



On the role of normative evaluations in the potential output estimation procedure

Study commissioned by Dezernat Zukunft e. V.,
Institute for Macrofinance, Berlin

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The study explores the question of how the European method for estimating potential output that is applied in the context of the German and European debt rules can or must take values and normative objectives into account that are enshrined in the German Basic Law and in European law.

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Executive Summary

Europe's fiscal architecture rests on technical assumptions with normative implications. The concept of potential output — used to determine permissible deficits under EU and German fiscal rules — appears technical but implicitly embeds value judgements about what counts as “normal” economic activity. This study explores the legal foundations of those assumptions and examines how European and German law allow for aligning them with broader constitutional and Union objectives.

Fiscal sustainability cannot be defined in isolation from social and environmental goals. The German Basic Law and EU Treaties commit policymakers to multiple constitutional values: full employment, gender equality, and environmental protection. These objectives are not external to fiscal policy; they are binding legal principles that should inform economic assessments and the interpretation of fiscal rules. Treating potential output purely as an econometric projection of past trends risks ignoring these obligations and locking in underutilisation, inequality, or unsustainable growth paths.

The law allows, and in some cases requires, normative correction. Both German and EU frameworks provide interpretative space to incorporate legally protected objectives when defining potential output. In the German context, the concept of “Normallage” (“normal conditions”) already presupposes normative judgement. At EU level, Articles 121 and 126 TFEU and the new 2024 fiscal governance regulations enable broader consideration of medium-term social and environmental factors when determining debt sustainability.

Integrating these principles would not politicise fiscal surveillance — it would legitimise it. Recognising that potential output estimation is partly normative strengthens, rather than weakens, the credibility of fiscal rules. It ensures consistency between economic methodology and the legal commitments of the Union and its Member States. It would also align incentives with the EU's investment, competitiveness, and climate objectives — while maintaining the DSA's rigour and comparability across Member States.

Key recommendations

1. **At EU level:** The European Commission should explicitly integrate full employment, gender equality, and sustainability objectives into the reference trajectories underpinning the DSA, at least where measurable medium-term effects exist.
2. **In future reform:** Clarify in EU secondary law that fiscal sustainability must be balanced with social and environmental sustainability. Ensure transparency and replicability by publishing assumptions, elasticities, and model updates on a regular and auditable basis.
3. **At national level:** Member States should ensure their fiscal frameworks reflect these normative standards. In Germany, this may require adapting the constitutional methodology for potential output estimation and, if necessary, decoupling it from the EU's purely statistical approach.

A. Key questions

I have conducted the following study commissioned by Dezernat Zukunft e.V., Institute for Microfinance, Berlin as part of the project titled “*Re-defining fiscal sustainability in terms of growth*”.

The study explores the question, how the European method for estimating potential output that is applied in the context of the German and European debt rules can or must take values and normative objectives into account that are enshrined in the German Basic Law and in European law.

The method applied by the European Commission is – at least to date – based on the so called *no-policy-change* scenario that the client summarises and criticises from an economic perspective as follows:

“ The EU-CAM is based on a no-policy-change scenario: current and future policy measures have no impact on potential output. This assumption means that the estimated potential output is largely independent of specific policies. It is instead derived from the historical trend of GDP (in the German context: “Normal-lage”, “normal conditions”, i.e. „normal“ GDP) and projected for the future.

Economic effects and policy measures are considered only marginally (Havik et. al. 2014). Firstly, measures that have already been approved at the time the estimate is made are included in the GDP short-term forecast for the next two years and are therefore included in the projection. Secondly, a so-called anchor is determined for unemployment as part of “normal” GDP (NAWRU) as the value it converges to in the long run. The anchor is determined using a statistical method in which current labour market reforms are considered, among other aspects.

However, this approach is not sufficient to plausibly reflect the economic impact that political measures have on potential output. Imagine a comprehensive infrastructure investment programme, for example. Roads and railway tracks will first need to be built, which means that it usually takes more than two years for such investments to be reflected in the potential as greater production capacities. The effects of reforms that rely on stronger incentives for work, such as tax and social reforms, also tend to be delayed, as workers will adjust to these only gradually. These

policy effects, that are to be expected from a business perspective, are ignored in potential output estimation.

Potential output as a projected trend from the past is therefore not a plausible benchmark for economic capacity. The projection logic is based on the assumption that the GDP cannot be above or below the historic average trend on the long run, and that the average output gap must therefore equal zero. However, recent research has shown that the average output gap can, after all, be negative, meaning that existing production capacity remains permanently unused (Aiyar and Voigts 2024). This permanent underutilisation is made a standard in the current assessment procedure. Policies that aim to change this do not have a direct positive effect on the estimated potential.”

The goal of my study is not to take a stand in the economic debate about the possibilities and methods of debt sustainability analysis and potential output estimation.¹ Instead, it aims to prepare further public policy discussions at the European and national level, by placing potential output estimation in the overall context of European and national fiscal rules (B.), illustrating the normative objectives and evaluations that exist in Union and national law regarding issues related to employment policy, including gender equality in the working life, as well as climate action (C.), and by exploring to what extent consideration of these evaluations is possible and appropriate within the framework of potential output estimation provisions prescribed by law (D.). Based on this, the study then draws up recommendations for action concerning potential output estimation pursuant to the applicable legislation, as well as adjustments to provisions under national and European law (E.).

Large parts of this study venture into new territory, as the approach to potential output estimation has been scarcely explored from a legal perspective. Also, the relevance of normative evaluations has barely been considered. However, the study can build upon existing work by myself and Stefan Koriath concerning the cyclical component in the German constitution.²

¹ In particular I am not going to address the question, whether changes to potential output estimation could open up further leeway for debt and how this might relate to other public policy recommendations on this issue; see F. Heinemann et.al., Zukunftshaushalt statt Schuldenbremse, 10.3.2025, available at: https://ftp.zew.de/pub/zew-docs/div/ZukunftshaushaltstattSchuldenbremse_2025.pdf, p. 9 et seqq.; overview of studies about economical consequences of fiscal rules: T. Brändle/M. Elsener, Do fiscal rules matter? A survey of recent evidence, Swiss Journal of Economics and Statistics 160 (2024), p. 11 et seqq.; N. Potrafke, Journal of International Money and Finance 153 (2025), online 103286.

² S. Koriath/M. W. Müller, Verfassungsrechtlicher und einfachgesetzlicher Rahmen einer Reform der Konjunkturkomponente der Schuldenbremse, short assessment, November 2021, available at: https://www.dezernatzukunft.org/wp-content/uploads/2024/04/Koriath_Mueller_Gutachten-Konjunkturkomponente_03112021-1.pdf; id., Die Konjunkturkomponente der Schuldenbremse – Spielräume und Grenzen, Wirtschaftsdienst 2021, p. 960 et seqq.; id., Reformpotential bei der Konjunkturkomponente der verfassungsrechtlichen Schuldenbremse, DÖV 2022, p. 349 et seqq.

³ Regulation (EU) 2024/1263 of the European Parliament and of the Council of 29 April 2024 on the effective coordination of economic policies and on multilateral budgetary surveillance and repealing Council Regulation (EC) No 1466/97 [hereinafter Regulation 2024/1263]; Council Regulation (EU) 2024/1264 of 29 April 2024 amending Regulation (EC) No 1467/97 on speeding up and clarifying

The question addressed is expanded through three aspects that also provide it with particular significance:

- The legal framework of European fiscal rules was fundamentally reformed in 2024.³ The Commission’s approach to potential output estimation is based on this legal framework that does, however, not provide for the standards of potential output estimation in detail. At the same time, the new fiscal rules are still subject to further reform debates, in particular in view of current challenges related to fiscal policy in the Member States.⁴
- The European fiscal rules are of enhanced significance for the Federal Republic of Germany, owing to the constitutional amendment of 2025: a recent study shows that by making use of the newly stipulated leeway for debt, the Federal Republic would exceed the deficit limits according to Article 126 (2) TFEU.⁵
- The relationship between German and European fiscal rules and in particular the reference to the potential output estimation methodology could also be addressed in the planned debate about a reform of German public debt law.⁶

ing the implementation of the excessive deficit procedure [hereinafter Regulation 2024/1264]; Council Directive (EU) 2024/1265 of 29 April 2024 amending Directive 2011/85/Union on requirements for budgetary frameworks of the Member States [hereinafter CD 2024/1265]; concerning the connection of legal acts see in particular recital 8 CD (EU) 2024/1265: “Together, these three legislative acts [...] reform the economic governance framework of the Union, incorporating into Union law the substance of Title III (Fiscal Compact) of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union of 2 March 2012 (the ‘TSCG’), in accordance with Article 16 of that Treaty.” From the German perspective the Federal Government’s draft law for implementation of Article 109 (3)(6) and (7) of the Basic Law and amendment of other laws is available here: https://www.bundesfinanzministerium.de/Content/DE/Gesetzestexte/Gesetze_Gesetzesvorhaben/Abteilungen/Abteilung_V/21_Legislaturperiode/2025-07-02-StruKomLaeG-und-andere-Gesetze/2-Regierungsentwurf.pdf?__blob=publicationFile&v=2, p. 11 et seq.

⁴ Cf. L. Guttenberg/N. Redeker, Für mehr Sicherheit: Warum und wie die EU die Fiskalregeln (noch einmal) reformieren sollte, *Wirtschaftsdienst* 105 (2025), p. 243 et seqq.; N. E. Boivin/Z. Darvas, The European Union’s new fiscal framework: a good start, but challenges loom, *Bruegel Policy Brief* 06/25 February 2025; for a critique in the draft stadium see also B. Riedl, Kritische Analyse der geplanten Reform des Stabilitäts- und Wachstumspakts: Flexibilität, Durchsetzbarkeit und ökonomische Logik, *ZG* 2023, p. 325 et seqq.; regarding the revision see also P. Heimberger et al., Debt Sustainability Analysis in Reformed EU Fiscal Rules, *Intereconomics* 59 (2024), p. 276 et seqq.; Z. Darvas et al., The implications of the European Union’s new fiscal rules, *Bruegel Policy Brief* 20/24, June 2024; C. Paetz/S. Watzka, The new fiscal rules: Another round of Austerity for Europe, *IMK Policy Brief* No 176, September 2024.

⁵ A. Steinbach/J. Zettelmeyer, Germany’s fiscal rules dilemma, *Bruegel Analysis*, 24 April 2025; for status before constitutional amendment see also L. Guttenberg/N. Redeker, Luft nach oben: Wieso die EU Fiskalregeln Spielraum für eine Reform der Schuldenbremse lassen, 12 December 2024, available at: <https://www.bertelsmann-stiftung.de/de/publikationen/publikation/did/luft-nach-oben-wieso-die-eu-fiskalregeln-spielraum-fuer-eine-reform-der-schuldenbremse-lassen>.

⁶ Regarding the goal of a reform of the debt rule in Basic Law, responsibility of Germany; 21st legislative period; regarding reform options in relation of the cyclical component of the Basic Law see Koriath/Müller, reform potential (note2).

B. The normative reference point of potential output estimation in the context of European and German fiscal rules

I. EUROPEAN FISCAL RULES

The European fiscal rules combine economic and budgetary policy objectives: they are based on Article 121 TFEU (coordination of economic policies, convergence of the economic performances of the Member States) on the one hand, and Article 126 TFEU (avoiding government deficits, compliance with budgetary discipline) in conjunction with the Protocol (No 12) on the excessive deficit procedure⁷ on the other hand.⁸ These provisions are explicitly referenced in Regulations 2024/1263 and 2024/1264 which interlock their aims;⁹ the two regulations are also explicitly interconnected.¹⁰

Article 121 TFEU provides in particular that – in order to ensure coordination of economic policies and sustainable convergence of the economic performances of the Member States – the Council shall on the basis of reports submitted by the Commission, monitor economic developments in each of the Member States and in the Union as well as the consistency of economic policies with the broad guidelines set out by the Council, as well as carrying out regular overall assessments (Article 121 (3) TFEU). If it is established that the economic policies of a Member State are not consistent with these broad guidelines or that the proper functioning of the economic and monetary union is potentially at risk, the Commission may address a warning to the Member State concerned; if recommended by the Commission, the Council may address the necessary recommendations to the Member State concerned (Article 121 (4) TFEU).

Against the background of the aim to avoid government deficits of the Member States, Article 126 TFEU provides for monitoring of the development of the budgetary situation and the stock of government debt “with a view to identifying gross errors” (Article 126 (2), first subparagraph TFEU). In this context the Commission monitors compliance with budgetary discipline in particular based on the question, whether the ratio of the planned or actual government deficit to gross domestic product does not exceed a reference value of 3% (Article 126 (2), second subparagraph, point (a) TFEU, Article 1, first dash, Protocol No 12) and whether the ratio of government debt to gross domestic product does not exceed the reference value of 60%

⁷ Official Journal No 115 dated 9.5.2008, p. 279 – 280.

⁸ Concerning the structure, see also the European Parliament’s Factsheet The EU Framework for Fiscal Policies, available at www.europarl.europa.eu/factsheets/en. Concerning Member States’ economic policies and avoidance of excessive government debt as goals of the economic union see: P. C. Müller-Graff, in: Ludwigs, Handbuch des EU-Wirtschaftsrecht, as of: 62. EL 2025, § 1 Rn. 163.

⁹ See in particular recital CD 2024/1263: “The fiscal governance framework forms part of the European Semester, which also comprises the coordination and surveillance of broader economic and employment policies of the Member States, in accordance with Articles 121 and 148 TFEU, including the European Pillar of Social Rights, and the related country-specific recommendations.”

¹⁰ See in particular recital CD 2024/1265.

(Article 126 (2), second subparagraph, point (b) TFEU, Article 1, second dash, Protocol No 12). The Commission will prepare a report if a Member State meets none or only one of these criteria or if it is of the opinion that there is a risk of an excessive deficit in a Member State despite fulfilment of the criteria (Article 126 (3), first subparagraph, Article 126 (3) second subparagraph TFEU). “The report of the Commission shall also take into account whether the government deficit exceeds government investment expenditure and take into account all other relevant factors, including the medium-term economic and budgetary position of the Member State.” (Article 126 (3), first subparagraph, first sentence TFEU). If the Commission has the impression that an excessive deficit in a Member State exists or may occur, it shall address an opinion to the Member State in question and shall inform the Council accordingly (Article 126 (5) TFEU), which shall, on a proposal from the Commission, and having considered any statements made by the Member State, decide whether an excessive deficit exists (Article 126 (6) TFEU) and it shall by further recommendation of the Commission make recommendations addressed to the Member State concerned with a view to bringing that situation to an end within a set period (para. (7)). Ultimately, the Council may decide to give notice to the Member State concerned to take measures for the deficit reduction which is judged necessary by the Council within a specified period (Article 126 (9), first subparagraph TFEU) and may request the Member State concerned to submit reports (Article 126 (9), second subparagraph TFEU). The sanctions provided for in Article 126 (11) TFEU can only be imposed following non-observance of a decision pursuant to paragraph 9: requiring the Member State concerned to publish additional information, to be specified by the Council, before issuing bonds and securities; inviting the European Investment Bank to reconsider its lending policy towards the Member States concerned; requiring the Member State concerned to make a non-interest-bearing deposit of an appropriate size with the Union until the excessive deficit has, in the view of the Council, been corrected; imposition of fines of an appropriate size.

Even primary legislation therefore provides for the provisions outlined above to give rise to a differentiated regime of preventative and corrective economic and budgetary monitoring. In addition, it becomes clear that exceeding the reference values indicated in Article 126 (2) TFEU, Article 1 Protocol No 12 is neither a sufficient nor a necessary prerequisite for further steps: the Commission must take overall circumstances into account in this case, too (Article 126 (3), first subparagraph TFEU), as well as being able to confirm the risk of excessive debt even without the threshold values being

exceeded (Article 126 (3), second subparagraph TFEU). In determining, whether an excessive deficit exists, the Council must also take the observations made by the Member State concerned into account (Article 126 (6) TFEU). This means that there is no automated process; the steps described and the wording “excessive deficit” instead suggest that the entire deficit procedure shall be based on a complex assessment of the Members States’ budgetary and economic circumstances.

The previously mentioned Regulations (EU) 2024/1263 and (EU) 2024/1264 provide for more details of economic and budgetary monitoring, as well as cross-referencing them as outlined below: Regulation 2024/1263 initially governs the formulation and implementation of the fundamentals of economic policy in the sense of Article 121 (2) TFEU, the transmission, assessment and approval of national medium-term structural fiscal planning of the Member States and monitoring of their implementation (see Article 121 (3) TFEU), which it combines with formulation and monitoring of labour-policy guidelines (see Article 148 (2) TFEU) and monitoring for the purpose of avoiding and correcting macro-economic imbalances (Regulation (EU) No 1176/2011) to form the European Semester (Article 3 Regulation 2024/1263) and to implement this European Semester including the measures according to Article 121 (4) TFEU (Article 4 Regulation 2024/1263).

In Article 5 et seqq. the Regulation 2024/1263 further provides for the procedure to be applied in the event that a Member State’s stock of government debt exceeds 60% of GDP or that its government deficit exceeds 3% of GDP, i.e. when the threshold values are exceeded, which are specified in Article 126 (2) TFEU in conjunction with Protocol No 12. To this end, the regulation provides that the Commission shall issue to the Member State a reference trajectory for net expenditure that covers an adjustment period of four or five years which can be extended by up to three years pursuant to Article 14 of the Regulation.

The requirements concerning the content and determination of this reference trajectory are stipulated by Articles 6–9 Regulation 2024/1263. It is specified here that:

- An individual risk-based reference trajectory is determined to ensure that the projected government debt ratio is returned to or kept on a plausibly declining trajectory by the end of the adjustment period *based on the assumption that no other budgetary*

measures are taken and is kept on a level below 60% of GDP in line with the prudence concept in the medium term and that projected government deficits are brought below 3% of GDP, *based on the assumption that no further budgetary measures are taken*, and that this reference value is maintained in the medium term (Article 6 Regulation 2024/1263)

- It is ensured with the reference trajectory that the projected government debt ratio is reduced by an annual minimum average of 1 percentage point of GDP, as long as the government debt-to-GDP ratio is above 90% of GDP, and reduced by 0.5 percentage points of GDP while the government debt-to-GDP ratio is between 60% and 90% of GDP (“Debt sustainability safeguard,” Article 7 (1) Regulation 2024/1263)
- It is ensured with the reference trajectory that, if necessary, budgetary adjustments are continued until the Member State concerned reaches a deficit level that provides a common structural resilience margin of 1.5% of GDP compared to the deficit reference value of 3% of GDP (“Deficit resilience safeguard,” Article 8 Regulation 2024/1263).¹¹

Article 9 (1), point (c) Regulation 2024/1263 requires the Commission to transmit the reference trajectory as prior guidance if required;¹² Article 10 Regulation 2024/1263 requires the Commission to perform a plausibility assessment: It shall therefore “assess the plausibility of whether the projected general government debt ratio of a Member State is on a downward path or remains at a prudent level, the Commission shall apply a replicable, predictable and transparent methodology based on the following conditions:

- a. General government debt ratio declines or stays at prudent levels, under the deterministic scenarios of the Commission’s medium-term government debt projection framework;
- b. The risk of the general government debt ratio not decreasing in the five years following the adjustment period of the national medium-term fiscal-structural plan is sufficiently low, the assessment of which shall be based on the Commission’s Debt Sustainability Analysis.”

The reference trajectory plays a significant role for further budgetary monitoring as well as for the deficit procedure pursuant to Article 126 TFEU and its elaboration in Regulation (EC) No 1467/97,

¹¹ On the central rule of debt sustainability analysis in the European fiscal rules system: *Paetz/Watzka, The New Fiscal Rules* (note 4), p. 3 et seq.

¹² See also recital 14 Regulation 1263/2024: “To frame the dialogue leading to the submission of national medium-term fiscal-structural plans, the Commission should transmit to Member States with a general government debt exceeding 60% of GDP or a government deficit exceeding 3% of GDP, as set out in Article 126(2) TFEU in conjunction with Protocol (No 12) on the excessive deficit procedure annexed to the Treaty on European Union (TEU) and TFEU (“Protocol (No 12)”), a reference trajectory covering an adjustment period of four years with a possible extension of up to three years. That trajectory should be risk-based, country-specific and anchored in debt sustainability to ensure a more forward-looking approach fit for both current and future challenges.”

last amended by Regulation (EU) 2024/1264. Article 13 Regulation 2024/1263 provides that the Member States must include a net expenditure path in their medium-term planned fiscal-structural measures¹³; if this provides for a higher net expenditure than a reference trajectory determined by the Commission, the Member State concerned must explain such difference in its plan based on sound and data-driven economic arguments.

Before the net expenditure path is determined by the Council pursuant to Article 17 Regulation 2024/1263, the Commission shall examine pursuant to Article 16 (2) Regulation 2024/1263, whether the respective net expenditure path complies with the requirements to put or keep general government debt on a plausibly downward path by the end of the adjustment period or remains at prudent levels below 60% of GDP, as well as bringing and maintaining the government deficit below 3% of GDP over the medium term. Article 16 (3) Regulation 2024/1263 further provides that it must be examined for Member States that have been issued a reference trajectory whether their net expenditure paths comply with the requirements set out in Articles 6, 7 and 8 of Regulation 2024/1263. This means that the determination of a net expenditure path does not allow for any substantive deviations from the specifications for the reference trajectory. If the specified requirements for the net expenditure path are not complied with, the Council recommends submission of a revised plan (Article 18 TFEU). If the Member State concerned fails to fulfil these obligations or if the new plan does not meet the requirements either, the Council recommends that the reference trajectory is applied as a net expenditure plan.

In the context of the deficit procedure, Article 2 (2) Regulation (EC) No 1467/97 as amended by Regulation 2024/1264 provides that the government debt to GDP ratio is considered as sufficiently diminishing and as approaching the reference trajectory at a satisfactory pace in the sense of Article 126 (2), point (b) TFEU if the Member State concerned complies with its net expenditure path as determined by the Council. If recommendations according to Article 126 (7) TFEU are addressed to a Member State, this also includes for the Council to request the Member State to implement a corrective net expenditure path according to Article 3 (4) Regulation (EC) No 1467/97 as amended by Regulation 2024/1264. Regarding this corrective net expenditure path it is detailed as follows in recital 15 of Regulation 2024/1264: “The corrective net expenditure path under the excessive deficit procedure would in principle be the one originally set by the Council, while taking into account the need to

¹³ Regarding the introduction of these plans as “central change” to the reform in 2024: M. Fremerey et al., Zwischen Schuldentragfähigkeit und Investitionsbedarf, IW-Policy Paper 11/24, 28.10.2024, p. 9.

ensure a minimum structural adjustment of 0.5 percentage points of GDP in case of a breach of the deficit criterion or the need to correct the deviation from that path as a rule in case of a breach of the debt criterion. In case the original path is no longer feasible, due to objective circumstances, the Council should be able to set a different path under the excessive deficit procedure.”

Recital 8 Regulation 2024/1264 summarises the role of the net expenditure path (as well as the reference trajectory it is based on) from the point of view of the regulator: “In order to simplify the Union fiscal framework and increase transparency, a single operational indicator anchored in debt sustainability should serve as a basis for setting the fiscal path and for carrying out annual fiscal surveillance for each Member State.”

Union legislation does not include any provisions for determining the reference trajectory and net expenditure plan beyond those from these two regulations. The method for debt sustainability analysis in particular is not specified in any more detail and therefore ultimately up to the Commission to choose. This is, also in the new version, an “internally determined procedure of the EU Commission that does not constitute a legal act”¹⁴.

The Debt Sustainability Monitor 2024 that was presented by the EU Commission after the new rules had entered into force, suggests that the Commission will want to continue using what was referred to as the EU-CAM in the past and that the Dezernat Zukunft summarises as follows:

“ Potential output cannot be observed and it therefore needs to be estimated. Both the Federal Government and the European Commission are using the EU Commonly Agreed Method (EU-CAM) for this purpose. At the core of the EU-CAM is a production function for calculating potential output based on the production factors capital stock and labour and their total factor productivity. Labour potential in particular must be estimated here: it is determined based on the working-age population and trends of the participation rate, unemployment (the so-called Non-Accelerating Wage Rate of Unemployment, NAWRU) and the average working hours per person employed. The EU-CAM is being developed further by the Potential Output Working Group (POWG), comprising representatives of the EU Commission, the European Central Bank (ECB) and the Member States’ governments.”¹⁵

¹⁴ Koriath/Müller, Verfassungsrechtlicher und einfachgesetzlicher Rahmen (note 2), p. 10; M. Ademmer et al., Schätzung von Produktionspotenzial und -lücke: Eine Analyse des EU-Verfahrens und mögliche Verbesserungen, 2019, p. 16..

¹⁵ Previously detailed in: F. Schuster/M. Krahé/P. Sigl-Glöckner, Wird die Konjunkturkomponente der Schuldenbremse in ihrer heutigen Ausgestaltung ihrer Aufgabe noch gerecht? Analyse und ein Reformvorschlag; available at: https://dezernatzukunft.org/wp-content/uploads/2021/08/Konjunkturkomponente_final-v4.pdf.

Studies suggest that there have been differences between the individual Member States in the past with regard to the methodology for estimates and the individual parameters considered.¹⁶

II. FISCAL RULES IN THE GERMAN BASIC LAW

In a previous paper, *Stefan Koriath* and I have already described the decisiveness of potential output for determining the cyclical component of constitutional debt rules.¹⁷ Our findings can be summarised as follows: the so-called debt brake in the German Constitution (Basic Law, “Grundgesetz”, GG) provides that according to Article 109 (3)(1) GG the budgets of the Federation and Länder shall in principle be balanced without revenue from credits, with Article 109 (3) (2) GG allowing for arrangements concerning symmetrical consideration of the effects of market developments that deviate from the „normal“ GDP (“Normallage”) in times of upswing and downswing. For the national level, Article 115 (2)(2) GG provides that the principle of a balanced budget shall be satisfied if revenue from credits does not exceed 0.35 percent in relation to the nominal gross domestic product. Article 115 (2)(3) GG provides that when economic developments deviate from „normal“ GDP (“Normallage”), effects on the budget in periods of upswing and downswing must be taken into account symmetrically.

The mandate pursuant to Article 115 (3)(5) GG according to which a procedure for calculating the upper limit of annual net borrowing in consideration of economic development based on a cyclical adjustment procedure must be prescribed in federal law, fulfils Section 5 G-115 inasmuch as Section 5 (3) G-115 defines the cyclical component as the product of the output gap and the budget semi-elasticity (which indicates how the Federation’s revenue and spending change in the event of a shift to the macroeconomic balance), as well as the output gap, i.e. the under or over-utilisation of production capacities of the economy as a whole, as the deviation of the potential output from the expected gross domestic product.

However, many things remain unclear at the statutory level, as Section 5 (4) G-115 delegates regulation of the details of the procedure for determining the cyclical component for the Federation to an ordinance by the Federal Finance Ministry in agreement with the Federal Ministry for Economic Affairs and Energy. On the one hand, Section 5 (4) G-115 calls for the procedure to be regulated in compliance with the procedure that applies in the context of the European Stability and Growth Pact, on the other hand it provides that it

¹⁶ See *Ademmer et al.*, Schätzung von Produktpotenzial und -lücke (note 11); *Philipp Heimberger et al.*, From paradigms to policies: Economic models in the EU’s fiscal regulation framework, 2017, ICAE Working Paper Series, No 61, May 2017, p. 15 et seqq.

¹⁷ *Koriath/Müller*, Verfassungsrechtlicher und einfachgesetzlicher Rahmen (note 2).

must be regularly reviewed and updated in consideration of the scientific state-of-the-art.

The ordinance concerning the procedure for determining the cyclical component pursuant to Section 5 of the Article 115 Act defines the cyclical component in Section 2 of the Article 115 Act as the multiplication of the output gap and the budget semi-elasticity, and the output gap as the difference between the gross domestic product and the potential output. In Section 2 (2) Article 115 Act the potential output is defined as the gross domestic product that can be achieved through normal capacity utilisation. “The estimate shall be made in conformity with the method applied within the framework of budgetary surveillance under the European Stability and Growth Pact using a Cobb-Douglas aggregate production function. The production function yields the potential output as a combination of labour and capital stock production factors utilised at normal capacity, multiplied by the total-factor productivity trend as a measure of the technological progress under normal capacity utilisation.” Section 2 (3) Article 115 Act defines the term budget semi-elasticity as “cyclically induced change in the Federation’s budget balance in relation to gross domestic product if gross domestic product deviates from the potential output by one percent. The budget semi-elasticity shall be calculated as the sum, weighted with the federal shares of the cyclically dependent general-government budget revenues and expenditures, of the partial elasticities of the general-government budget semi-elasticity which is also used in the budgetary surveillance method under the European Stability and Growth Pact.”

It has been detailed in literature, including in the papers by *Korioth* and myself, that the legislative assignment under constitutional law to detail the cyclical component has not been fulfilled sufficiently here:¹⁸ while the production function is described, the precise relationship between the required factors remains unclear.¹⁹ Available labour capacity, in particular, needs to be estimated, and this gives rise to questions concerning the compatibility of family and work duties, part-time and full-time work and the retirement age.²⁰

¹⁸ Addressed in detail in: *Korioth/Müller, Verfassungsrechtlicher und einfachgesetzlicher Rahmen* (note 2), p. 12, previous work concerning insufficient fulfilment of the legislative assignment: C. Seiler, *Konsolidierung der Staatsfinanzen mithilfe der neuen Schuldenregel*, JZ 2009, p. 721 et seqq. (724); R. Wendt, in: Peter M. Huber/Andreas Voßkuhle (eds.), *by Mangoldt/Klein/Starck, GG, 7th edition 2018, Art. 115 para 44.*

¹⁹ *Korioth/Müller, Verfassungsrechtlicher und einfachgesetzlicher Rahmen* (note 2), p. 12.

²⁰ *Korioth/Müller, Verfassungsrechtlicher und einfachgesetzlicher Rahmen* (note 2), p. 14.

III. RELATIONSHIP BETWEEN GERMAN AND EUROPEAN RULES

Apart from the fundamental stipulation of Article 109 (2) GG that provides that the Federation and Länder are jointly responsible for fulfilling the budgetary provisions under Union law, the German and European fiscal rules only refer to each other directly in the point outlined above: the reference to the procedure for determining potential

output and the budget semi-elasticity.²¹ While the relationship between national debt and economic output is a central point of reference of the European fiscal rules, it is only relevant to the fiscal rules under German law in the context of the cyclical component. While the debt rules provided for in the Basic Law used to be considered stricter than those of the European Union, they might grow in significance also for the Federal Republic, as a result of the 2025 Basic Law amendment and the resulting leeway for debt.²²

Adoption of the method applied at the Union level concerning the cyclical component is not mandatory under constitutional or Union law: Article 115 (3)(5) GG refers to “a procedure for adjusting the cycle” and therefore implies the legislator’s creative leeway. The cyclical calculation method cannot be binding under Union law given the fact that it is – including in the amended version – an “internally determined procedure of the EU Commission” that does not constitute a legal act.²³

Section 5 (4) G-115 also allows for leeway for the national regulator, referring on the one hand to compliance with the procedures applied in the context of the European Stability and Growth Pact, but stipulating that the procedure must be regularly reviewed and updated in consideration of the scientific state-of-the-art on the other hand. As this type of instruction by the national legislator can only be addressed at German authorities and not at the Commission, this must mean that: if and as far as the methodology at the Union level is not in line with the scientific state-of-the-art, it is not a binding requirement under German law either. Nevertheless, the methodology at the Union level is relevant to the Federal Republic’s fiscal policy in that it also forms the basis for determining the reference trajectory and net expenditure path in the context of the medium-term financial planning provided for in Union law and therefore of limitation of borrowing under Union law.

²¹ Another connection exists in the very similar version of the emergency clause, see: *P. Orphal, Die demokratische Revisibilität von Fiskalregeln*, 2025, p. 62. Regarding the relationship see also: *J. Priewe, European Fiscal Rules and the German Debt Brake – Reform Options*, FES Diskurs 2022, p. 6 et seq., with reference to the close political correlation of the Union rules on the one hand and its greatest national economy on the other.

²² See above note 5.

²³ *Korioth/Müller, Verfassungsrechtlicher und einfachgesetzlicher Rahmen* (note 2), p. 10; *M. Ademmer et al., Schätzung von Produktionspotenzial und -lücke: Eine Analyse des EU-Verfahrens und mögliche Verbesserungen*, 2019, p. 16.

C. Normative dependence of potential output estimation

Both the determination of the reference trajectory and the net expenditure path based on European fiscal rules and determination of the cyclical component according to German law are therefore based on an estimate of economic potential. Estimating a national economy’s potential is inevitably a process that depends on evaluation, as assumptions must be made concerning the future development of the national economy in question.²⁴ As detailed by the Dezernat Zukunft, this concerns in particular the question, to what extent workers are available to the national economy and on what scale and in which areas public investment is taking place.

The special characteristic of these factors is that these concern the public sector in the areas of employment policy, gender equality and investment policy and that they are controlled by means of normative evaluations. Goals regarding labour, gender equality, especially in the working life, and climate action can be found in both the Basic Law and in Union law. In European fiscal law, which combines economic and budget policy issues as outlined above (B.I.), these aspects are also addressed at the level of regulations and guidelines. This will be outlined below, before exploring the question whether and to what extent these legal evaluations can and must be considered in the context of potential output estimation in the next section.

I. FULL EMPLOYMENT

The labour policy goal of full employment is explicitly stated in Article 3 (3) TEU as one of the European Union’s goals. It says here: “The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at *full employment* and social progress, and a high level of protection and improvement of the quality of the environment.” ²⁵

Article 5 (2) TFEU accordingly requires the Union to take measures for coordinating the Member States’ employment policies in particular by determining guidelines for such policies. Article 151 TFEU also states “the development of human resources with a view to lasting high employment and the combating of exclusion” as the goal of the Union’s employment policy.

²⁴ See also: J. Huber u.a., From paradigms to policies: Economic models in the EU’s fiscal regulation framework, ICAE Working Paper Series No 61, May 2017, p. 19: “In essence, we document that the PO-model translates paradigmatic priors into political action.”; Paetz/Watzka, The New Fiscal Rules (note 4), p. 7: “crucial assumptions”.

²⁵ Not highlighted in the original text

Coordination of employment policy is promoted if employment policy guidelines are part of the European Semester as outlined in Article 3 Regulation (EU) 2024/1263 and if the Member States are asked to include statements about their employment-policy goals in their national medium-term plans.

The connection between budgetary and employment policy is also clearly illustrated in recital 5 Regulation (EU) 2024/1263. Against the background of the new rules, it says here that the development of the COVID-19 pandemic underscored “the importance of reducing debt ratios and deficits to prudent levels in a gradual, realistic, sustained and growth-friendly manner ensuring leeway for counter-cyclical policies and addressing macroeconomic imbalances, *while paying due attention to employment and social objectives*”.²⁶

The goal of full employment was not directly anchored in the text of the Basic Law. The right to freedom of occupation as stipulated in Articles 12 (1) GG and Article 15 (1) Charter of Fundamental Rights of the European Union (CFR) only provides for the right to work, but not for a “right to employment”²⁷. However, there are good reasons that speak in favour of interpreting the social state principle of Article 20 (1) GG and the granting of individual freedoms that in substance require access to the labour market (in particular occupational freedom according to Article 12 (1) GG) as the constitutional task to aim for full employment as far as possible.²⁸ The goal of macroeconomic balance according to Article 109 (2) GG also includes that a high level of employment must be ensured, according to the ordinary-law definition from Section 1 StabG (Act to Promote Economic Stability and Growth).²⁹

²⁶ Not highlighted in the original text

²⁷ BVerfGE 84, 133 (146 et seq.), 85, 360 (373); J. A. Kämmerer, in: von Münch/Kunig, GG, 7th edition 2021, Art. 12 GG para 9 et seqq.

²⁸ Seminal literature: E. W. Böckenförde, Was nützen soziale Grundrechte, FAZ dated 11.2.1980; W. Spieker, Das Recht auf Arbeit im demokratischen Sozialstaat, in: Gewerkschaftliche Monatshefte, 1980, p. 777 et seqq. (787); see also Koriath/Müller, Verfassungsrechtlicher und einfachgesetzlicher Rahmen (note 2), p. 18.

²⁹ Regarding the idea of global control and the related goal to control the level of employment see: S. Koriath, Die vergessene Globalsteuerung der Wirtschaft, in: Michael W. Müller (ed.), Mittelbare Verhältnisststeuerung, 2024, p. 17 et seqq. (17). Concerning the question to what extent compliance with requirements related to macroeconomic balance has the character of a state objective see: J. Isensee, Staatsaufgaben, in: ders./Kirchhof, Handbuch des Staatsrechts, 3rd edition 2006, Art. 73 para 39; M. Schladebach, Staatszielbestimmungen im Verfassungsrecht, JuS 2018, 118 (120); K. A. Schwarz, Staatsziele und Staatsaufgaben – Grundfragen, in: Stern/Sodan/Möstl, Das Staatsrecht der Bundesrepublik Deutschland im europäischen Staatenverbund, 2nd edition 2022, Chapter 20 para 14 with further citations from the discussion.

³⁰ Not highlighted in the original text.

II. GENDER EQUALITY IN THE LABOUR MARKET

Gender equality, in particular with regard to the working life, is a key aim of both Union law and the Basic Law. In the European Union’s legislation “equality between women and men” is first of all one of the Union’s values listed in Article 2 TEU. Regarding the goals of the Union, Article 3 (3) subparagraph 2 TEU stipulates: [The Union] “shall combat social exclusion and discrimination, and shall promote social justice and protection, *equality between women and men*, solidarity between generations and protection of the rights of the child.”³⁰

Concerning fulfilment of the European Union’s tasks, Article 8 TFEU develops the provision that the Union shall aim to eliminate inequalities, and to promote equality between men and women in all

its activities. Article 19 (1) TFEU stipulates mandatory anti-discrimination measures, Article 157 (3) TFEU requires measures for ensuring application of the principle of equal opportunities and gender equality in matters related to work and employment.

Article 23 (1) CFR provides that equality between women and men must be ensured in all areas, including employment, work and pay.

Against the background of all of these provisions it seems reasonable to understand the task of equality as part of the “employment and social objectives” mentioned in recital 5 Regulation (EU) 2024/1263.

In Article 3 (2) (2) GG, the Basic Law also includes the explicit call to promote equal opportunities that refers to the actual societal conditions: the state for which the Basic Law applies shall not only be authorised but required to take effective measures for promoting gender equality in the working life.³¹ The task to protect marriage and families according to Article 6 (1) GG also calls for effective measures to allow for compatibility of family and work duties, according to the case law of the Federal Constitutional Court.³²

³¹ BVerfGE 113, 1 (15); 126, 29 (53).

³² Korioth/Müller, Verfassungsrechtlicher und einfachgesetzlicher Rahmen (note 2), p. 18 et seq.; M. W. Müller, Unbedingte Rechtsansprüche im Bildungsföderalismus, ZG 2021, p. 64 et seqq. (74 et seqq.).

III. SUSTAINABILITY GOALS

Sustainability goals in relation to environmental protection and climate action are also enshrined at various points in primary legislation. “A high level of protection and improvement of the quality of the environment” is stated as a goal in Union legislation – again in Article 3 (3) TEU.

The Treaty on the Functioning of the European Union includes a general clause for environmental protection in which sustainable development is referenced in particular: it provides that environmental protection requirements must be considered in determination and implementation of Union policies and measures, in particular with the aim to promote sustainable development. Article 191 (1) TFEU lists environmental policy goals and principles, in particular conservation and protection of the environment, improvement, promotion and measures at the international level, aiming to master regional and global environmental issues and climate change mitigation in particular.

A central programme for implementing environmental protection and climate action goals at the Union level is provided for by the Green Deal which is explicitly referenced in the 2024 budget reform

in relation to the European Semester.³³ It says in recital 5 of Regulation (EU) 2024/1263 – which should be understood against the background of the link between budgetary and economic policy (see I. above): “At the same time, the economic governance framework of the Union should be adapted to help address the medium- and long-term challenges facing the Union such as achieving a fair digital and green transition including the *climate objectives* set out in Regulation (EU) 2021/1119 of the European Parliament and of the Council, ensuring energy security, supporting open strategic autonomy, *addressing demographic change*, strengthening social and economic resilience and sustained convergence, and implementing the Strategic Compass for Security and Defence, all of which require reforms and sustained high levels of investment in the years to come.”³⁴

In Article 20a GG the Basic Law contains a state objective for protecting natural resources. This state objective includes climate action in particular;³⁵ the Federal Constitutional Court has detailed this as follows in its well-known climate-action resolution from 2021:

“ Art. 20a of the Basic Law obliges the state to take climate action [...]. One key indicator for the overall state of the Earth system is the global average temperature. Accordingly, the obligation to take climate action primarily manifests itself in efforts to ensure that human-induced global warming does not exceed a certain temperature limit. The global warming that is currently observable results from anthropogenic greenhouse gas emissions being released into the Earth’s atmosphere. In order to prevent global warming from exceeding the temperature limit that is relevant under constitutional law [...], it is necessary to stop further greenhouse gas concentrations from accumulating in the Earth’s atmosphere. This is because, as things currently stand, greenhouse gas concentrations and the resultant global warming that leads to climate change are largely irreversible. The main onus is therefore on measures to reduce greenhouse gas emissions. Once the constitutionally relevant limits of global warming have been reached, the constitutional obligation to take climate action will make it mandatory to restrict greenhouse gas emissions to levels that have a net zero impact on greenhouse gas concentrations in the Earth’s atmosphere [...]. In this respect, Art. 20a GG is also aimed at achieving climate neutrality.”

³³ See CD (EU) 2024/1265, recital 5.

³⁴ Not highlighted in the original text

³⁵ In detail in: BVerfGE 157, 30 (138 et seq.); previously: BVerfGE 118, 79 (110 et seq.); 137, 350 (368 et seq.); 47, 378; 155, 238.

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	However, even insofar as this resolution does provide an individual protection dimension to the climate action imperative³⁶ – with regard to so-called inter-epochal safeguarding of freedom – the following still applies: “ Art. 20a GG does not however take absolute precedence over other interests. In cases of conflict, it must be balanced against other constitutional interests and principles.” ³⁷	³⁶ See BVerfGE 157, 30 (131 et seq.); in this context also: Starck, KritV 2021, 237 et seqq. (267); Koriath/Müller, Staatsrecht I, 7th edition 2024, para 360a. ³⁷ BVerfGE 157, 30 (138) with various further remarks.

D. Normative corrections in the context of potential output estimation

Union law and the Basic Law therefore generally stipulate the goals of full employment, gender equality and climate action. The question is now, to what extent these aims can and must be considered in potential output estimation. It is appropriate here to start with a few comments on the nature and consideration of objectives under Union and constitutional law (I.), before discussing eligibility for consideration in the context of German (II.) and European (III.) fiscal rules.

I. THE NATURE OF OBJECTIVES UNDER UNION AND CONSTITUTIONAL LAW

The quoted statement by the Federal Constitutional Court concerning the climate action imperative based on Article 20a GG illustrates what is generally characteristic of objectives stated in constitutional and European Union legislation.³⁸ They must be complied with as directly applicable legislation by the holders of sovereign power at whom they are addressed, and they are designed to allow the greatest possible degree of implementation. At the same time, they must also be harmonised with other provisions that apply to Union or national action.³⁹

The aim in addressing the decisive issues here *in the case of conflict* must therefore be to find an adequate balance between the Union and constitutional goals of full employment, gender equality and environmental sustainability on the one hand, and the goal of fiscal sustainability on which the European and German fiscal rules are based on the other hand. As far as such balancing of different objectives under Union or constitutional law does not take place directly on the level of primary or constitutional law, it is generally the legislator's responsibility to create such balance, and – provided that the required leeway exists – also a matter of the application of laws.⁴⁰

Union law and the constitution do not normally include any immediate obligations for *fleshing out areas of statutory law in a very specific manner*.⁴¹ The prohibition of insufficient state action is only violated if the measures taken for realising the objectives are on the whole insufficient in a legal system.⁴² Against this background it is very unlikely that a violation against the specified objectives concerning the issues addressed here exists, as potential output estimation does

³⁸ Concerning the relationship of state objectives under Union and constitutional law in general: D. Hahn, Staatszielbestimmungen im integrierten Bundesstaat 2010, p. 183 et seqq.; the statements above (C.) show that concerning the relevant evaluations in this context no fundamental differences exist between objectives under Union and national law.

³⁹ See generally: K. A. Schwarz, Staatsziele und Staatsaufgaben – Grundfragen (note) Union legislation does not include any provisions for determining the reference trajectory and net expenditure plan beyond those from these two regulations. The method for debt sustainability analysis in particular is not specified in any more detail and therefore ultimately up to the Commission to choose. This is, also in the new version, an "internally determined procedure of the EU Commission that does not constitute a legal act"¹⁴, Chapter 20 para 13: "State objectives are [...] a part of modern constitutional texts; they are legal principles and state abstract programmatic targets as *directly applicable binding constitutional law*, which must be implemented by the state which has further *political leeway* concerning the 'how' of implementation; it is decisive – and in line with their nature as optimisation requirements – that state objectives are realised as effectively as possible both legally and factually through legislation, administration and case law, without giving the state objectives a *priori* precedence over other constitutional principles or any general constitutional statements" (Original text in German; highlighted in the original text). On Article 3 TEU M. Ruffert, in: Callies/Ruffert, TEU/TFEU, 6th edition 2022, Art. 3 para 7 TEU: "As an objective it [that is the NWM standard] stipulates a *final programme* that must be realised by the Union organs and the relevant fields through coordinated policies of the Member States with regard to perceptions of the limited individual authorisations. This gives rise to a specific *hierarchy of objectives* in Union law" (Original text in German; highlighted in the original text).

⁴⁰ Concerning the role of the determination of state objectives for interpreting provisions in German law: M. Schladebach, Staatszielbestimmungen im Verfassungsrecht, JuS 2018, p. 118 et seqq. (121); concerning climate action as a state objective in Art. 20a see: GG I. Härtef, Klimaschutzverfassungsrecht: Klima-Staatszielbestimmungen im Föderalismus NuR 2020, p. 577 et seqq. (578): "For the legislator, Article 20a GG has the effect of a call for action, for the executive power it guides interpretation and consideration in applying standards pursuant to ordinary law, and for the judicial power it also has a guiding effect for interpreting norms in the context of monitoring administration and in reviewing discretionary and planning-related decisions." (Original text in German).

form a possible starting point for realising the goals of full employment, gender equality and environmental sustainability, it is hardly the only possible one within the legal system.

However, as far as *scope of interpretation* exists in ordinary law, as considered below, it should be possible to demand that value judgments are adequately considered there.⁴³ The following approach should also be relevant here, which has been detailed in Union law in particular: a *prohibition of frustration* is also inherent to legal objectives. This means that rules or measures can turn out to be unlawful if they provide for incentives that explicitly counteract the objectives.⁴⁴ An example of this type of case would be fiscal rules that make it necessary to ignore positive effects of labour, equality or climate action measures in the medium term, thus creating misplaced incentives.

What appears even more important to me in the relevant context here is, however, this: where objectives under Union or constitutional law are *not in conflict with* other values in the first place, they must be considered in legislation and the application of law to the greatest extent possible. If it can therefore be demonstrated that reforms or investments in the areas of employment, gender equality or environmental sustainability will also contribute to fiscal sustainability in the medium term, these must not be left unconsidered in an assessment.

The decisive question for a closer inspection of German and European fiscal rules therefore has to be, to what extent a consideration of the evaluations of Union and constitutional law outlined here (1) is already aimed at the primary or constitutional law level, (2) is brought about through the structure of ordinary law, or (3) facilitated in the context of the application of laws.

⁴¹ See also: K. A. Schwarz, Staatsziele und Staatsaufgaben – Grundfragen (note-Union legislation does not include any provisions for determining the reference trajectory and net expenditure plan beyond those from these two regulations. The method for debt sustainability analysis in particular is not specified in any more detail and therefore ultimately up to the Commission to choose. This is, also in the new version, an “internally determined procedure of the EU Commission that does not constitute a legal act”¹⁴), Chapter 20 para 13: “prinzipielle Handlungspflicht”

⁴² In view of Art. 20a GG see, for example: D. Murswiek, in: Sachs, Grundgesetz, 10th edition 2024, Art. 20a para 17: “This gives rise to further leeway for the legislator in the context of which the [i.e. specific, MWM] realisation of the state objective is not actionable.” (Original text in German).

⁴³ See above note II. Gender equality in the labour market.

⁴⁴ For Union law coherence requirement according to Art. 7 TEU, for national constitutional law of Art. 20a GG: BVerfGE 157, 30 (155, para 225), regarding the Federal Republic’s international action: “Since Art. 20a GG also includes an obligation to reach the climate goal through international cooperation, Germany’s contribution in this regard must be determined in a way that promotes mutual trust in the willingness of the Parties to take action, and does not create incentives to undermine it”: on this question more broadly: R. Weber, Anreize trotz Verbots? Das Verhältnis von Klimaschutzinstrumenten im EU-Recht am Beispiel von CO₂-Abscheidung und -Speicherung, EurUP 2022, p. 422 et seqq. (425 et seq.); M. W. Müller, Konditionalität, Chapter 14 II.

II. BASIC LAW

As previously established by Stefan Koriath and myself, the Basic Law includes – in the classifications of Art. 109 (3), Art. 115 (3) GG as well as by referring to “cyclical developments that deviate from normal conditions” – a number of indications at the constitutional level for consideration of evaluations in formulating the cyclical component.

The fact that the cyclical component is described as an exception from the general prohibition of new debt, initially suggests that its

application must remain limited in such a way “that it does not ultimately lead to permanently permitted new debt”.⁴⁵ The distinction between the cyclical component and exceptions in the event of emergencies gives rise to the following: “Natural disasters and emergencies must be isolated unforeseeable events, while the cyclical component refers to fluctuations that are to be expected as a normal part of business life.”⁴⁶

The resulting framework allows for the term “Normallage” (“normal conditions”, i.e. „normal“ GDP) – which according to the interpretation of the constitution-amending legislator must not be used synonymous with the previously used term “macroeconomic balance”⁴⁷ but must allow for the creation of a new benchmark⁴⁸ – to be outlined as follows: “normal conditions” are on the one hand not “ideal conditions” but they must actually be attainable;⁴⁹ due to the fact that the cyclical component “aims for symmetrical consideration of the actual⁵⁰ impact of a development deviating from normal conditions,” the term “Normallage” („normal“ GDP) must be used to depict actual cyclical fluctuations.⁵¹

The term „normal“ GDP does, on the one hand, explicitly account for dependency on evaluation: „normal“ GDP are not “actual conditions” i.e. they “must always be specified – in consideration of evaluations – as they differ from the current actual situation”.⁵² Against the background of the cyclical component’s exceptional nature, this deviation must, of course, be considerable; „normal“ GDP forms a “corridor,” “in which it is not the case that any deviation, no matter how small, allows for incurring debts”.⁵³

What does this mean with regard to the eligibility for consideration of the objectives of full employment, gender equality and climate action? Initially and as a starting point: as constitutional objectives they are generally on the same level as the obligation to ensure a balanced budget according to Article 109 (1) GG – they must therefore be realised within the existing financial framework; any additional leeway must – as has in part been done in the context of Art. 109 (3)(5), Article 143h GG – be opened up by the constitution-amending legislator.

However, realisation of the objectives can be included in the interpretation of the term “Normallage” („normal“ GDP). This type of interpretation is based on the one hand on the statements above concerning the difference between normal and actual conditions. On the other hand, it can build upon sociological concept formulation

⁴⁵ Koriath/Müller, Verfassungsrechtlicher und einfachgesetzlicher Rahmen (note 2), p. 7 with reference to R. Schiller, Die verfassungsrechtliche Begrenzung der Staatsverschuldung, 2013, p. 104 et seq.

⁴⁶ S. Koriath, Die Schuldenbremse – reparaturbedürftig?, ifo-Schnelldienst 4/2021, p. 21 et seqq. (22); Koriath/Müller, Verfassungsrechtlicher und einfachgesetzlicher Rahmen (note 2), p. 7.

⁴⁷ BT-Drs. 16/12410, p. 7.

⁴⁸ Koriath/Müller, Verfassungsrechtlicher und einfachgesetzlicher Rahmen (note 2), p. 8; C. Seiler, Konsolidierung der Staatsfinanzen mithilfe der neuen Schuldenregel, JZ 2009, p. 721 et seqq. (724); R. Schmidt, Die neue Schuldenregel und die weiteren Finanzthemen der zweiten Föderalismusreform, DVBl 2009, p. 1274 et seqq. (1279); K. von Lewinski, Article 115 Act 2012, § 5 G-115 para 5; alternative view: C. Lenz/E. Burgbacher, Die neue Schuldenbremse im Grundgesetz, NJW 2009, p. 2561 et seqq. (2563) with reference to past case law of the Federal Constitutional Court BVerfGE 79, 311 (334); 119, 96 (138).

⁴⁹ C. Lenz/E. Burgbacher, Die neue Schuldenbremse im Grundgesetz, NJW 2009, p. 2561 et seqq. (2563); C. Seiler, Konsolidierung der Staatsfinanzen mithilfe der neuen Schuldenregel, JZ 2009, p. 721 et seqq. (724); Koriath/Müller, Verfassungsrechtlicher und einfachgesetzlicher Rahmen (note 2), p. 8.

⁵⁰ See also indications in literature suggesting that the cyclical component is about “symmetrical consideration” of the (actual) impact, not about “symmetrical impact”, see: E. Baumann/J. Schneider, Die neue Regel des Bundes, in: C. Kastrof et al. (publisher), Die neuen Schuldenregeln im Grundgesetz, 2010, p. 89 et seqq. (103); R. Wendt, in: P. M. Huber/A. Voßkuhle, von Mangoldt/Klein/Starck, GG, 7th edition 2018, Art. 115 para 40; Koriath/Müller, Verfassungsrechtlicher und einfachgesetzlicher Rahmen (note 2), p. 9.

⁵¹ Koriath/Müller, Verfassungsrechtlicher und einfachgesetzlicher Rahmen (note 2), p. 9; H. Pünder, in: W. Höfling (publisher), Berliner Kommentar zum Grundgesetz, 30th EL 2010, Art. 115 para 97; C. Mayer, Greift die neue Schuldenbremse, AöR 136 (2011), p. 266 et seqq. (278 f.); C. Seiler, Konsolidierung der Staatsfinanzen mithilfe der neuen Schuldenregel, JZ 2009, p. 721 et seqq. (724); H.-G. Henneke, in: H. Hofmann/H.-G. Henneke (publishers), Schmidt-Bleibtreu/Hofmann/Henneke, Basic Law, 14th edition 2018, Art. 109 para 140: “Rule symmetry”.

⁵² Koriath/Müller, Verfassungsrechtlicher und einfachgesetzlicher Rahmen (note 2), p. 8, with reference to W. Heun, in: H. Dreier (publisher), Basic Law, 3rd edi-

of the idea of normality. A statement by the German Ethics Council in particular explains that the term normality always features a normative dimension: “Normality is not a purely empirical category; it is [...] (also) an expression of normatively impacted normalisation processes.”⁵⁴ “Constructing or at least defining” normality⁵⁵ also gives rise to or solidifies rules-based expectations.⁵⁶ This so-called “normalisation” adds its own normative dimension to the concept of normality.⁵⁷ This must be the case in particular when the legislator itself – as is the case with „normal“ GDP – is using the term normality. This means that, conversely, it must also be demanded that a legal understanding of normality in particular takes such expectations into account, which have already been subject to normative solidification. “Normalisation processes” that are reflected in political implementation of constitutional objectives should therefore also be considered when forecasting „normal“ GDP.

The existence of a constitutional objective alone does not suffice for assuming that a full realisation of it is part of the „normal“ GDP, owing to the relationship between the rule and its exceptions concerning the prohibition of new debt and the cyclical component, the reference to the actual economic situation, and the differentiation from merely imaginary ideal conditions.

However, if the legislator does take measures aimed at realising these objectives, the expected effects must also be considered when outlining the „normal“ GDP. Simple forward projection of a past reality for the future would constitute failure to acknowledge not only the dependency on evaluation of the concept of „normal“ GDP, but also the objectives from Basic Law and their realisation by the legislator.

With regard to the Basic Law, the question posed at the start of this section can therefore be answered inasmuch as the constitution and provisions for potential output estimation in ordinary law do indeed not explicitly address the outlined questions related to evaluation, they do, however, prove to be open for an interpretation that would allow for adequate consideration. Given the importance of the question, however, an explicit statutory provision, appears favourable.

tion 2018, Art. 115 recital 33: “The role of nominal conditions is not purely a matter of statistics.” (Original text in German).

⁵³ Koriath/Müller, Verfassungsrechtlicher und einfachgesetzlicher Rahmen (note 2), p. 8 (Original in German) with reference to M. Heintzen, in: J. A. Kämmerer/M. Kotzur (publishers), von Münch/Kunig, Basic Law, 7th edition 2021, Art. 109 para 42.

⁵⁴ German Ethics Council, Normalität als Prozess, impulse paper, 16.10.2024, p. 7.

⁵⁵ German Ethics Council, Normalität (note Union law and the constitution do not normally include any immediate obligations for fleshing out areas of statutory law in a very specific manner.⁴¹ The prohibition of insufficient state action is only violated if the measures taken for realising the objectives are on the whole insufficient in a legal system.⁴² Against this background it is very unlikely that a violation against the specified objectives concerning the issues addressed here exists, as potential output estimation does form a possible starting point for realising the goals of full employment, gender equality and environmental sustainability, it is hardly the only possible one within the legal system.), p. 18.

⁵⁶ See also C. Braunmühl, Normalisierung versus Normativität? Dem konstitutiven Außen Rechnung tragen, Gender 2018, p. 136 et seqq. (148).

⁵⁷ From a jurisprudential perspective: I. Augsberg, Die Normalität der Normativität, JZ 2020, p. 425 et seqq. (427): “Normality is not a mere description of empirical circumstances from this perspective. It is an attribution used to imagine a certain social status and meant to create it as such” (Original text in German; not highlighted in the original text).

III. EUROPEAN FISCAL RULES

The primary law foundations suggest, also in Union law, that there is some leeway with regard to economic and budgetary policy monitoring which could, at the same time, allow for integration of the realisation of employment, gender equality and sustainability goals that are

also outlined in primary law: evaluation of the Member States’ economic policy measures takes place pursuant to Article 121 (3) TFEU as part of an “overall evaluation”;⁵⁸ this suggests that the realisation of objectives from Union law are also acknowledged. For the event that the reference values stated in Article 126 (2) TFEU in conjunction with Prot. No 12 are exceeded, Article 126 (3) TFEU provides that “all other relevant factors, including the medium-term economic and budgetary position of the Member State” must be taken into account. This, too, should include realisation of the economy-related objectives of the Union at least to the extent that these impact the economic and budgetary situation of the Member State concerned in the medium term. Article 126 (6) TFEU further provides that it must be checked as part of the further deficit procedure whether an “excessive deficit” exists. The term “excessive deficit” is an indeterminate legal concept that is open for interpretation, especially in view of evaluations under Union law. In consideration of the purpose of the provision it must be determined here whether the Member State’s deficit is sustainable in the medium term. Projects that aim to improve the labour market situation or sustainability in the medium term can and must be considered in this assessment.

The arrangement at the regulation level initially suggests some leeway, too, which could be utilised in view of the outlined evaluations. This applies in particular to acknowledgement of the required explanations about the implementation of reforms and investments in the context of the “common priorities of the Union” for national medium-term fiscal-structural plans pursuant to Article 13 (c) Regulation 2024/1263. These include “a fair green and digital transition, including the climate objectives set out in Regulation (EU) 2021/1119,” “social and economic resilience” and the related possibilities for an extension of the adjustment period (Article 14 Regulation 2024/1263)⁵⁹ and presentation of revised national medium-term fiscal-structural plans (Article 15 Regulation 2024/1263). Article 2 (3) Regulation (EC) No 1467/97 as amended by Regulation 2024/1264 also mentions “progress in the implementation of reforms and investments” in view on the report pursuant to Article 126 (3) TFEU.

It can, however, be seen that all of this does not discharge those Member States with a reference trajectory in the sense of Article 5 Regulation 2024/1263 from reviewing whether the net expenditure path complies with the requirements of Articles 6–8 Regulation 2024/1263.⁶⁰ Article 3 (4) Regulation (EC) No 1467/97 as amended by Regulation 2024/1264 also refers to the net expenditure correction

⁵⁸ See also: *M. Schulte*, in: *von der Groeben/Schwarze/Hatje, Europäisches Unionsrecht*, 7th edition 2015, Art. 121 para 42.

⁵⁹ See also: *Fremerey et al. (note 11)*, p. 11 et seq.

⁶⁰ *Fremerey et al. (note 11)*, p. 11 et seq.

path – which is in turn based on the reference trajectory –⁶¹ for the Council’s recommendations pursuant to Article 126 (7) TFEU.

⁶¹ See B.I. above

However, this has the following consequence: an effective consideration of reforms and investments that are geared towards implementing the outlined objectives under Union law is only possible if these can also be reflected in the guidelines for a reference trajectory pursuant to Articles 6–8 Regulation (EU) 2024/1263, and ideally in its determination by the Commission according to Article 5 Regulation (EU) 2024/1263. Uncertainty does, of course, exist in this regard. This is due to the fact that Article 6 Regulation (EU) 2024/1263 explicitly assumes the expectation “that there are no further budgetary measures”. This wording could be interpreted as the legal basis for a *no-policy-change* assumption. What does, however, speak against this interpretation in my opinion, is the fact that while the regulation does bring together economic and budgetary questions, it also distinguishes them conceptually (see in particular recital 3 of the regulation). With regard to evaluation, a limitation of the assumption from Article 6 Regulation (EU) 2024/1263 to budgetary measures in a narrower sense, is supported by the monitoring procedure’s goal to work towards budgetary corrections and the fact that it would be at the expense of the Member State concerned if their effects were already considered in the reference trajectory. Conversely, matters and recommendations related to economic policy are in deed part of the European Semester, but not of the recommendation that is linked to a special budgetary situation of the Member States.

This means that there is much to suggest that a no-policy-change assumption should not necessarily be made in the context of determining the reference trajectory, but that those economic policy and socio-political reforms and investments should be included in the consideration, which will have an effect on the budgetary situation of the Member State concerned in the foreseeable future. The outlined deliberation is further reinforced in terms of value by the fact that evaluations under primary law concerning the central questions here are also reflected in the regulator’s recitals, as outlined above.

The Regulation also contains reference points for the *timescale*: it requires the Member States to prepare medium-term structural plans, mentioning a “period of four or five years” for implementation,⁶² while Article 14 (1) Regulation 2024/1263 provides for the option of an extension of the adjustment period by up to three years. The reference trajectory according to Article (5) Regulation 2024/1263 is also meant to cover “an adjustment period of four years and its

⁶² See recital 22 Regulation 2024/1263.

possible extension by up to three years pursuant to Article 14”. The impact of measures to implement the socio-political and sustainability policy objectives referenced in the Regulation should then also be considered when determining reference trajectories and expenditure paths.

Based on the concept developed here, Article 6 Regulation (EU) 2024/1263 should therefore be understood and applied in a manner that provides for the realisation of economic, socio-political and environmental policy objectives by the Member States to be acknowledged by the Commission when determining the reference trajectory, provided such activities have a medium-term impact on debt sustainability and deficit resilience.⁶³ If this understanding is assumed, the European fiscal rules do not provide for a reference point for a full *no-policy-change* assumption, even based on the current state of law.

Article 6 Regulation (EU) 2024/1263 does meanwhile not cover any more extensive limitations, based on which also medium-term restrictions of debt sustainability and deficit resilience would have to be accepted for pursuing the Union’s employment, gender equality and sustainability policy objectives. In view of the budgetary policy objectives of Article 126 TFEU, these also do not appear imperative based on the above statements. They would need to be negotiated at the legal policy level.

However, the following does generally apply also with regard to Union law: based on the interpretation proposed here, the provisions under primary and secondary law prove to be open to evaluation; the outlined objectives can and must be considered in the context of their application. Owing to the described uncertainties, a plea must be made for an explicit secondary-law provision also here. The legal-policy issue of a resolution of any conflict of objectives should also be considered when drawing up this type of provision.

⁶³ For a calculation in view of climate policy measures see: *Philippa Sigl-Glöckner/Janek Steitz/Vinzenz Ziesemer, The baseline is wrong. How debt sustainability analyses used in the EU ignore climate change*, 25.4.2025, available at: <https://dezernatzukunft.org/wp-content/uploads/2025/04/Ziesemer-2025-The-baseline-is-wrong.pdf>.

E. Recommendations

I. AT THE UNION LEVEL

1. When developing the country-specific reference trajectories, the European Commission should consider any changes that are the result of the effects of implementation of Union goals and values in national law. Owing to the limitation of the debt sustainability analysis to economically measurable effects, this approach may be limited, based on the current state of law, to such effects that can be calculated for the medium term based on projects that have already been implemented.

2. In the context of a reform of the European fiscal rules, the consideration of employment policy and socio-political questions and those related to climate action, which is already mentioned in the recitals, should be provided for more clearly in the provisions on determining the reference trajectory and net expenditure path. A provision should be promoted that at least includes economically measurable effects of approved projects in the consideration. Also, a provision that relaxes the budgetary policy requirements if socio-political, employment or climate policy objectives of the Union are addressed in a credible and sustainable manner could be considered.⁶⁴ In this way, EU law could contribute to balancing fiscal sustainability on the one hand, and social and environmental sustainability on the other hand. A precise drafting of such provisions would require in-depth discussion with involvement of economical and legal expertise.

⁶⁴ A demand that goes in the same direction can be found here: *Fremerey u.a.* (note 11), p. 16.

II. AT THE MEMBER STATE LEVEL, IN PARTICULAR IN VIEW OF THE FEDERAL REPUBLIC OF GERMANY

3. The Member States should work towards a consideration of reforms and investments in the context of their national medium-term structural fiscal plans according to Article 3 (3), point (c) Regulation (EU) 2024/1263, in line with the standards outlined above. Based on the current state of secondary law, they are in particular encouraged to portray the impact which reform and investment projects have on medium-term debt sustainability and deficit resilience.

4. It is also against the background of constitutional requirements for potential output estimation under national law that the Federal Republic should promote a consideration of the impact of employment, gender equality and sustainability policy reforms and investments as

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	part of the European procedure. If this should not succeed, the further reform debate in Germany should consider disconnecting the cyclical component under national law from the Union methodology and creating a clear provision for the cyclical component including a description of its normative elements.⁶⁵ This would not represent a breach of Union law if the Federal Republic generally complies with the Union cooperation duties and deficit limits, which it is also constitutionally required to do according to Article 109 (2) GG.	⁶⁵ Addressed previously in Koriath/Müller, Reformpotential (note 2), p. 356



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