entire Community for half a year.

Only seven years previously, Germany, France, Italy, Belgium, the Netherlands and Luxembourg had joined together to form the European Economic Community (EEC). The Treaties of Rome had come into force in January 1958. It was agreed in these treaties that the establishment of an internal European market and the gradual convergence of economic policy was to promote prosperity in the countries and improve relations between the states. However, opinions about how far integration would have to go varied widely.

The French President at the time, Charles de Gaulle, could certainly be described as a Eurosceptic from today's perspective. While he was in favor of a Europe with France and Germany as supporting pillars, his greater priority was helping his country regain its former global status. For de Gaulle, national independence was of key impor-

European Court of Justice

Judges from all member states

.... *judges and interprets EU law* ....

Council of Europe

Summit of the heads
of state and government

*defines the
general political
direction*

EU Commission

Commissioners
(one independent commissioner
for each member state)

proposes legislations   *monitors*

Council of Ministers

Ministers from the member
states for specific areas
(e.g. Foreign Minister or
Minister of Agriculture)

*jointly decide
on legislation
and the
EU budget*

European Parliament

751 delegates
from all
member states

*is directly
elected by*

EU citizens

Divided leadership: along with the EU Commission and
the European Parliament as supranational institutions,
the individual member states in the Council of Europe
and the Council of Ministers also have an influence over
the development of the Union. The European Court of
Justice acts independently but has repeatedly driven
forward integration in the past.

tance, and he accordingly took a critical view of cross-state European institutions. The controversy that ultimately culminated in the crisis of 1965 flared up over two issues. Majority voting was to be extended to a series of important questions. Moreover, in de Gaulle's view, the EEC Commission under Walter Hallstein was acting like "a European government", since it was planning for example to introduce a separate Community budget.

However, there were other reasons for the French blockade. The French President wanted to secure a dominant role for his country in the European Community and to strengthen the influence of the national governments overall. It was not until January 1966

that the French returned to the table with the other EEC members, where they then negotiated what became known as the "Luxembourg Compromise": a veto option for certain states which regarded their national interests as being in danger.

**INTEGRATION THROUGH CRISIS –
THE MORE SEVERE, THE BETTER**

Events show that the atmosphere in Europe was by no means more peaceful and harmonious in the past. "There have always been crises," says legal historian Stefan Vogenauer, "and they are easily forgotten. Since I've been following its development, the European Union has in fact been in permanent

crisis mode." One of the few exceptions was the period at the end of the 1980s and the early 1990s, when Jacques Delors was President of the European Commission and agreement was reached over the Single European Act and the Treaty of Maastricht. "There have always been times when giant strides towards European integration were made," says Vogenauer. "However, they were again followed by long periods of tactical withdrawal or stagnation."

Nevertheless, there are always two sides to a crisis. Walter Hallstein, who was the first President of the EEC Commission from 1958 to 1967, firmly believed that the European Community could "gain in stature and stability, particularly in times of escalating crisis," explains Philip Bajon, a historian in Vogenauer's team. "This was a part of his theory and his self-identification as President of the Commission: integration through crisis – the more severe, the better."

Hallstein was a professor of law and a staunch European. As one of the founding fathers of the European Community, he regarded Europe as a Community of Law (*Rechtsgemeinschaft*) – an idea that has since played an important role in the debate surrounding European integration. Even so, it is not so easy to clearly define what the "European Community of Law means," explains Thorben Klünder, who is examining the concept for his doctoral thesis. "On the one hand, it is assumed that there was already a Community of Law before the European states came together by signing an agreement." The European Community is therefore something akin to a community of values that had already had a common legal basis for hundreds of years in the form of Roman law.

On the other hand, the term is also used in the sense of an ideal, according to which the European states should become ever more closely aligned in legislative terms, as Klünder explains: "In the view of Walter Hallstein, for example, we were a Community of Law and were to become an even stronger one." According to Klünder, there is no

doubt that the different meanings of the word have influenced our understanding of the European Community: "The Community of Law can certainly be perceived as a narrative of how European integration can succeed, namely through the law."

However, what might sound good in theory is proving difficult to realize in practice. Even if there is a certain degree of consensus in Europe about the rule of law or basic rights, matters get complicated as soon as it comes to the details. Since the European Union's main focus is still the internal market, the goal in question is "merely" the creation of equal terms for the economies of all member states. However, these terms ultimately influence topics that relate to everyone: consumer protection, environmental protection, workers' rights, and national ways of dealing with issues ranging from food production to the design of car number plates.

A BLACKCURRANT LIQUEUR CHANGES POLITICS

Philipp Schmitt, who is also a doctoral student in Vogenauer's Department, explains how it soon became clear that agreeing on entirely congruent legal rules for all states was an impossibility. "The European Commission wanted to drive forward the Community of Law and attempted to achieve legal standardization. However, time and again, the countries expressed their opposition. This became particularly problematic in areas in which the members were supposed to agree unanimously." Schmitt is researching the development of a legislative technique known as minimum harmonization. This offered a way out of the dilemma that was frequently used from the 1960s until the recent past. For EU directives, i.e. for rules that need to be converted by the individual states into their own laws, it created room for maneuver for national concerns. The states only needed to agree on a minimum standard, with more stringent rules possible.

Schmitt cites an early example from the 1970s, the reduction of lead

in petrol. "Germany was the only country to have already significantly reduced the lead content by law when the standard was to be unanimously aligned at European level. The other members wanted to reduce the lead content in stages; however, Germany successfully proposed a derogation that permitted more stringent limits." In his analyses, Philipp Schmitt also comes across country-specific patterns: "It is those states that have high standards in certain areas that most frequently press the case for derogations. Environmental protection was often an important issue for the Germans, while the Danes insisted on asserting their principles when it came to social matters and the British were particularly keen on animal welfare."

Working for Europe: when in 1975, the British first voted on membership of the European Community, Margaret Thatcher as the leader of the Conservative Party advocated saying yes to Europe. She met with success: more than two-thirds of voters were in favor. The arguments on both sides at that time are largely the same ones that are used today.

While minimum harmonization may not conform to the ideal of legal unification, the EU has in Philipp Schmitt's view certainly benefited from the option of allowing more stringent measures: "I think that in a Europe with opposing views, this was a good way of making progress in the single market without ignoring social issues or environmental and consumer protection." After all, this is precisely the danger

that arises when a group has to agree on the smallest common denominator: "In general, there is the risk of a race to the bottom; in other words, at the end of the day, the lowest standard sets the benchmark."

Today, the European Commission is anything but supportive of derogations for more stringent national standards. Schmitt can certainly understand why: "It's a question from which angle you look at it. As important as the deviations upwards were for consumer protection, for example, for the economy, different periods for the right of withdrawal or claims for damage compensation might be an obstacle."

One important question in this context is to what extent it is actually necessary for the single market to regulate details centrally. The European Court of Justice (CJEU) passed an important ruling in this respect at the end of the 1970s. The case may at first sound banal, since the subject of dispute was blackcurrant liqueur. A German supermarket wanted to start selling French Crème de Cassis as part of its product range. However, since the alcohol content did not conform to the German law on spirits, the liqueur could not be sold. The company filed an objection and was given a favorable ruling by the CJEU. The judges explained their decision by saying that national regulations may only restrict the European internal market when this is deemed necessary to fulfill mandatory requirements, for example for fiscal supervision purposes or when there is a risk to public health. In the case of the liqueur, the court did not find that such grounds applied.

Philipp Schmitt says that the so-called *Cassis-de-Dijon* judgment of 1979 set new standards for the alignment of legislation: "A certain alcohol content would have previously been specified in a directive on 'Euro liqueur', since it appeared to be necessary to set uniform requirements in order to enable the free movement of goods. The CJEU judgment prepared the path away from product alignment and towards more mutual recognition."

This was not the only ruling with which the European Court of Justice

Joint investigation: the team headed by Stefan Vogenauer (above right) studies the European Union and its history. Insa Jarass (above left) is working on issues relating to European private law. Philip Bajon is studying the veto after the Luxembourg Compromise, while Philipp Schmitt is researching the development of minimum harmonization, and Thorben Klünder is focusing on the concept of the European Community of Law (below from left).

facilitated the advance of the single market in Europe. For decades, it was considered to be the "engine of integration" – a role that is contentious. Criticism has been voiced not only by politicians who see their national interests as being at risk, but also from the academic arena, particularly by political scientists and sociologists (see also "The Union of disparity", page 30). They are critical of the fact that the Court of Justice has consciously acted in a political way over the years, and in so doing has acted *ultra vires*.

In his research, Stefan Vogenauer has focused on the history of the European Court of Justice. He and his team are studying this institution's past, and

not only with reference to files, protocols and other written documents, but also by recording its oral history in a pilot project. In interviews, they are questioning judges, Advocates General and high-ranking administrative officials who used to work there in the past, and are comparing their memories with the official written records.

One question in their interviews relates to the possible political role played by the Court. The answers differ, according to Philip Bajon, who has been conducting some of these interviews together with a colleague. "Many interviewees insist that the CJEU was only applying the law – that there was therefore no political role, no activism, no

room for maneuver involved. There are only a small number of people who say that its role was occasionally also a political one."

Regardless of its own understanding of its role, judgments by the Court of Justice often triggered fierce emotional reactions in the member states, particularly when traditional national regulations were affected. Stefan Vogenauer cites the ruling on the 1987 German regulation on the purity of beer as an example: "That was the first time that the German public said: 'These people just came in from Brussels and overturned our purity regulation.' That was truly traumatic. Today, no-one talks about this any more. German beer sells well abroad. And here in Germany, it's probably possible to purchase beer that has not been brewed in accordance with the purity regulation standards; it's just that no-one buys it."

NO ATTEMPT WAS EVER MADE TO PUT A STOP TO THE DEVELOPMENT

For Vogenauer, the purity regulation is an example of how in every nation, there are strong, ultimately often uncompromising positions that citizens expect politicians to defend. It is therefore not surprising that the heads of state and government in the Council of Ministers are often vehement in their defense of their national interests – today just as they were in the past.

In the 1970s in particular, the Luxembourg Compromise was often used. This was the agreement that brought Charles de Gaulle's "empty chair policy" to an end. At that time, the members negotiated an arrangement whereby every state could veto a majority decision when "national interests" were at stake. These "national interests" were not defined in greater detail, and the Luxembourg Compromise never became European law. The governments were happy to accept an informal, more political deal, since it gave them more room for maneuver when they invoked it in order to block majority decisions in the Council of Ministers. During the 1970s, the large number of vetoes led to what became known as "Eurosclerosis",

an extensive blockade of European policies. It was only with the major revisions of the Treaties from the mid-1980s onwards that the decision-making culture began to change.

Philip Bajon has conducted a close study of the Luxembourg Compromise and its application. It is noticeable that during the 1970s, precisely during the period of Eurosclerosis, the European Court of Justice facilitated the advance of European integration to a significant degree with rulings that were of fundamental importance. According to Bajon, the legal and political spheres were therefore working in opposite directions: "Even so, no major attempt was ever made to limit the competences of the CJEU, to put a stop to the development or even to turn back the clock of history." He concludes that the veto was a tool used to bring the critics on board and make it easier for them to cooperate. "It gave the governments the impression that they were still in control of the process of European integration."

Only once did an attempt by a member to veto a decision fail, and it did so in spectacular fashion. In 1982, the United Kingdom was outvoted in its attempt to block a vote. At that time, the British had made their support for common agricultural prices conditional upon budget concessions. This went too far for the other states, and the prices were approved without the consent of the UK. "The British regarded this as an enormous blow to their sovereignty," Bajon explains, "with all the consequences that this entailed. Even at that time, various Brexit scenarios were already being published in the press." The arguments put forward in the de-

bate were the same as those used today: the fear of loss of autonomy and the desire to have full sovereignty over regulations in their own country.

For Stefan Vogenauer, Brexit ultimately reflects the tensions that have surrounded the European Union since it was founded as an economic community: how can I enjoy all the benefits that standardization brings, with access to the market, low production costs, and less bureaucracy for patent applications without giving up my identity or the values underlying my national legal system, concerning, for example, consumer and environmental protection? "It isn't always easy to find the right balance here," Vogenauer stresses. "The example of Brexit shows that the British want to square the circle. On the one hand, they want full access to the single market, while on the other maintaining full sovereignty over their own regulations and standards. But it's impossible to have both at the same time."

For Vogenauer, there is a positive side to Brexit. Current surveys in Europe show that, at present, no majority in any member state would vote against the EU. Before the United Kingdom voted in favor of exiting the EU, the picture was different. In the legal historian's opinion, it is by all means possible that Brexit will weld together the other member states and facilitate a major step forward – entirely in the spirit of the first President of the European Commission, Walter Hallstein, who saw every crisis as an opportunity for Europe to grow closer together. ◀

🎧 www.mpg.de/podcasts/europa (in German)

SUMMARY

- European unification has been a source of tension from the beginning: the common internal market demands standardization. However, the states are also unwilling to give up their national self-determination.
- Compromises such as those that take the form of minimum standards with national derogations have made it easier for European states to grow together in the past.
- An informal veto option, which was frequently used from the mid-1960s until the mid-1980s, left national governments under the impression that they were still in control of the increasing degree of integration.