The EU at a Crossroads

The EU at a Crossroads:

Challenges and Perspectives

Edited by

Despina Anagnostopoulou,
Ioannis Papadopoulos
and Lina Papadopoulou

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PREFACE AND ACKNOWLEDGMENTS

We are pleased to publish this volume of pan-European research papers, which were presented at the Doctoral Colloquium '1st Jean Monnet Chair Pan-European Forum of PhD Candidates and Young Researchers on EU Legal Studies', under the title 'The EU at a Crossroads: Challenges and Perspectives'.

Europe is at a crossroads. It is an undeniable fact that the EU faces multiple crises, not only in the economic and banking sector, but also in tackling the refugee and humanitarian crisis, in its complex decision-making, and in its democratic functioning. This fact has led to an increasing Euroscepticism that haunts the member states. Though this situation is difficult, it offers a lot of food for thought and research. Young PhD researchers have started researching all these processes all over the EU, and have eagerly responded to our call for papers.

The Doctoral Colloquium was organised as a joint event of two Jean Monnet Chairs established in Thessaloniki, Greece, at two different Universities: a) the Jean Monnet Chair for 'New Dimensions in European Legal Studies' at the Department of International and European Studies of the University of Macedonia, and b) the Jean Monnet Chair for 'European Constitutional Law and Culture' at the Law School of the Aristotle University of Thessaloniki.

The Colloquium could not have been realised without the support of the Lifelong Learning Programme 2007-2013 of the European Commission.

The aim of this Doctoral Colloquium was to establish a forum of discussion on the state of affairs and the vital issues of the European integration process. It consisted of a panel of PhD researchers in European studies, and a panel of experienced University professors, the 'Advisory Scientific Committee'. Their common goal was to explore new and multi-dimensional prospects of European integration, and to provide possible insights or solutions on cutting-edge research questions and controversies

After the publication of the call for papers, thirteen young PhD researchers were selected to present a part of their research in the Colloquium. We thank them for their participation and the preparation of their contributions, and also for their acceptance of the corrections we have suggested as editors.

We would also like to thank our collaborators for their support in organising the event: the University of Macedonia, the Law School of the Aristotle University of Thessaloniki, the 'Europe Direct' Office at the American Farm School, the 'European Law Students Association' in Thessaloniki, Greece, and the 'Jeunes Fédéralistes'.

We express our gratitude to our panel of experienced researchers: Miguel Gardeñes Santiago, Profesor Titular at the Universitat Autonoma de Barcelona, Spain, Vassilis Hatzopoulos, Professor at the Democritus University of Thrace, Greece, and Iosif Ktenidis, Associate Professor at the Aristotle University of Thessaloniki, Greece. They were the members of the Advisory Scientific Board of the Colloquium, who attended the Colloquium and asked questions to the young researchers after their presentation.

We are also grateful to our keynote speakers: Panayiotis Kanellopoulos, Professor Emeritus, Jean Monnet Chair, University of Piraeus, Greece, Damian Chalmers, Professor at the London School of Economics, UK, Miguel Gardeñes Santiago, Professor Titular at the Universitat Autònoma de Barcelona, Spain, Iuliia Mokshina Sushkova, Dean of the Law Department, Ogarev Mordovia State University, Saransk, Russian Federation, and Vassilis Hatzopoulos, Professor at the Democritus University of Thrace, Greece, Visiting Professor at the College of Europe, Bruges, Belgium.

We would like to thank the one-year trainees of the Jean Monnet Chair at the University of Macedonia, Dimitrios Kaloutsikos, Efrosyni Iliopoulou, Nefeli Douma and George Boskos, for helping us with the organisation of the colloquium. We are also grateful to the following short-term trainees of the same Jean Monnet Chair: Alexandros Doumias, for editing the Youtube presentations, as well as Aikaterini Nikita and Mario Tsekoski, for assisting us with editing the footnotes of the volume upon our instructions. Ms Theofano Mantzari, PhD researcher at the Department of International and European Studies of the University of Macedonia, Thessaloniki, Greece, has undertaken proofreading of parts of the draft book with great diligence. Last but not least, we would like to thank Ms Chrysothea Basia, PhD researcher at the same Department, for her outstanding work in reviewing the correct use of English legal terminology and the homogeneity of the whole text.

Thessaloniki, August 2016

—The Organizing Committee and Co-Editors of the Volume

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STRUCTURE OF THE BOOK

The title of this collective volume refers to the multilevel crisis of the European Union (EU) and the dilemmas regarding its future.

The chapters are organized in four parts. The first part of the book deals with certain constitutional issues of the EU, namely multilevel democratic governance, gender equality, and participatory democracy, and focuses on the impact of the crisis on them. The second part analyses public governance problems, with reference to urban planning as a new policy for the EU, state aid and privatization of public companies, corporate governance principles for public companies, and the EU case law on freedom of establishment of companies. The third part discusses certain issues of the EU internal market and external trade, namely the Europeanisation of labour relations, the relation between EU environmental law and international agreements, the dilemma between regionalism and multilateralism in international trade law, and the Eurasian Economic Union. The fourth part of the book deals with the different perspectives of the Eurozone crisis using as tools political philosophy, economics, political science, administrative science, and law.

The opening chapter of the first part is the introductory speech by *Professor Panayiotis I. Kanellopoulos*, who points out the important achievements of the European Union, e.g. peace, prosperity and solidarity, using as examples the European Welfare State, the internal market and the common currency. He makes a historical trajectory emphasising the stages that the European integration process has passed through. His main point is that globalisation and intense international competition have changed the context of the European integration and have transformed EU policies. The context change has been achieved both by rendering WTO the actual supervisory authority of the markets and by obliging the EU to sacrifice the European Welfare State and social rights in order to reduce production costs. According to his opinion, the fifth EU enlargement in 2004 created many problems in the EU's cohesion because of the varying degrees of productivity and competitiveness between Northern and Southern Europe, which eventually put in doubt the future of the EU monetary union. Putting everything into perspective, Professor Kanellopoulos is confident that the EU will overcome the crisis if it takes new initiatives, and evolves into its final form, that of a federal state.

Cătălina Antonie aims to explore the complexity of the European institutions and the way they treat the decision-making process based on the enormous interactions that occur in the EU. She uses complexity theory for an interdisciplinary approach of the structural model and the informational process of the EU, seen as a complex adaptive system with interconnected activities and interdependent actors. Antonie discusses the Europeanisation process and the general tendency of the administration to transit from the traditional model of government to the model of governance. She analyses the relevance of the 'New Public Management' model for the understanding of national administrations in the EU, and she describes the basic characteristics of the European public administration system and its interrelations with the several national administrative systems. For Antonie, the improvement of the decisional process can be achieved by focusing on the main features of complexity theory and the properties of a complex adaptive system, such as interconnectivity, interdependence, nonlinearity, co-evolution, and cooperation. For the author, the national administrations have a pertinent and complex influence upon the EU decisional process, being important participants, or agents, to all the decisional levels and in all the steps of the policy cycle. This chapter attempts to answer how the European institutions could change their decisions and proceed with innovations using the continuously developing complexity theory.

Livia di Pietro examines the equality of men and women, an EU constitutional value, which has not been upheld by the EU in all cases, particularly in the case of gender violence. She focuses on the legal regulation of the various manifestations of gender violence in the Spanish legal system with the support of EU law. In the Spanish welfare state, the need for real and effective equality requires that the legislator establishes positive actions when, in specific areas of social reality, men and women are not on a par with each other. In the case of gender violence, the imbalance lies in the fact that it is mostly perpetrated by men against women. At the EU level, it has been established that member states shall take into account the objective of equality between women and men when formulating and implementing laws, regulations, and public policies, including measures against gender-based violence (*gender mainstreaming*). Likewise, issues related to gender violence, such as harassment related to the gender of a person and sexual harassment at the workplace, have been regulated by the EU. The Istanbul Convention can also be used against domestic violence in Spain and EU, since it has been ratified by all EU member states in the framework of the Council of Europe. However, since the EU has no competence in such punitive

matters, binding EU legislation on gender violence is lacking. The author argues that legislation including all forms of violence against women needs harmonisation at the European level, so as for member states to adopt specific regulations on the matter. By doing so, an equivalent level of protection for all victims in EU member states would be ensured, and the European Protection Order would operate with greater efficiency.

In his keynote speech, *Professor Ioannis Papadopoulos* describes in detail all the stages of development of the only hitherto successful European Citizens' Initiative (ECI) 'Right2Water' and the reactions of the EU institutional players. Despite the seemingly positive assessment of the European Commission, the stakeholders of the 'Right2Water' initiative themselves remained skeptical, if not directly dismissive, in relation to the planned actions the Commission announced at the follow-up stage, since these actions did not demonstrate the Commission's serious commitment to take a specific legislative initiative. Papadopoulos analyses why one and only, until now, ECI has managed to overcome all the procedural hurdles wrought by EU law and to obtain the Commission's approval. The author argues that the form of a *quasi-judicial reasoning* that the European Commission has used in its follow-up Communication aims to give the impression that the Commission responds only in a *technocratic* fashion to civil society bottom-up calls for a legislative initiative. This fact confirms that the Commission uses strategically this new institution of participatory democracy as a means of enhancing its own institutional influence, and at the same time of strengthening the democratic legitimacy of the EU institutional structure as a whole. However, the simultaneous effort of the European Commission to solidify the ECI as a tool of participatory democracy and to preserve the exclusivity of legislative initiative for itself seems to impinge on, rather than increase, its institutional prestige, and more generally the democratic legitimacy of the Union. In addition, Papadopoulos points out the ambiguity surrounding the nature of this new tool: is it, after all, an agenda-setting tool that poses issues for discussion in the EU political agenda, or is it a part of the right to legislative initiative? He focuses on the institutional tension exercised by the civil society and the European institutions that are the closest to citizens (European Ombudsman, European Parliament). Papadopoulos suggests changes that can make the ECI more functional as a tool of participatory democracy at the follow-up stage of those initiatives that have successfully received at least one million signatures, so that the EU can avoid the legitimisation crisis that plagues Europe lately.

The second part of the book begins with a chapter on the Europeanisation (or not) of urban planning law, which is a sector of

national public law. *Adamantia Zisopoulou* argues that there is an informal urban planning policy already established in the EU as a continuation of the European urban planning history. She explains the reasons for its development and the influence of the existing EU policies on urban planning using arguments based on social urban theories. She emphasises the importance of the European city as a 'complex system of human activities' (social city), which contributes decisively to European integration. The author admits that there was no explicit competence of the EU in the field of urban planning. However, during the last two decades, the EU shows its intention to develop an urban policy on morphology and functions of the European Cities, based mainly on the environmental and energy policies. The EU also recognises the urban environmental degradation as a negative factor affecting residents' life quality and health. Even though the EU has delayed the development of an urban agenda due to the lack of a sound legal basis, the concept of territorial cohesion, included in the Lisbon Treaty, may constitute such a legal basis for the implementation of urban interventions and for enhancing national, regional and local urban policies. The development of a truly common European urban policy becomes all the more relevant in view of increasing inequalities within the EU and, most importantly, the pressing housing needs caused by the ongoing migration crisis.

Ilektra Antonaki explores the politically sensitive issue of the privatisation of public utilities. This chapter traces the legal vicissitudes of the debate in the EU over privatisation versus nationalisation of public utilities and companies of a strategic interest. The first section gives a brief overview of how the emergence of Europe's economic constitution encouraged the policy of privatisation and sought to diminish the public sector in Europe, while at the same time trying to safeguard some core social values. The second section focuses on Article 345 TFEU and the case law of the Court of Justice of the European Union, which has adopted a broad interpretation of 'restrictions' to free movement of capital, prohibiting any national rule liable to affect market access of foreign investors. This can be evidenced in the 2013 *Essent* judgment, where the Court held that the prohibition of privatisation of the Dutch electricity and gas distribution system operator infringed the free movement of capital, despite the fact that in principle the EU should remain neutral with respect to national property ownership systems under Article 345 TFEU. She attempts to resolve the conflict between the free movement of capital under Article 63 TFEU and the discretion of the member states to determine their property ownership systems under Article 345 TFEU. She develops an interpretative scheme based on the different approaches that

have been adopted by the Court and certain legal scholars, which demonstrate the degrees of acceptance of state interventionism in the market: (1) the shield interpretation (divided into the 'maximalist shield' and the 'reductionist shield' interpretations), according to which Article 345 TFEU shields or exempts the property ownership rules from the Court's internal market scrutiny, and (2) the sword interpretation, according to which Article 345 TFEU does not necessarily mean that national property ownership choices are not subject to the fundamental rules of the Treaty. The author attempts to address the broader question of reconciling capital liberalisation with a 'highly competitive social market economy', an objective of the EU under Article 3(3) TEU encapsulating the fundamental coexistence of free competition and social justice.

Ciprian Drumașu discusses the Corporate Governance (CG) model as a leadership and coordination method for public sector entities. CG can serve as a best practice for the EU public sector governance in its quest to prevent cases of fraud, bribery and poor management of public funds. The author analyses CG based on specific international standards originating from the private sector; he analyses the main CG characteristics of the model for private companies (Internal System Control, Risk Management, Internal Audit and External Audit), and proceeds to the analysis of CG characteristics implemented in the public sector of the EU member states. He describes the Public Internal Control (PIC) Network, made up of the European Commission and Internal Control specialists of all EU member states, and the implementation of the 'Compendium of the public internal control systems in the EU member states 2012', a common framework for the solutions used by some EU member states on the PIC, risk management, accountability arrangements, internal audit and external audit. Topics such as an Optimal Internal Control environment and a Central Harmonisation Function for all public entities are novel approaches to the challenge that the EU is facing regarding sound public administration in all member states. He argues that the benefits of CG in the short, medium and long term are important, and that this leadership and control model can become a new governance method for public bodies in the European Union member states and a viable solution for the key problems it is faced with.

In his keynote speech, *Professor Miguel Gardeñes Santiago* makes certain critical remarks on the ECJ case law on freedom of establishment of companies, from *Daily Mail* (1986) to *KA Finanz AG* (2016), focusing mainly on the *Centros* case (1999). His aim is to demonstrate the impact of that case law on private international law of companies in the EU. The author first explains Article 54 TFEU and its importance to the underlying

problem of company taxation and regulatory competition. He presents the dogmatic error in the *Centros* judgment, in which the ECJ ruled that a company is allowed by EU law to incorporate in a member state where it does not undertake its main economic activity. In his opinion, the ECJ seems to confuse the right of the founders to form a company and the freedom of establishment of the company itself to establish branches. He endorses the view that as nationals of a member state would not be established unless they had their main economic activity in the member state of establishment, the same had to be true for companies, though the *Centros* judgment has ruled otherwise. He then discusses the phenomenon of pseudo-corporations and the risk of their being sued in a member state where they do not exercise their main economic activity. He also emphasises the limits imposed by the ECJ case law on the prevention or sanction of fraud and the abuse of the freedom of establishment, pointing out at the *Inspire Art* judgment, where the ECJ has maintained an ex post approach on a case-by-case basis. He however argues that also national preventive measures could be considered as compatible with Article 54 TFEU in order to prevent fraud and abuse of the freedom of establishment. Professor Gardeñes Santiago explains the ECJ's apparent deference towards the law of the member state in which the company is incorporated. He argues that this 'incorporation model' is what the ECJ recognizes in principle as the *lex societatis*, and he analyses the case law regarding its scope (*Überseering, Inspire Art* and *Impacto Azul Lda*). He cautions prudence, since the ECJ decides on a case-by-case basis, and suggests the intervention of EU legislation in order to achieve more clarity on which issues are governed by that law. He then proceeds with the analysis of the Court's reconciliation with the 'real seat' model and its case law on the transfer of company seat, examining the *Cartesio* and *Vale* cases. He concludes that the fact that the real seat of the company is not established in the country of incorporation may not be used by another member state in order to refuse the recognition of its legal personality. However, this requirement may be imposed by a member state as a condition that companies formed under its own law should fulfill. The EU can also impose that the member state of the real seat and the one where the main economic activity takes place are the same. He favours a narrow interpretation of the *Centros* doctrine, confined to the field of company law and limited to the formation of the company and not to its functioning. His main conclusion though is that the abovementioned case law does not impose a uniform conflict-of-laws system in the EU modelled on the state of incorporation. However, the *Centros* case has introduced the 'recognition doctrine' as an alternative method to bilateral conflict-of-laws

rules as far as the issue of the valid formation of a legal person is concerned. According to Professor Gardeñes Santiago, this doctrine should be subject to: a) the reservation of the public policy of the forum state (already applied by the ECJ as a general interest objective that may justify restrictions) and b) the condition of a sufficient link between the specific situation and the state of granting a given legal status, in order to avoid fraud. This link is not regarded as a precondition according to the liberal *Centros* approach, but the EU legislator should uphold it in future legislation.

The third part begins with the chapter written by *Vasilios Koniaris*, who analyses the nature, scope and effect of 'Transnational Company Agreements' (TCA) in the EU and their potential reinforcement towards a network-based Europeanisation of Labour Relations. Transnational Company Bargaining (TCB) has risen to become a soft tool, albeit in an embryonic stage, which aims at the involvement of social partners at the European level. Despite the intention of the European Commission to leave this area unregulated, significant challenges exist concerning the legal nature of TCB. Researchers support the opinion that the legitimisation of TCB, as a bottom-up process, can be founded on several grounds, such as Articles 115 and 152 TFEU. In the light of recent developments outside the boundaries of the EU, hypotheses tested in this paper demonstrate the existence of a significant trend towards the diversification and diminution of the traditional target of legal and contractual regulation. This seems to break down into a multitude of 'communities' or networks, whose boundaries tend to correspond to that of the multinational company. In this respect, it is expected that agents of this trend are the multinationals that operate under a European culture of Labour Relations, European Trade Union Federations that operate on sectoral or cross-sectoral levels, as well as representative associations of European employees, such as the European Works Councils. Yet, all these unions or associations have questionable legitimacy concerning their ability to negotiate on behalf of the employees of the multinational. Koniaris argues that the focus needs to shift from the legal character of TCBs towards the character of the signatories and the specification of their role and competencies. The signatories cannot be characterised as traditional trade unions, since they operate under a network context of cooperation with the management rather than defending their own conflicting interests. Koniaris concludes that TCAs pose unique challenges regarding the role of the actors involved to rebalance the equilibrium between the economic and the social aspect of the EU integration process. The concepts of the 'Euroworker' and the 'European Works Councils',

among others, are based on the European Social Model, and their scope is dual. On the one hand, they represent the interests of the workplace, and on the other hand, they contribute to the strengthening of the European integration process by creating new identities and new ethics.

Alexandros Katsanos analyses the principle of primacy of international agreements, especially on environmental protection, and its effect on their review of legality on the basis of Article 216(2) TFEU. He discusses the criteria under which the Court of Justice of the European Union recognises the direct effect of the provisions of EU international agreements, i.e. if their provisions are sufficiently clear, intelligible, precise and unconditional. He also examines the 'treaty friendly interpretation', under which the EU secondary law must also, as far as possible, be interpreted in conformity with those agreements, when the nature and the broad logic of the latter do not preclude this. He then presents the effect of GATT and WTO agreements which are based on 'reciprocal and mutually advantageous arrangements', with emphasis on the *Fediol* and *Nakajima* cases. He continues with the consistent broad interpretation of the EU association agreements, which generally can be invoked before national courts. The author discusses the so-called *Biotechnology* case (2001), where the Court decided that the lack of direct effect of a provision should not preclude the review of legality, provided that the characteristics of the international convention in question allowed it, regardless of its granting direct individual rights. However, in the *Intertanko* case (2008), the Court decided to stick to a restrictive interpretation of the United Nations Convention on the Law of the Sea (UNCLOS). It held that the Convention does not confer rights to individuals, and therefore the 'nature and broad logic' of the Convention prevented the Court from examining the legality of EU acts based on its provisions, such as agreements on the environment which serve basic goals of the European Union Treaties. The author then examines the ECJ case law on the Aarhus Convention (*Vereniging Milieudefensie* 2015), and he agrees that the Convention does not really intend to directly grant the citizens environmental rights, but rather to oblige the contracting parties to ensure such a possibility within their national legal orders. He concludes with the dilemma that the European Union will face, whether it will stick to formalities in order to preserve its autonomy, or it will find a more flexible way to integrate international law and contribute to its further evolution.

The dilemma between regionalism and multilateralism has for a long time troubled scholars and practitioners of international trade law. The specific issue has been increasingly gaining importance, especially taking into account the ongoing economic recession and the constant alterations

in the field of international trade. *Stefanos Katsoulis* analyses the divergent views expressed in international scholarship, and concludes that both regional and multilateral trade entails advantages and disadvantages, rendering obsolete the debate over the prevalence of one theory over the other. Katsoulis argues that the provisions of the Agreement Establishing the WTO, in combination with Article XXIV of GATT, as well as with the Trade Policy Review Mechanism and the Dispute Settlement Mechanism, comprise the institutional base for the transformation of regional trade cooperation within the regulatory framework of the multilateral trading system. The EU holds an outstanding position among regional trade agreements (RTAs) worldwide. It has its own international legal personality, a common currency and a single market. After having analysed the different approaches in the 'multilateralisation of regionalism', i.e. in the achievement of consistency between multilateral and regional trade, the author presents the EU as an outstanding example of a regional trade agreement. He concludes that the current challenge in international trade relations is to build a new form of multilateral trade governance based on regional cooperation, within the WTO framework and according to multilateral trade agreements. The institutional framework for progressive development in this direction already exists, but the effort will definitely need the political will by the WTO member states themselves in order to proceed with the required mutual concessions, following the example of the EU member states.

Professor Iiulia Sushkova describes the Eurasian Economic Union as an effort to preserve the best aspects of the long history of Europe and Asia and to build upon 'Eurasianism'. This is the fundamental concept for the development of modern Russia and the neighboring former Soviet Republics, with a growing role in international political and economic relations. The European Union has been a source of inspiration for the establishment of the Eurasian Economic Community (2000) and more recently of the Eurasian Economic Union (2015). Inspired by the European Union in its terminology and organisation principles, the Eurasian Economic Union provides not only free movement of goods and a common trade regime towards third countries, but also free movement of services, capital and labour, common rules and principles of competition, and the regulation of natural monopolies. Professor Sushkova analyses the institutional structure of the Eurasian Union and points out the caution in the establishment of supranational bodies and in giving them the necessary scope of authority. A future challenge for the Eurasian countries is to establish a Eurasian Parliament, resembling the European Parliament, endowed with legislative and oversight powers, and formed on the basis of

direct democratic elections. Thus, for further development of the Eurasian Economic Union, the very reasonable combination of national and supranational features of the EU should be taken into account.

The fourth part of the book begins the chapter by *Ilias Konstantinidis*. He attempts to apply the so-called civic republican political philosophy, combined with macroeconomic theories, to the unfolding Eurozone crisis. His analysis is centered on the concepts of 'citizenship', 'freedom as non-domination', and 'civic economy', that are central to civic republican thought. Konstantinidis analyses the relations between the 'individual' and the 'community', and expounds the notion of 'deliberative democracy' as a form of cooperation between institutions and civil society in favour of the 'common good', as opposed to 'direct democracy'. Drawing on the lawyer Cass Sunstein and the economist Amartya Sen, he presents the several forms of state intervention in the economy as a form of 'capacitation' of citizens so as to give them, or to restore, socioeconomic independence from domination. He also argues that consumerism is a weakened sense of citizenship. Konstantinidis connects the above philosophical analysis to the notion of 'European citizenship', as supplementary to national identities. In his analysis, he combines political philosophy, political economy and macroeconomics in his discussion of the Eurozone crisis, which he presents as a productive crisis. In such a crisis, public debt is not due to productive investments, and thus transfers costs, hurts sustainability, and decreases the living standards of the following generations with wrong investments, wrong import-export policies, over-consumption, and over-lending.

Alexandros Kyriakidis dwells on the well-documented subject of the EU democratic deficit. While the existence of the EU democratic deficit is largely accepted, scholars argue over its nature, extent and significance. Such arguments are split across two main theoretical approaches: Input and Output. The aim of this chapter is to evaluate these approaches vis-à-vis the supranational measures undertaken in relation to the Eurozone crisis. Such measures have arguably been extensive, fundamentally changing the EU and Eurozone *modus operandi*. They include a reinforced budgetary discipline, an enhanced fiscal surveillance framework, a better coordination of economic policies, but also a substantial delegation of decision-making authority from the national to the supranational level. Through extensive document analysis, Kyriakidis offers an assessment of the impact of the aforementioned reforms on the different approaches of the EU democratic deficit, in answer to the question as to which approach seems to be more consistent with this new form of the EU/Eurozone governance. While it is demonstrated that both approaches are still

relevant, subject also to their different ontological foundations, the Input aspect has been reinforced throughout the measures implemented at the supranational level against the Eurozone Crisis.

The global economic crisis represents the greatest societal challenge in the era of the globalisation of administrative systems, generating new pressure on states. In this context, there is a trend among scholars to research the effects and changes brought about by the economic turmoil, although a standardised analysis methodology in the field has not been established. The chapter by *Octavian Chesaru* represents an example of such a study. The author analyses the effects of the crisis on the administrative systems in the EU and in the member states, as well as the change processes of public administration as a reaction to new global challenges. After a critical review of the most important theories on administrative systems, the author explains what kinds of changes have been generated by the economic crisis in both objectives and vision, at the EU and national level. He explains the nature of reforms that are necessary in public administration by analysing the coordination of various change processes addressing the political, economic, social and technological challenges the EU administrative systems must deal with. He traces, as a case study, the reform trends in the EU public administration that became apparent during the economic crisis, considered as benchmark examples by the relevant literature: agencification, depoliticisation and professionalisation, reduction of administrative burdens, and development of information technology in the public sector. Chesaru then associates them with the Europe 2020 Strategy.

In the wake of the 2007-08 financial crisis the question that naturally arises is whether the European agencies created to supervise the financial activities are efficient or not. In view of the fact that the financial markets are increasingly more globalised and that states have fewer effective means to control them, the issue of the structure, competencies, and efficiency of supervising agencies becomes crucial. *Jadwiga Glanc* examines in particular the European Securities and Markets Authority (ESMA). She describes the origins of ESMA as an agency that enhances cooperation between national authorities, discusses its growing powers pursuant to a recent decision by the Court of Justice of the European Union, and confronts them with the relevant problems of the financial markets that ESMA has to face. Glanc thinks that in cases of serious financial instability, ESMA's effectiveness in protecting integrating markets may be called into question. The author concludes that given the lack of stable centralised powers and a generalised lack of political will to transfer more powers to the EU level of decision-making, further financial

integration should probably not be encouraged. Therefore, ESMA needs to temporarily postpone the vision of further financial integration in order to ensure stability.

The keynote speech delivered by *Professor Vassilis Hatzopoulos* analyses the use of EU Agencies (such as ESMA) as one of the means of the 'New Governance' model in the EU. The financial and economic crises have triggered various responses from the EU. New institutions and novel governance mechanisms have been set up. Inevitably, these have affected the so-called 'institutional balance' of the EU and have rendered previously established principles obsolete. The increasing establishment of EU Agencies is a clear manifestation of this development. The EU has been experimenting with Agencies since the mid-eighties, since they develop specific knowledge and permanent capacity on issues which are technical, scientific, sensible or complex. Agencies draw regulatory technical standards, which are eventually adopted in the form of Directives or Regulations; they also develop implementing technical standards, and they can issue guidelines and recommendations, as well as adopt individual decisions addressed to member states. EU Agencies have been flourishing, even though animosity has been developing against them, since they take away powers from national decision-making bodies. Professor Hatzopoulos presents the three waves of creation of EU Agencies, and also presents their different classification types. However, due to the *Meroni* doctrine, powers delegated to these Agencies have always been extremely limited. In order to tackle the existing crises and prevent future ones, the EU has put in place a system where financial institutions are authorised, supervised and resolved centrally; this has been a precondition for the European Stability Mechanism to operate and to bail out failed economies. These Single Supervision and Single Resolution Mechanisms have necessitated the creation of new Agencies with real decision-making powers. The Court of Justice of the EU had no other choice than to uphold the creation of such Agencies, thus revising previously established principles and, more importantly, opening up the way for new, more powerful Agencies.

—The Co-Editors
D. Anagnostopoulou
I. Papadopoulos
L. Papadopoulou

INTRODUCTION: MULTIPLE SYSTEMIC CRISES IN THE EUROPEAN UNION

IOANNIS PAPADOPOULOS*

The European Union (hereinafter EU) is at a crossroads. It will either really evolve into a federation or disband. After several years of intertwined and mutually reinforcing crises, the stakes are extremely high. The crux of the matter is the capacity for responsiveness of the EU political system in the wake of crises: the Union needs to prove that it can effectively react to the confidence crisis plaguing it, due to the widespread impression among European citizens that the sacrifices they are experiencing are not even-handedly distributed. More deeply, the EU needs to show that it still has survival and adaptation reflexes. It must convince the European citizens that it still is capable of satisfying the quest for justice, by demonstrating that it can respond to the basic demands of collective life, and that it has neither abdicated nor been captured by special interests or nationalistic agendas.

A paradox at the heart of the West

In several cases during the last years, the vote, actual or threatened, of a parliament has marked a policy shift,[1] which until not long ago seemed

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[1] Three such examples, only from the period of August-September 2013, are: firstly, the British House of Commons that refused to give approval to David Cameron's government for a military involvement in Syria to deter the Assad regime from using chemical weapons (August 2013); secondly, President Obama who decided to turn to Congress to obtain approval for the same subject, before making a turnabout and halting any military strike against the Assad regime (September 2013); and thirdly, the European Parliament that only endorsed, by a narrow majority, the decrease of the so-called 'first generation biofuels', i.e. crops

rather unthinkable. The great French political scientist Georges Burdeau analysed, in his ten-volume *Treaty of Political Science*,[2] the distinction between the 'governed democracy' (*démocratie gouvernée*) of the 19th century and the 'ruling democracy' (*démocratie gouvernante*) of the 20th century. According to Burdeau's typology, the first coincides with the rise of political liberalism and its principles: parliamentary democracy, rule of law, protection of individual and minority rights, free and rational debate at the basis of collective decisions. In this period, the parliaments of the major Western democracies brought together real power, while deputies enjoyed freedom of conscience and had to be convinced by the use of arguments before offering their vote to the executive.

Following the rise of urbanisation, rapid industrialisation, the labour movement, and mass political parties in the 20th century, the 'ruling democracy' was born. The reason was the incapacity of liberal democracies to effectively manage the era's financial crises and sharp social conflicts, especially after the Great Depression of 1929. Thus, democracies strengthened the executive power and party discipline for the sake of governability, with the thought that these two factors would serve as a counterweight against the fascist and communist regimes, which were then endorsed by broad masses in Continental Europe. This trend continued after the Second World War with the rise of the Welfare State, administrative bureaucracies and large business groups. The EU was created from the top down by administrative elites lacking direct parliamentary legitimacy, with the main task of promoting rapid growth in the torn-apart Continent and consolidating peace on the basis of mutual economic interests of the European states. The 'ruling democracy' in the West was operative as long as the two poles of the Cold War stood, and as long as enough prosperity was produced and redistributed to support the purchasing power of an ever expanding middle class.

But today, the multifaceted legitimacy crisis and the citizens' emotional disengagement from the public sphere have exacted a heavy

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which are used as fuel in transport, to only up to 6% of the final energy consumption in transport by 2020, as opposed to the 10% target in the initial legislation, while promoting 'advanced biofuels' up to at least 2,5% of energy consumption in transport by 2020, and including an indirect land use change (iLUC) factor in the Fuel Quality Directive methodology as of 2020 (September 2013).

[2] G. Burdeau, *Traité de science politique*, tome 6 (L'Etat libéral et les techniques politiques de la démocratie gouvernée) (3ème édition LGDJ 1987), and G. Burdeau, *Traité de science politique*, tome 7 (La démocratie gouvernante, son assise sociale et sa philosophie politique) (2ème édition LGDJ 1987).

toll: United Europe has alienated the working classes because it is not perceived as able to protect them from de-industrialisation, workforce decreasing technological developments, and pauperisation. The middle class is continuously squeezed, has lost its orientation, and watches the living conditions of its children fall. All these factors contribute to the rise of the demagogic and populist extreme right that promises simplicity in place of complexity, protectionism vis-à-vis economic liberalisation, and 'national preference' to confront the increase of migratory flows.

The rise of a simplistic populism lays stress upon the democratic political forces across the political spectrum. It puts particular pressure on the center right, part of which succumbs to the temptation of a turn to the right so as to build embankments vis-à-vis the extreme right. However, the result is the opposite: this osmosis uniquely serves as a communicating vessel towards the extreme right. In this landscape, we are recently witnessing a dynamic revival of the 'governed democracy', especially in English-speaking countries. Thus, a rift has been installed in the heart of the Western world: the compromise between political liberalism and its values, on the one hand, and of unregulated globalisation with their managerial elites, on the other, becomes increasingly unstable, generating insecurity and giving a boost to anti-democratic forces. The elites constantly invoke 'urgent economic situations' for their self-legitimisation. If this tension is resolved with less democratic accountability, more concentration of wealth and power in the few, and opacity, instead of a revamp of popular sovereignty, it is probable that the EU will soon reach a political boiling point.

Primary and secondary crises in the EU

Each system of governance must incorporate certain precautions – in the form of organs, rules, and practices – for the successful handling of bursting crises, be them structural or conjunctural. This obligation stems from each system's basic aim of self-preservation, without wasting too much energy and resources, and without this effort undermining the justificatory foundations themselves on which the system is based.

The EU, as a complex and gradually evolving political and economic system, has witnessed, throughout these last years, multiple primary crises that, partially at least, feed back into one another. These crises can be divided into those for whom the EU itself is not to blame (exogenous crises), and those for whom the EU has a smaller or larger share of responsibility (endogenous crises). But the management of both exogenous and endogenous crises lies in the same system, which is called *nolens*

volens to solve them effectively and justly, without ultimately differentiating between them as to their political effects. When a system of governance does not appear, in the eyes of its citizens who constantly evaluate it, to cope well with this mission, then it enters into a secondary crisis. This may happen either because the forecasts it has made have proven *de facto* inadequate, or because the predictions are not correctly applied, i.e. without the true intention of collectively overcoming the crises. A secondary crisis is a crisis that arises from the lack of an adequate response by a political system to the primary crises it has to handle and that actually worsens the latter by feeding back into them.

With a dispassionate and scientifically detached glance, this unfortunately seems to be the case with the EU today. Exogenous conjunctural crises[3] merge with endogenous structural crises.[4] To these individual primary crises, which are like tributaries that flow into a large and overflowing river, are also added endogenous but conjunctural crises, such as the so-called 'Brexit' one, i.e. the political and economic threat posed by the exit of Britain from the EU as a result of the referendum of 23 June 2016, which Prime Minister David Cameron decided for purely internal political reasons.

All these primary crises need to be addressed by the existing institutions, rules and procedures of a supranational arrangement that had started as a Common Market and, in many cases, had not anticipated, had delayed, or simply had connived at the quest for mutually acceptable, rational and fair crisis management and resolution mechanisms. It is a fact that the Union has advanced through crises, as described in all the European integration manuals. But in the previous crises, the conjuncture presented itself as more favorable than the contemporary situation, both because there were not so many primary crises combined simultaneously and they did not fold back into one another so vigorously. Moreover, the political will to solve them always remained extremely strong at the 'core' of the Union, which remains the famous Franco-German axis. Is there such a political will today? The following months and years will show.

[3] An example is the refugee crisis, for which the EU member states' foreign policies are not to blame. It was rather the explosion of the Middle East due to the catastrophic US invasion in Iraq, as well as the rise of fundamentalist terrorism, with the glorification of brute force by the so-called 'Islamic State' as its latest and worst symptom.

[4] Such as that which is brought by the suboptimal currency zone called 'Economic and Monetary Union' and by the pro-cyclical, deflationary, and high structural unemployment policies that are caused by the Stability and Growth Pact and the Fiscal Compact.

Yet, there is a growing gap between Germany, an export economy with a rising sense of hegemony in world affairs, on the one hand, and France, a country in economic and social difficulties that witnesses, as a result, the rise of political extremism, on the other hand. This is certainly not a good sign. If one adds to this image the cracking of Europe between the wealthy North and the vulnerable South, and between the tolerant West and the authoritarian East, as well as the political and economic exhaustion of key countries such as Italy and Spain, the omens for the EU future are not good at all.

The democratic deficit of the EU, main cause of the rise of Anti-Europeanism

It is a commonplace to note that the European Union suffers from a 'democratic deficit'. Indeed, unlike a federation like the United States, European citizens do not have the institutional capacity to elect a European government. This mainly means that they cannot choose, based on political, ideological, and economic criteria, a President of the EU who would be the chief of the executive branch and would choose his/her ministers, drawing up simultaneously the political guidelines of his/her cabinet, within which the ministers must forward their action.

This political representation deficit becomes not only stronger, but also qualitatively more serious during the interminable economic crisis experienced by Europe in recent years than before. The EU is – we tend to ignore it – the largest single economic zone and internal market in the world. However, it is also a geopolitical arrangement that has not really developed political tools to pursue an integrated economic policy. The comparison with the USA in the existing crisis management mechanisms proves it. In North America, the voters had to choose, both in 2008 and in 2012, between two clearly distinct macroeconomic proposals for the exit from the financial crisis, and they made their choice very clearly in favor of the Democrats' and President Obama's proposal. The same had happened in 1932, when the American people had chosen by an overwhelming majority the proposal for a New Deal by Franklin Delano Roosevelt, after the Great Depression of 1929 and the precipitation of the economy in a big crunch.

Now, suppose the majority of European citizens want to change the course of European economic policy, turning it from an extreme monetarist version of *ordoliberalismus* (a macroeconomic model that insists on continuous budget cuts to balance the public deficits and a

relatively tight monetary policy because of the fear of hyperinflation)[5] to a fiscal stimulus as countercyclical policy against the generalized stagnation, or recession, and the increasing unemployment. This would not be possible because there is no transmission belt between the floating policy choices Europeans make and the comprehensive economic philosophy that constantly governs the Union. In other words, European citizens intuitively know that whatever they vote in the European Parliament elections, both the macroeconomic assumptions on which the operation of the euro zone rests and the *intergovernmental* political management of the crisis[6] – instead of a Union one – will continue seamlessly because of the existing Treaty framework. This diffuse impression has, sadly, proven true: the European Parliament which, as known, is the only EU institution that enjoys direct popular legitimacy through elections, neither has the slightest power to amend or put into question the generalized austerity recipe, nor can push for a shorter transition period towards a Fiscal and Banking Union.

The realisation of this sense of weakness unfortunately leads to the identification of current policies, which are rejected by a clear social majority both in the South and even the North of Europe, with the European Union itself. The unfortunate result is the rise of euroscepticism, even in countries that have traditionally been considered very pro-European, such as Greece and Italy.

A threefold challenge for Europe

Friday, 13 November 2015, was a dreadful day for Paris and Europe: 130 persons were massacred in Paris by Islamist terrorists acting in the name of the so-called 'Islamic State'. The world was taken by surprise and was completely shocked. Waves of anger and sadness traveled all around the planet. After this horrible event, the Union will undergo perhaps the greatest challenge ever since the foundation of the European Economic Community in 1957, due to the combined effects of terrorism, the ongoing migration and refugee crisis, and the always underlying economic crisis.

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[5] *See* I. Papadopoulos, 'The Efficiency of Debt Crisis Management by EU Mechanisms: Lessons from the Greek Case', in A. Bitzenis, I. Papadopoulos, and V. A. Vlachos (eds.), *Reflections on the Greek Sovereign Debt Crisis: The EU Institutional Framework, Economic Adjustment in an Extensive Shadow Economy* (Cambridge Scholars Publishing 2013) p. 24 at p. 74-75.

[6] For the problems of Intergovernmentalism, *see* Introduction, *infra* section 'The pernicious role of intergovernmentalism and of neo-mercantilism in the Eurozone crisis'.

This challenge, which will probably strain the European integration to its limits, will be threefold: moral, political and economic.

Moral challenge, at first. The modern Western culture actually began in the late Middle Ages with the guarantee of personal liberty from the emerging state. A key principle safeguarding human dignity and self-identity in the West is the free movement of people and the free development of their personality. From this need, Habeas Corpus was born in the 13th century England, according to which any restriction on persons' freedom of movement could be ordered only by an independent judge and only for specific, predetermined reasons in law. Now if the jihadists succeed, with the Paris massacre, the self-annulment of the Western legal culture because of the pressure that the political systems will undergo in favor of extrajudicial detention of terrorism suspects and of 'enemy combatants', without time limits, clear and limited probable cause, procedural safeguards and assistance of counsel; if we, in other words, open one, two, many Guantanamos on European soil, then the jihadists will have solemnly defeated us, even though in the meanwhile the 'Caliphate' will have hopefully been decimated in the Middle East battlefields.

Political challenge, then. Extremist political forces exploit the migration and refugee crisis, with the huge increase in the influx of refugees and migrants, to promote their own nationalist, intolerant and racist agenda, often gaining benefits from the ballot box. The refugee crisis has revealed the weaknesses of a distorted and unjust framework (the Dublin Regulation),[7] which has for years been imposing on the member state of first entry to shoulder the entire burden of irregularly incoming asylum seekers from third countries. Now we have all realized that the refugee crisis is a pan-European problem. But instead of a Union solution based on solidarity, we can observe constant recriminations between governments, the gradual re-establishment of border controls, and the (re-)building of walls, fences and barbed wires even in the Union's internal borders. This development, coupled with the rise of religious terrorism, creates the fear of a *de facto* abolition of the Schengen Area,

[7] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the member state responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, *OJ* L [2013] 180/31, 29.6.2013, which repealed Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in one of the member states by a third-country national, *OJ* L [2003] 50/1, 25.2.2003.

which allowed the free movement of people and goods within its borders. The fragmentation of the Union now looks increasingly possible, unfortunately.

Economic challenge, at last. If we set aside the Eurozone crisis and focus only upon the economic impact of the gradual suspension of the freedom of movement of persons, goods and services within the Union as an adjunct to the outbreak of the influx of asylum seekers and terrorism, we will discover that the so-called 'transaction costs', i.e. the costs that mediate between the production and the marketing of a product or a service to the final consumer, are growing rapidly due to border controls that multiply the time, and therefore the cost, of intra-EU transport, as well as the bureaucratic control processes. But transaction costs also increase the so-called 'opportunity costs', i.e. the consumption of hours of manpower to process activities that, if channeled into the real economy, would increase productivity. The combined increase of transaction costs and of opportunity costs are undermining the very foundations of the Internal Market that we have managed to establish after many decades of efforts.

The pernicious role of intergovernmentalism and of neo-mercantilism in the Eurozone crisis

Since the beginning of the systemic crisis in the Eurozone in 2009, the intergovernmental factor in EU governance has gained power to the detriment of the Union spirit. Instead of comprehensive plans prepared and piloted by the European Commission, under the democratic monitoring and control of the European Parliament and with the aid of the European Central Bank, it seems that the EU leaders now let national bargaining lines and strategies take hold at the heart of the European integration process. Yet, national rivalries not only produce lesser democratic legitimacy and alienate European citizens – especially those from the smaller and weaker member states – from the European project; they also bring about a decreased efficiency of decision-making. Intergovernmentalism by definition strives to reconcile a myriad of particular national needs and requirements, instead of producing regulation that promotes the European collective interest over and above the particularistic, self-centered national interests (or those that national governments conceive as such).

The governance model applied in the EU is complex, multilevel, and polycentric. It basically is a model of coordination between different types of actors through vertical and horizontal networks that involve both member states and civil society in a complex web of decision-making and

policy implementation at the EU, national, regional and local levels. Yet, that model, that is clearly differentiated from the classical government models in nation-states, which are based on a unified political system and a hierarchically organized administrative mechanism, has been producing erratic practices in the management of the Eurozone crisis, breeding thus indeterminacy and insecurity, and worsening the regulatory quality of decisions.

This trend is clearly borne by the appearance of neo-mercantilism, namely the economic protectionism at the expense of trading partners for the sake of boosting domestic industry. For instance, the German car industry dictated to the German government a delay in the validity period of the new EU legislation on the maximum permissible amount of carbon dioxide emissions from passenger cars, because it still focuses largely on the production of heavy and energy-intensive cars, and the new rules will provide a competitive advantage to the French and Italian automakers because they produce cars with lower carbon dioxide emissions. Thus, the German government acted essentially as a "sales representative" of a powerful industrial lobby in its struggle to retain its market share.

A single currency area, that is not based on comprehensive political decision-making institutions and on the power to make direct transfers to absorb asymmetric shocks in one member state of the monetary union, is definitely not 'optimal'.[8] Where a member state of a monetary union is suffering a severe liquidity crisis due to lack of confidence of depositors and investors in its prospects, a genuine Economic and Monetary Union should have been able to restore conditions of normality and systemic safety. For instance, a pan-European deposit guarantee mechanism should be activated, up to a mutually agreed amount, for those banks considered as solvent according to commonly accepted rules, and a safe transfer of the remaining balance of the 'bad banks' that will undergo liquidation should be operated in order not to affect the very basis of the capitalist system itself, which is none other than bank credit. By contrast, the Eurozone – apparently because there was no such unifying political will at the highest level – has been able to establish only some coordination between national deposit guarantee funds, leaving depositors vulnerable in countries that are 'weak links'.

As for the actual management of a crisis, what is happening today in Europe is an example to be avoided. Instead of a full-blooded Union institution making quick and effective decisions solely driven by European

[8] R.A. Mundell, 'A Theory of Optimum Currency Areas', 51 *The American Economic Review* (1961) p. 657.

collective interest, as is the case in the USA, we see the Eurogroup, i.e. a pure intergovernmental body dominated by raw and coercive power correlations, as the dominant entity. In this opaque forum, every finance minister may invoke some national interest, promoting even extra-institutional, illegal or immoral proposals of the type 'temporary exit of a country from the Eurozone'. Essentially, the intergovernmental setting of the Eurogroup aims at shielding every minister from the political costs that he could be called to pay to a purely national audience for a decision of solidarity with another member state, the inhabitants of which are considered as 'wasteful and lazy' by the populist press and the extreme right or nationalist political parties. The frame of reference is toxic and exacerbates the legitimacy crisis of the EU. It is totally respectful for every national politician to have national perceptions. However, within the European context, it is not possible to take decisions in the same manner and with the same references that would exist if the country were moving exclusively within its national context. In fact, this behaviour is the driving force of corrosive nationalism, which in turn deterministically inflates anti-European populism and the extreme right, which then feeds back into the crisis until it reaches an implosion point. This way of thinking, which is a direct result of the prevalence of deleterious intergovernmentalism in the management of the Union during the crisis years, instead of the Community-federal spirit, is what has brought the current multiple systemic crises to the EU. At present, it is difficult to see how this trend towards the rise of nationalism and well-hidden economic neo-mercantilism would falter.

The time has probably come for a radical overhaul of the EU governance model if the Union intends to lay down clear, strong, and efficient general rules of macroeconomic stability and competitiveness. The plans for a European Fiscal and Banking Union will necessarily limit the freedom of member states to determine in a sovereign manner their own policy mix through the discretionary use of their national budgets, something that is at the core of their national sovereignty, and will thus need political legitimacy through some kind of European federalisation. Otherwise, it is highly probable that they will worsen the democratic deficit of the Union. More generally, the only way out into the clearing is a genuine federation with political union, debt mutualisation, banking union, European investments, and social solidarity, with the hope that it is not already too late to heal the very deep wounds that the multiple crises and the crisis management have left behind.

In Greek mythology, there is an episode where the semi-god Hercules found himself at a crossroads: he had to choose between the road of Virtue and the road of Vice; there was no third way. Virtue called him to take the hardest path that would lead him to glory through hardship, while Vice enticed him to take the path of worldly pleasures, the easier path, that would nonetheless lead to his destruction. Hercules chose the road of Virtue.

It is becoming increasingly clear that the European Union will have to make this herculean choice. European citizens demand no less. No delays, day-by-day compromises, and kicking the can down the road will do anymore.

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1. INTRODUCTORY SPEECH: 65 YEARS OF EUROPEAN INTEGRATION: ACHIEVEMENTS AND DEFICIENCIES

PANAYIOTIS KANELLOPOULOS*

Dear colleagues, ladies and gentlemen,

Addressing such an audience is a great honour for me. You are an audience that represents the future of Europe. Young Europeans, from all over Europe, who study European subjects.

At the same time, I feel particularly privileged because I have the opportunity to speak about the progress of European integration, today, the 9th of May, a historic day, the Day of Europe, when the French Minister for Foreign Affairs Robert Schuman, in 1950, published his Declaration, the 'Robert Schuman Declaration', by which France addressed a formal invitation to all European countries, mainly to Germany, to come together in order to establish Peace, Prosperity and Solidarity in our Continent. Since then, 9 May has been celebrated as the starting point of the European unification process.

The 9th of May 1945 marked the end of the Second World War, a dreadful war, during which human dignity suffered enormously, a war that cost millions of human lives and caused unprecedented horror and pain.

As you know, the French invitation was accepted by five European countries, which very soon, during the decade of the 1950s, agreed to establish the three European Communities, the scope of which was restricted to the economic sector. The six member states of the three Communities gradually became nine in 1973, ten in 1981, twelve in 1986, fifteen in 1995, twenty-five in 2004, twenty-seven in 2007, and twenty-eight in 2013, whereas there are currently five candidate countries for accession to the EU. During the same period, empires have disappeared, regimes have collapsed, and new economic forces have emerged on the world stage.

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Today, sixty-five years later, with some small exceptions, the EU territory coincides with Europe as a whole. We must admit that this is a great achievement and a vindication of Robert Schuman and the other founding fathers.

At the same time, the EU is enjoying an unprecedented period of peace, during which not a drop of blood has been shed on a land where wars were commonplace in the past. Peace in Europe for a period extending over sixty-five years is neither a coincidence, nor a simple symptom, nor an obvious evolution. It is a great achievement of the EU given that, during this time in many parts of our planet, even in our near neighborhood, war has shown again its prevailing horrible face. It is a great achievement of the European Union, due to our common understanding that the only way to resolve our problems and differences is through dialogue and cooperation.

Therefore, rightly, in 2012, the Norwegian Nobel Committee awarded to the EU the Nobel Prize for Peace for its contribution to Peace, and for the role of the EU in promoting stability and reconciliation in Europe. Peace in Europe is the greatest achievement of the European unification process and by itself is the vindication of the Robert Schuman initiative. At the beginning of his Declaration, he said: 'Europe was not done, and then we had war'.

As I said, European Unification, at the beginning, was restricted to the economic sector, but from the early 1990s a new entity, the EU, was set up with powers in Foreign Policy as well as in Justice and Home Affairs. In order to examine the evolution and progress of European unification, one should divide the whole period into two parts. The first part coincides with the Cold War, and the second one with the era of globalisation.

During the first period, the European unification project faced many problems: a) Euroscepticism, through the establishment of the European Free Trade Association, under the guidance of the British, and b) the Cold War itself. EFTA gradually lost its power, since the majority of its members became members of the European Communities. Nevertheless, Euroscepticism, through the UK participation, was transmitted to the EU body, acting even today as a brake to furthering and finalising European integration.

The second obstacle was the Cold War. European unification was badly affected by the Cold War, which developed between the USA and the Soviet Union, because Europe had been divided into two camps. On the other hand, although the European Community was developed within the 'Western system', its policies and activities had an intensive social character, touching in many aspects the socialist model in the form of the

social democracy. Because of the Cold War, the European Community adopted policies with an intensive protective character, in accordance with the principle of 'community solidarity'. At the same time, the European Community and its member states developed the so-called 'Welfare State' for the protection of the weak, the elderly and the under-privileged.

The end of the Cold War coincided with two major successes on the part of European unification: First, the creation of the internal market, namely the creation of a geographically broader market, which contains the individual national markets of the member states, within which persons, goods, services and capitals move freely, without national frontiers, without passports, customs, duties and other restrictions, in the same way as they move within their own national market. The integrated EU internal market today contains twenty-eight member states and more than five hundred million people. The size of the USA market is three fifths of the EU market. As you know, in the last couple of years, negotiations have been carried out between the US and EU on the establishment of the Transatlantic Trade and Investments Partnership (TTIP). If this effort is successful, it will create a huge market of nine hundred million citizens.

Another major achievement of the European integration process, closely connected to the integrated market, is prosperity. Together with the US and Japan, the EU is one of the most prosperous areas of the globe. Overall, the EU's GDP is 20% higher than that of the US. The per capita income of the EU is the third after the US and Japan. The EU is the largest trading partner in world trade, and provides the greatest humanitarian aid to people facing food supply problems.

The second achievement of the European integration in the early 1990s was the signing of the Maastricht Treaty in 1992, which finally laid the foundations for the political union of Europe, with the creation of the EU, the establishment of the European citizenship, the Common Foreign and Security Policy (CFSP), cooperation in Justice and Home Affairs, as well as the establishment of the EMU and the common currency. During the same period, the European Community established regional and structural policies to transfer huge economic resources from financially prosperous regions to less developed areas in the form of the Delors packages. And this is an expression of solidarity among member states.

Since the early 1990s, the situation in the EU has changed considerably. The dissolution of the Soviet Union and the collapse of socialist regimes worldwide have brought a new regime of globalisation. From that point onwards, the global economy has been functioning according to the same principles and rules. Today, the real head of the

global economy is the WTO under the agreements of GATT, GATS, TRIPs, etc. This means that the WTO is indeed the supervisory authority of the markets, even of that of the European Union. In addition, within the globalised world market, competition has been enormously intensified, and this is a real problem for the member states of the EU, because their economies have to be competitive in order to survive. Under the new international regime, EU policies have gradually changed. For example, according to the rules of GATT, subsidies within the Common Agricultural Policy are not allowed any more. Community solidarity has been significantly reduced.

Now the EU rules have been adapted to the new international environment of intense competition. The first victim of the new situation has been the European Welfare State, which requires huge financial resources, coming from a thriving economy, which should be productive and competitive. In order to maintain their competitiveness, the EU and its member states have been forced to squeeze production costs as much as they can. Thus, labor cost and social rights are being cut. But is there any other solution? Or it is inevitable, given that the emerging economies of the East produce at extremely low cost, with a system of social subsidies, and thus threaten the competitiveness of the European economy?

Then, after the EU expanded to fifteen member states, in 1995, a major effort began so as to integrate the countries of Central and Eastern Europe which, in the second half of the 20th century, had been constructed according to the Soviet model. It was a model completely different from that of Western Europe. We asked their peoples to implement parliamentary democracy and the rules of the open market economy, something they had not been taught before. We asked them to change suddenly and acquire Western culture. It was a very difficult task. This great enlargement, the fifth enlargement including twelve new member states, although it accomplished the unification of the entire European continent, also created many problems in the EU's cohesion and its drive towards deeper integration.

The next test for the EU pertained to the EMU and the creation of a single currency. The authors of the Maastricht Treaty designed a stable currency, in order to win the confidence of citizens and markets and to be used in international trade. The rules are very strict, similar to those of the German mark. The Treaty did not aim at a currency like the Italian lira or the French franc. Its goal was something resembling the German mark. The resulting problems, particularly with the countries of the South, were due to the varying degrees of productivity and competitiveness between Northern and Southern Europe. The future of the monetary union and of

our common currency depends mainly on the answer to the question whether these two groups of member states can co-exist in a monetary union.

These are, to my mind, dear friends, the most important problems the EU is facing today. In short, so far, globalisation has radically altered the context in which European unification was created. It is my belief that, with small exceptions, the performance of the European unification effort up to now has been successful and has fully vindicated the vision of Robert Schumann and the other founding fathers, like Jean Monnet. For those who do not agree with the achievements of European unification, the question arises as to how the present situation in Europe would have been without the EU. Europe would have been dominated by the nation states, with bilateral alliances and enmities, which would have led to tensions, perhaps even conflicts, with unforeseeable consequences. In any case, the dependence of Europe on the US would have been greater. In this context, neither peace nor prosperity nor solidarity would have been secured to the extent that they have developed today.

Now, as times have changed, we cannot expect the EU to react as in the 1950s. Life goes on; we cannot stay behind developments. New initiatives should be taken in order to guide Europe in the new era. Within the near future, the EU should take its final form, which should be a form of federal state. Young Europeans, such as yourselves, should be the pioneers for the future of our Europe in the new era.

Now, my friends, it is your turn to take the initiatives.

Thank you for your attention.

PART 1:

EUROPEAN DEMOCRACY AND CONSTITUTIONAL ISSUES

2. THE EUROPEAN INSTITUTIONS, A COMPLEX MODEL TO EXPLAIN

CĂTĂLINA ANTONIE*

Introduction

Complexity science explores the emergent behaviour of complex systems by focusing on the interconnections of the system components and system architecture, rather than the individual components themselves. It represents a novel scientific approach which cuts across traditional discipline boundaries.

A model of complexity science is offered by complex adaptive systems. A. Matei and L. Matei[1] offer a view of the complex social environment represented by the European Union and state that the EU administration is a complex system, with multiple loops of feedback, incorporating the national administrations in its structure while respecting their identities and values. This research will focus mostly on the local level of public service systems governed by the EU regulatory ecosystem.

1. Organisations: the complex perspective

Complexity theory emerged from the natural sciences in the second half of the twentieth century. The discovery of the quantum properties of energy and matter in the 1930s, and the mounting evidence about the

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[1] A. Matei & L. Matei, 'European Administration. Normative Fundaments and Systemic Models' (2010), available at: http://aei.pitt.edu/14478/1/European_Administration_Systemic_Models.pdf.

nature of the physical universe, provided a new understanding about the physical world. The simple linear causality proposed in Newtonian theories of the behaviour of matter does not always apply. An ecosystem or an individual can behave unpredictably, and new patterns can emerge without external cause. It is now believed that this knowledge has enormous implications on how a system can be examined and described.

Professor Prigogine called systems with a stable macro-appearance sustained by many micro-dynamic changes 'dissipative structures'. At bifurcation points the system might disintegrate to a form where no pattern can be detected (i.e. chaos), or might transform into a new ordered pattern. He observed that there are 'far-from-equilibrium' dynamic systems that can maintain a stable macro-pattern, or can suddenly, and unpredictably, undergo changes at some critical point, which he called a 'bifurcation point'. Chaotic systems are not completely without order. Order patterns can 'self-organise' and 'emerge' from the seemingly chaotic without external intervention – the intricate patterns seen in fractals are one such example.[2]

A simple analogy is used by some to highlight the stability and sudden change phenomenon, characteristic of complex systems. A stable pile of sand grains sometimes remains stable following the addition of one further grain. However, every now and then, with unpredictable frequency and magnitude, an avalanche occurs, which leads to the restructuration and change in the appearance of the sand pile. Such a nonlinear, disproportionate and unpredictable response to environmental change is the hallmark of complex systems.[3]

The functions of complex systems and the understanding of human beings operating as far-from-equilibrium complex systems can be applied to human social interactions in two main ways: The first involves the creation of artificial intelligence applications. The second is using knowledge of humans as complex systems to model, understand, intervene in, and explain social systems. This chapter will follow the second way.

Cilliers[4] views human social systems and society as complex and nonlinear based on the following characteristics: the number of elements (humans) is large; humans interact dynamically through the constant

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[2] I. Prigogine & I. Stengers, *Order out of chaos: Man's new dialogue with nature* (Bantam Books 1984) p. 140; I. Prigogine, 'Exploring complexity', in G. Midgley (ed.), *Systems Thinking, Vol. 1: General Systems Theory, Cybernetics and Complexity* (Sage 2003) p. 409.

[3] R. Lewin, *Complexity: Life at the edge of chaos* (Dent 1993) p. 61.

[4] P. Cilliers, *Complexity and Postmodernism: Understanding complex systems* (Routledge 1998) p. 7-13.

exchange of information between individuals, in a pattern of interconnections between them; the level of interaction between individuals is rich; humans interact with each other in a vast array of different capacities; and the interactions between individuals are nonlinear and asymmetrical. Specifically, power and exploitation can skew interactions, the interactions have a short range, and they are dominated by proximity, but that does not preclude a wider influence. Moreover, there are loops in the interconnections – individuals influence each other, and can directly or indirectly influence themselves, since human systems are open, and therefore local discourses are not closed off but influence each other. Human systems operate under conditions far-from-equilibrium. They need a constant flow of energy to change, evolve and survive as complex entities. Society can only survive as a process, by what it is doing, and it is not defined by its origins or goals; human systems have histories, a collection of traces, which are open to multiple interpretations; individual human elements of the system are ignorant of the behaviour of the whole system (society) of which they are a part and can neither control the whole nor fully understand it.

Midgley[5] employs the notion of 'critical boundary critique' for exploring the artificial boundaries in communities, as a precursor to intervention, by asking questions such as:

- Who owns and benefits from the system in question and who ought to?
- What is the actual purpose of the system and what ought that purpose to be?
- What is considered to be a success and what ought the system's success to be judged by?
- What conditions of successful planning and implementation are really controlled by the decision-maker?
- What decisions cannot be controlled by the decision-maker (and as a consequence are defined as 'external environment')?
- What resources and conditions ought to be controlled by the decision-maker?
- What worldview is actually underlying the design of the system, and what has been excluded?

[5] G. Midgley, 'Systemic Intervention for Public Health', 96 *American Journal of Public Health* (2006) p. 466; G. Midgley & K. A. Richardson, 'Systems thinking for community involvement in policy analysis', 9 *Emergence: Complexity and Organization* (2007) p. 167.

Organisations are a particular example of human social communities, and therefore can be analysed by complexity theory. Organisations, as human social systems, have all the characteristics discussed in the previous section, and they differ only in that they are artificial and socially constructed around a particular purpose.[6] Organisations understood as complex systems are open to a flow of energy, actors, information, and ideas, and cannot be easily understood or disaggregated.[7]

Stacey portrays organisations not as things or organisms, but as processes for joint action. These are phenomena that complexity theorists call 'self-organisation' and 'emergence'. While individuals can plan their own actions, they cannot plan the action of others or the interplay of plans and actions. Thus, causality lies in the interplay between the participants.[8]

The term 'complex "adaptive" system' is sometimes used to signal the ongoing dynamism of complex systems. According to Ashby, organisations can be understood as adaptive systems that, in a non-trivial way, need to match the complexity of their environment. The individual elements of the system are 'coupled'. 'Coupled' or 'coupling' refers to the degree of predictable connection between action and response.[9] Boisot and Child describe human social systems as more loosely coupled than natural systems, and therefore more complex. The number of different combinations of the elements that make up the system adds further complexity.

2. Administrative dynamics: Where is the system heading?

The development of the construction and enlargement of the European Union processes introduces new concepts to the specific terminology. Within a system framework, these concepts describe and summon the institutional and normative mechanisms sustained by the investigation. An approach is based on the work of Mehl, who deals with the 'implicit and explicit connections between the general theory of systems and the legal

[6] G. Morgan, *Images of organization* (Sage 1997).

[7] M. Boisot & J. Child, 'Organizations as adaptive systems in complex environments: The case of China', 10 *Organization Science* (1999) p. 237; G. Morgan, *supra* n. 6; R. D. Stacey, *Strategic management and organizational dynamics: The challenge of complexity* (4th ed.) (Pearson Education/Prentice Hall 2003).

[8] R. D. Stacey, *supra* n. 7, p. 78-106.

[9] W. R. Ashby, *An introduction to cybernetics* (Chapman Hall 1957) p. 74-80.

process',[10] where the latter can be seen 'in its entire complexity and interdependency with the social environment'.[11]

Usually, the legal and public opinion vocabulary uses the concept of 'legal system' as the set of norms (laws, decisions, and regulations) which are valid in a country or a group of countries. To us, this approach is limited. As such, just as in the case of the European building process, we should take into consideration, apart from the normative area, the institutional (political and administrative), economic, and psycho-sociological domains. Such an approach, extended towards the law system of the European Union, supports our systemic viewpoint. Decleris continues the argument of the abovementioned authors, while sustaining the idea, according to which there is compatibility between the systemic approach and the evolution of the administrative law. 'We must identify the public administration inside the larger system of governance. That would allow us to define the boundaries of the public administration and to describe the latter's connections with the other subsystems of the state'.[12] In such a context, it is likely to discuss the idea of a model of European administration that would reveal both its internal structure as well as the networks of the European public policies necessary to its implementation.

Nedergaard[13] speaks of the 'European Union Administration' from the point of view of two concepts: efficiency and legitimacy. The two concepts are used to assess the functioning of the European administration and its connections to the national administrations and the civil services in the European Union's member states. The relevant contributions made by Nedergaard in the understanding of the European administration are presented in the several characteristics the author shows at the beginning of his work:

- The unique character of the EU administration, the mode in which it is organised, is a result of the special character of the European Union;
- In some regards, it resembles an ordinary international organisation, while in others it resembles a federal state;

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[10] E. Andreewsky, L. Mehl & L. Saint-Paul (eds.), *Deuxième école européenne de systémique* (AFCET 1992) p. 211-222.
[11] L. Matei, *Dezvoltare economică locală* (Editura Economică 2005) p. 135-136.
[12] M. Decleris, 'Systemic Theory of Public Administration: Main Problems', in E. Andreevsky, L. Mehl & L. Saint-Paul (eds.), *Deuxième école européenne de systémique* (AFCET 1992) p. 149.
[13] P. Nedergaard, *European Union Administration: Legitimacy and Efficiency* (Martinus Nijhoff Publishers 2007) p. 1-2.

- The fact that the European Union has both intergovernmental and federal characteristics influences the framework for the Union and the workings of its administration;
- In the European administration, the national public servant lies in a system that encompasses a range of federal characteristics that are superior in some areas to the national administration or civil service;
- The game of power politics in the European administration in many ways resembles what is usually seen in a national administration.

If we make a reference to the European administration, we should note that it can be understood as a system of institutions and structures situated at a European level. This approach is somehow restrictive because the European administration describes, in fact, a process that evolves towards a series of values and standards that are unanimously accepted as 'European'. Matei also translates it as a process with a philosophy that includes the so-called 'Europeanisation of the national administrations'.[14]

'Europeanisation' is a process closely linked to the European integration, and it intercepts the impact of the latter on the national administrations. Peters[15] and Page[16] discuss the link between the Europeanisation process and the general tendency of the administration to transit from the traditional model of government to the model of governance, where the authority is diffuse and agencies claim a multiple role, especially in the area of public policies. Governance is generally seen as an alternative to the monolithic and hierarchic concept of government. Governance is oriented towards horizontal networks. In the context of international cooperation, governance is a reaction to the lack of traditional hierarchy. Europeanisation is translated in active dynamics among all the involved countries, and its processes are the actions that generate change in a rigorous system, the national administration. The European administration will be structured as a system having a mixed architecture, several subsystems – the national administrations and connections that point to the norm of the Community law and to the respect for sovereignty and national traditions and experiences. 'Administrative convergence' is the response of the national administrations

[14] L. Matei (ed.), *European Administration: Contemporary Concepts and Approaches* (Economica Publishing House 2005) p. 12.
[15] B. Guy Peters, *The future of governing: Four emerging models* (University Press of Kansas 1996).
[16] E. C. Page, 'The Impact of the European Legislation on British Public Policy Making: A Research Note', 76 *Public Administration* (1998) p. 803.

when facing a complex process such as Europeanisation. This is a concept that, at first glance, is clear, agreed upon and understood; yet convergence towards a common model implies the reduction of the variability and disparities in the administrative agreements.[17]

Europeanisation is translated in the development of national administrations. These are interpreted by means of two generic models: the 'classical' or Weberian public administration, and the 'New Public Management'.[18] A favourite diagnosis has been a paradigmatic shift from the 'Old Public Administration' to the 'New Public Management' and furthermore, to an adaptive administration.[19] Regardless of the standards, the new public management stands in contrast to the idea of a unique European convergence. L. Matei states that the vision of a global convergence supplements, or even may compete with, the institutional robustness. Global convergence can follow if administration is a context-free, technical activity with a single best solution and if the global environment is currently dominant. The European convergence can follow if the most important context in the matter is the European one, both being dominant in the administration and outside of it. The institutional robustness appears, though, if the context is dominant and the administration has the same degree of autonomy as other environments and established arrangements.[20]

The administrative dynamics theory tries to catch, as vividly as possible, the evolution of the social processes and phenomena in the public administration space, as well as those that are adjacent, like strategic management, legislative process and connections with other subsystems of the society. Regardless of the country, public administration is hard to change. Complexity demands change within its processes, and the European administration needs to increase efforts if their mechanisms are willing to change a rigorous status quo. It is possible to accept convergent structural, content or behavioural transformations, if we admit the existence of a certain yet not necessarily unique or divergent model, leaving aside the traditional national values, or replacing them with ones not really configured to the social realities and physiognomy of a country.

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[17] C. Pollitt, 'Clarifying convergence: Striking similarities and durable differences in public management reform', 4 *Public Management Review* (2002) p. 471.
[18] L. Matei, *Management public* (Economica Publishing House 2001) p. 62-64 and p. 139-153.
[19] P. Dunleavy & C. Hood, 'From Old Public Administration to New Public Management', 14 *Public Money & Management* (1994) p. 9.
[20] *Supra* n. 19, p. 12.

In contemporary democracies, administrative environments are not so simple, coherent and imperative. Olsen makes a clear point regarding environments: 'they seldom provide public administration with clear competences, rules, objectives and incentive. On the contrary, the administration operates in a complex ecology of institutions, actors, goals, rules, interests, powers, principles, values, beliefs and cleavages. Politicians, judges, experts, organised groups, mass media and individual citizens are likely to hold different and changing – not coherent and stable – concepts of 'good administration' and 'good governance'.[21] Administrative dynamics assumes the dynamics of the public administration concept that should imply *a priori* relations between the specific authority and the agents inside the system.[22] Here we must investigate the connection between the outcomes and the efforts, based on a serious attractor: power.

The key concepts of complexity science provide a means to understand dynamics and processes of change in a range of physical and biological phenomena. Because we are talking about organisations and administrations, we are definitely able to say that we have a collection of ideas and principles, many of which have been influenced by other bodies of knowledge. A better understanding of the dynamics of social and organisational change is at the heart of our work in each of these areas. Nonlinear dynamics were explained by the work of Professor Lorenz.[23] In simple systems, the dynamics and information flows around the system are referred to as 'feedback loops'. In such systems, where outputs are predictable and determined, feedback is often associated with controlling the system. The feedback processes do not always produce the same effects and are not predictable. In addition, because such complex feedback loops have both positive and negative effects, different people will look at the same situation and evaluate it differently. The same happens with national administrations. They are required to adopt and implement a set of rules in order to build the convergence with a European administration, but the specific approach taken can result in a positive (implementation) or negative (disruptions) outcome.

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[21] J. P. Olsen, 'The many faces of Europeanization', 40 *Journal of Common Market Studies* (2002) p. 951.

[22] D. Bossaert, C. Demmke, K. Nomden and R. Polet, *Civil Services in the European of Fifteen: Trends and New Development* (European Institute of Public Administration 2001).

[23] E. N. Lorenz, *The Essence of Chaos* (The University of Washington Press 1993); E. N. Lorenz, 'Deterministic non-periodic flow', 20 *Journal of Atmospheric Science* (1963) p. 130.

The organisations that are in a position to determine policy programmes and projects should not include definitions and conditions more than what is absolutely necessary to launch a particular initiative; moreover, the role of the chief designer should be avoided in favour of facilitation, orchestration and creation of the enabling environment that allows the system to find its own form.[24] However, in specifying the minimum rules, it is crucial to understand the dynamics of local circumstances and actors. As Holland puts it, '[emergent properties are global, but] context… determines their function. It is important to build a perspective on an issue from the point of view of those who live their lives immersed in it'.[25]

Feedback loops, adaptive behaviours and emergent dynamics within the system may mean that the relationship between input and output is a nonlinear one: 'Sometimes even a small amount of the variable can do a great deal of work and then the law of diminishing returns sets in [a negative feedback process]…in other cases very little impact is felt until a critical mass is assembled'.[26] The dynamics of administration are also nonlinear and unpredictable. We can have an estimation of the results based on the investigation of the indicators (absorption, convergence, principles, rules), but it is measurable over a short amount of time. The impact can be heavy or insignificant. The only trigger is the necessity of implementing the Treaties during a certain timeframe, but the way of doing it has a lot to do with how the system reacts to the feedback processes.

Within complex systems, the degree of nonlinearity, the relationships between various factors, and the lack of proportionality between inputs and outputs, mean that the dynamics of change are highly context-specific. Therefore, if there are assumptions, aggregations, and theories about the relations among different aspects of a specific situation, and these are not entirely appropriate when applied to the dynamics of a new local situation, then this perspective is unlikely to lead to a deep understanding of what should be done, and is furthermore unlikely to lead to the hoped-for changes. Nonlinearity implies that, beyond understanding the limitations of a particular model or perspective, it is important to build and improve new models that can provide the sort of information required for the particular task at hand.

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[24] *Supra* n. 22, p. 5.

[25] J. H. Holland, 'Studying Complex Adaptive Systems', 19 *Journal of Systems Science and Complexity* (2006) p. 1.

[26] R. Jervis, *System Effects: Complexity in Political and Social Life* (Princeton University Press 1997) p. 155.

As a system, the European administration has three important characteristics: it is complex, open and cybernetic. It is however possible to add a few more. These sustain and develop the specifics of the European Administrative Space, thus the operational sight of the concepts, principles and beliefs that are at the basis of the European Administrative Space construction.

For a better understanding of the above characteristics, three arguments are presented:[27]

- The existence of several interconnections between the EU administration and its political system; the administration is determined by the nature of the EU political system, and vice versa, the European administration has an impact on the EU political system;
- The consolidation of the national administrations in the bureaucratic system of the EU has led to important consequences for the functioning of the latter;
- The national administrations were influenced, yet not transformed by the EU's development.

As a cybernetic system, the European administration has its own regulatory system that comprises three tiers: national, regional and European. L. Matei mentioned that these connections of the European administration with the EU political system or intra-system rely heavily on the system's elements. Thus the discussion can be of hard connections (at the level of national administrations) and weak ones (between the latter and the regional and European level).[28] All the other principles for organising the cybernetic systems have relevant interpretations or expressions. Even though we do not focus here on the systemic organisation of the European public administration, one interpretation is worth mentioning: the necessary variation in law which, in the framework of the European administration development, assumes the decrease of the ratio of national forms of organisation and functioning of the administration, and the acceptance of new sets of norms, values and good practices, belonging to a possible European model of public administration. The outlet or systemic synergy principle refers to administrative convergence.

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[27] H. Kassim, 'The European Administration: Between Europeanization and Domestication', in J. Hayward & A. Menon (eds.), *Governing Europe* (Oxford University Press 2002) p. 139.

[28] *Supra* n. 18, p. 12.

3. The European system

A certain administrative system may be evaluated by researching the limits of the application of the European Administrative Space principles; and it is examined how these principles serve as generic frames, and to what degree there can be compatibility between different administrative systems. The European administration is a system with many characteristics described in many references in the relevant literature. Taking into account the correct adaptation of context, Kassim lists the following characteristics:[29]

1. Lack of an agreed demarcation of competencies and powers between the European Union and the national administrations: In addition to this, the EU, as a unified system, has a complex structure, based – up to 2009 – on three pillars, with different decisional powers, structures and procedures.
2. Fluidity: Many studies have described the Union as 'fluid, ambiguous and hybrid', since 'there is no shared vision or project or common understanding of the legitimate basis of a future Europe'.[30] Although these remarks predate the Treaty of Lisbon, they are still, at least partially, pertinent.
3. Institutional fragmentation: Power at the European level is diffused in several institutions, and there is no single authoritative legislator. Legislative power is shared by two institutions – the Council and the European Parliament – that form a classical two-chamber legislature, and executive authority is spread between the member states and the Commission.
4. Complexity: The complexity of the EU policy process is a consequence of the fact that decision-making in the EU involves a multiplicity of actors, including, besides the member states, the EU institutions and other European bodies and agencies, representatives of the regional and local authorities, and lobby groups. Each one of them is at once an actor with its own interests, and an institution with its own rules, code of conduct and operating style.
5. Sectorialisation which abides to a specific logic for the construction of the EU: A broad distinction is to be made between constitutional

[29] *Supra* n. 27, p. 26.
[30] J. P. Olsen, 'European Challenges to the Nation State', in B. Steunenberg & Fr. Van Vught (eds.), *Political Institutions and Public Policy* (Kluwer Academic Publishers 1997) p. 157.

> matters, such as treaty negotiations, institutional reform, and enlargement, which involve heads of state and government and ministries of foreign affairs, and routine policy of a regulatory, redistributive or distributive nature.

A. Matei and C. Antonie refer to an administrative system where we can identify three important subsystems: a driven subsystem, whose output controls the input of the entire system, a decisional subsystem, whose output represents the input of the driven system, and a reaction system, which transmits the output of the driven system to the input of the decisional subsystem.[31]

The European administration stems from its unique character, a direct consequence of the EU's unique political system. Being unique, the European administration offers a complex image, marked by national and European interpretations and interrelations. National administrations have reached the EU decisional bodies; they are present in every European area and determine the functioning of every European institution. At the same time, the national civil services acknowledge adaptations in their structures and practices. We may add to this the specific character of the coordination mechanisms at EU institutional level and, with direct link to the national administrations, mechanisms that are permanently articulated and are formally, increasingly consolidated, thus ensuring the foundation for a European public administration system.

Of course, all the above characteristics are embedded within the EU political system, but there are still certain specific connotations for the European administration. With all these characteristics, the European administration is unique and creates a complex system, not fully developed. The European Union is a complex entity without a clearly defined core and, compared to a state, with a far less hierarchical system of governance.[32] It is a mixture of supranational, transnational, transgovernmental and intergovernmental structures. The best way we can see this system react is via democratic governance. It has its own internal mechanisms which create change. However, it has an entire ecosystem which it needs to adapt.

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[31] A. Matei & C. Antonie, 'The New Public Management within the Complexity Model', 109 *Procedia - Social and Behavioral Sciences* (2014) p. 1125.

[32] P. C. Schmitter, 'The Influence of the International Context Upon the Choice of National Institutions and Policies in Neo-Democracies', in L. Whitehead (ed.), *The International Dimensions of Democratization* (Oxford University Press 1996) p. 26.

Analysts and policymakers are greatly concerned with the challenges the nation state is facing. Mainstream analysts have assessed the democratic implications of the challenges by means of terminology and standards transposed from conceptions of democratic governance, generally associated with the nation state. Eriksen and Fossum[33] analyse the European integration process as an attractor. They claim that it is urgent to try to explain what makes the system keep on going. The difficulty stems partly from the intellectual hegemony of power-based and strategic action-based approaches that dominate so much of the theoretical and empirical analysis of the EU. A system goes through perturbations in its cycle of living, but it is imperative to understand the stability and longevity of the EU, generated by the 'virtues' of the EU system.

Integration is an emergent effect of the EU and member states' coexistence. However, there is a distinction between functional adaptation and integration that occurs through interest-accommodation or strategic group activity. Integration can also occur through deliberation, through the process of arguing. Communication through reason-giving is oriented at convincing opponents of the best or right course of action.

Conclusion

The legal regulation of the European administration system is actually one of the characteristics of the administrative systems. This is due to the European administration having a multi-polar nature and many of the European practices and standards not being imposed by specific regulations, but accepted by member states.

The Europeanisation, as a regulatory mechanism, is a synthesis of the connections present between national administrations and the European level of the European administration. From this perspective, we conclude that the national administrations have a pertinent and complex influence upon the EU decisional process, being important participants, or agents, to all the decisional levels and involved in all the phases of the policy cycle.

We need to focus more on the feedback mechanism created by the national administrations, which are encouraged to develop support mechanisms for participation and coordination of actions for their representatives at EU level. In the general context of administrative dynamics, an evaluation of the self-regulatory process and its dynamics is necessary.

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[33] E. O. Eriksen & J. E. Fossum, *Democracy in the European Union: Integration Through Deliberation?* (Routledge 2000).

A conclusion regarding the European administration stems from its unique, *sui generis* character, a direct consequence of the unique EU political system. Being unique, the European administration offers a complex image, marked by national and European interpretations and interrelations. The national civil service needs to acknowledge the changes and to adapt their structures and practices, which is the consequence of the behaviour of a general complex adaptive system.

If we take Greece as a complex system country, we might conclude that in order for the system to evolve, the interconnections between both the local actors and powers at a horizontal level need to increase. The control does not have to come from the center in order for the system to organise and evolve. The behavior is emergent after the self-organisation among processes, and the magnitude of the crisis Greece is experiencing calls for far-reaching changes. A new, dynamic, competitive Greek economy can emerge, one that is capable of generating sustainable growth, creating jobs, supporting social cohesion and fulfilling the expectations of Greek citizens. Greece does not have to face this huge challenge on its own, it may interact with other successful countries and systems, in order to learn and adapt on the way. It can draw strength and concrete support from its membership in the European Union. Greece needs to find solidarity in these interactions and to apply the best policies to co-evolve in this Union. Communication and good practices can significantly improve the situation of citizens and companies in a relatively short timeframe. In the medium term, more profound reforms of the Greek public administration and justice systems are required to ensure faster, more efficient procedures, more effective and equitable new business activities, and more legal certainty.

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3. LEGAL TREATMENT OF GENDER VIOLENCE IN SPAIN AND THE EUROPEAN UNION: A CONSTITUTIONAL APPROACH

LIVIA DI PIETRO*

Introduction

The aim of this chapter is to describe the legal regulation of gender violence in Spain in the light of the double meaning of material and formal equality, as a constitutional requirement of the prohibition of discrimination on the basis of sex (Articles 14 and 9(2) of the Spanish Constitution). In particular, my intention is to examine whether positive action in the legal regulation of violence has been implemented in all possible manifestations of gender violence in the Spanish legal system. As such, the aim of the chapter is to propose improvements to the legal regulation in this field, while applying gender mainstreaming.

1. From formal to substantive equality in the Spanish Constitution and the regulation of gender violence

From a formal perspective, equality before the law (Article 14 of the Spanish Constitution) states that legal norms have to be general and capable of reaching the maximum possible number of recipients, without making any distinctions on subjective grounds, including those based on sex.[1] In turn, within the context of the Spanish welfare state (Article 1(1) of the Spanish Constitution), formal equality has to be balanced with the call for real and effective equality (Article 9(2) of the Spanish Constitution). This means that legal norms have to be general, but it is

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[1] C. Zoco Zabala, *Prohibición de Distinciones por Razón de Sexo: Derecho Comunitario, Nacional y Autonómico* [*Prohibition of distinction on the ground of sex: Community, National and Regional law*] (Editorial Aranzadi 2008) p. 25.

possible that the legislator establishes positive action and anti-discrimination measures when, in specific areas of social reality, different population groups (here: men and women) are not on a par with each other. These measures need to be temporary, and thus periodically evaluated. Therefore, if the discrimination disappears, the affirmative action taken has to be revoked.[2] These measures also have to be proportionate, in the sense that, for instance, in the case of domestic violence and intimate-partner violence, with or without cohabitation, a greater penalty is set in the case of a masculine perpetrator, but that doesn't mean that a female perpetrator is not punished at all.[3]

Gender violence is rooted in the real and effective inequality between women and men. The female population suffers the most from its consequences, because this violence is mostly perpetrated by men against women. However, the Spanish legal system only protects one type of violence against women, that is, domestic violence or intimate-partner violence, with or without cohabitation. As a result, there is no regulation of the other types of violence existing in the social reality from a gender perspective, such as sexual exploitation, female genital mutilation, sexual assault and trafficking.[4]

Regarding domestic violence or intimate-partner violence, with or without cohabitation, not all the possible manifestations of gender violence are regulated under a gender perspective, but only some of them, such as threat, coercion, injury, and no habitual ill-treatment (with or without cohabitation in this case). However, habitual ill-treatment in the domestic context with intimate-partner relationship is not regulated using the same, gender-oriented approach.[5] Regarding gender violence in the workplace, sexual harassment and harassment related to the sex in the workplace are also regulated differently.

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[2] *Ibid*. p. 35-36.

[3] C. Zoco Zabala, 'Violencia de género en la reciente jurisprudencia del Tribunal Constitucional' ['Gender violence in the recent case law of the Constitutional Court'], in M. P. García Rubio & M. R. Valpuesta Fernández, *El levantamiento del velo: Las mujeres en el derecho privado [Lifting the veil: Women in private law*] (Tirant lo Blanch 2011) p. 874.

[4] E. M. Domínguez Izquierdo, 'La protección penal reforzada de la mujer en la Ley integral contra la violencia de género y el principio de igualdad' ['The strengthened criminal protection of women in the comprehensive Law against gender violence and the principle of equality'], in M. J. Jiménez Díaz et al., *La Ley integral: Un estudio multidisciplinar* [*The comprehensive Law: A multidisciplinary study*] (Dykinson 2009) p. 297 at p. 304.

[5] C. Zoco Zabala, *supra* n. 1, p. 103.

2. Legal regulation of gender violence at the EU level

European Union law obliges member states to take into account the objective of securing gender equality when formulating laws and regulations and implementing public policies, including those about gender-based violence (*gender mainstreaming*).[6] As a consequence, changes in national legal systems have been introduced in the field of equal opportunity between women and men. Likewise, some concepts related to gender violence, such as sexual harassment and harassment related to sex in the workplace, have been institutionalised,[7] but those manifestations of gender violence have not been regulated while taking into account the real and effective inequalities between men and women in labour relations.

As a matter of fact, the European Union has no competence, neither exclusive, nor shared, in gender violence matters, given that no specific disposition in this particular matter has been introduced in EU primary law, not even in the Lisbon Treaty.[8] Despite the fact that Declaration no. 19 on Article 8 of the Treaty on the Functioning of the European Union refers to the need to eradicate domestic violence and recommends that member states take all the necessary measures to prevent and punish such criminal acts, this cannot represent a sufficiently solid legal basis for the adoption of legal acts in matters of domestic violence. This appears to be the case because neither the Declarations annexed to the Treaties nor the Protocols and Annexes constitute part of the treaties.[9] Despite the fact that the Declaration No 19 mentioned above is not legally binding, it is a

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[6] *See* Art. 1 bis, Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, *OJ* [2002] L 269/15, 5.10.2002.

[7] *Supra* n. 6.

[8] M. Martín Martínez, 'Protección a las víctimas, violencia de género y cooperación judicial penal en la Unión Europea post-Lisboa' ['Victims' protection, gender violence and judicial cooperation in criminal matters in the post-Lisbon EU'], 39 *Revista de Derecho Comunitario Europeo* (2011) p. 407 at p. 429.

[9] Art. 51 TEU. T. Freixes Sanjuán, 'La igualdad de mujeres y hombres en el derecho de la Unión Europea: Especial referencia a la jurisprudencia del Tribunal de Justicia de la Unión y del Tribunal Europeo de Derechos Humanos' ['Equality between women and men in the European Union law: Special reference to the case law of both the European Court of Justice and the European Court of Human Rights'], in M. I. Pastor Gosálbez et al., *Integración Europea y Género [European integration and Gender]* (Tecnos 2014) p. 15 at p. 59.

provision of soft law,[10] which has the character of a recommendation to member states.[11] As a consequence, no manifestation of gender violence is developed under a gender perspective. In accordance with the principle of gender mainstreaming, it is necessary that the legislator considers the inequalities between women and men in every aspect of reality and the existence of roles and stereotypes assigned to each sex, in order to establish public policies aimed to reach equality between the sexes.[12]

Referring to the trafficking of human beings (regulated by Directive 2011/36/UE of 5 April 2011 of the European Parliament and of the Council),[13] the specificity of gender aspects in trafficking is recognised, since it is declared that trafficking has different connotations and purposes depending on the sex of the victim. In addition, it is recognised that the exploitation of the prostitution of others, or other forms of sexual exploitation, are classified as criminal offenses. However, the gender perspective is not introduced, because there are no specific measures aimed to protect female victims. One could safely assume that this Directive about human trafficking has been introduced because this offence has a transnational dimension and as such, it can be faced and punished more effectively within the Area of Freedom, Security and Justice of the European Union. On the contrary, domestic violence and intimate-partner violence, with or without cohabitation, is still considered to be an internal problem for the member states and as a consequence, the punitive treatment is still part of national law. Despite this lack of legal basis, it would be advisable, due to the same reasons, to regulate at the Community level not only human trafficking, but also other forms of

[10] About the meaning and definition of the concept of soft law, *see* R. Alonso García, 'El soft law comunitario' ['The Community soft law'], 154 *Revista de administración pública* (2001) p. 63 at p. 94.

[11] A greater involvement of the European Union primary law in equality issues is lacking. *See* Á. Figueruelo Burrieza, 'Igualdad y violencia de género en la Unión Europea después del Tratado de Lisboa' ['Equality and gender-based violence in the European Union after the Treaty of Lisbon'], in Á. Figueruelo Burrieza et al., *Violencia de género e igualdad: Una cuestión de derechos humanos [Gender-based violence and equality: A matter of human rights]* (Comares 2013) p. 94.

[12] A. Alonso Álvarez, *El Mainstreaming de género en España: Hacia un compromiso transversal con la igualdad* [*Gender Mainstreaming in Spain: A transversal commitment with equality*] (Tirant lo Blanch 2015) p. 32.

[13] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, *OJ* L [2011] L 101/1, 15.4.2011.

violence against women (for instance, sexual abuse and sexual harassment in the workplace).

More than once, the European Parliament has asked both the Commission and the Council to elaborate a 'comprehensive Directive on action to prevent and combat all forms of violence against women', through a series of directives. The most significant of its calls are the European Parliament Resolution of 26 November 2009 on the elimination of violence against women,[14] the European Parliament Resolution of 10 February 2010 on equality between women and men in the European Union,[15] and the European Parliament Resolution of 5 April 2011 on priorities and outline of a new EU policy framework to fight violence against women.[16] With respect to the eradication of female genital mutilation, which is one form of gender-based violence, the European Parliament intervened through two resolutions, the European Parliament Resolution of 24 March 2009 on combating female genital mutilation in the EU,[17] and the European Parliament Resolution of 14 June 2012 on ending female genital mutilation.[18] The European Parliament has considered this practice 'an act of violence against women which constitutes a violation of their fundamental rights, particularly the right to personal integrity and physical and mental health, and of their sexual and reproductive health'. More specifically, the Commission is encouraged to develop measures to combat female genital mutilation within the framework of the fight against gender violence. Furthermore, it urges member states to take measures to prevent, combat, and punish this practice. However, currently there is no binding regulation in the European Union context.

[14] European Parliament Resolution of 26 November 2009 on the elimination of violence against women, Texts adopted, P7_TA(2009)0098.
[15] European Parliament Resolution of 10 February 2010 on equality between women and men in the European Union - 2009, Texts adopted, P7_TA(2010)0021.
[16] European Parliament Resolution of 5 April 2011 on priorities and outline of a new EU policy framework to fight violence against women, Texts adopted, P7_TA(2011)0127.
[17] European Parliament Resolution of 24 March 2009 on combating female genital mutilation in the EU, Texts adopted, P6_TA(2009)0161.
[18] European Parliament Resolution of 14 June 2012 on ending female genital mutilation, Texts adopted, P7_TA(2012)0261.

3. The European protection order: problematic aspects

The need for the implementation of a legally binding normative instrument on gender-based violence has become even more urgent after the adoption of the Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European Protection Order.[19] The European Protection Order is a mechanism enabling judicial cooperation between EU member states and allowing the mutual recognition of judicial decisions, in order to simplify the procedure of their enforcement.[20] Its aim is to ensure the protection of victims, including gender violence victims, who enjoy a protection measure in their country of origin in case they move to another member state of which they are neither a national nor a resident.[21] Due to the changes introduced by the Lisbon Treaty, the competence of the European Union in judicial cooperation in criminal matters has been enhanced. Article 82(2) TFEU establishes that the European Parliament and the Council may adopt Directives concerning the rights of victims of crimes.[22]

The approval of the Directive on the European Protection Order represents an important step towards the construction of a European Area of Freedom, Security and Justice. Within this Area, the main goal is to ensure the freedom of movement and residence of Union citizens in conditions of safety and equal access to justice.[23] However, the Directive 2011/99/EU did not introduce an instrument aiming to harmonise each member state's national legislation and to homogenise the concept of protection order and protection measures.[24] In the European Union, the

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[19] Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European Protection Order, *OJ* L [2011] L 338/2, 21.12.2011.

[20] M. Carrasquero Cepeda, 'Orden europea de protección: Un paso adelante en la protección de las víctimas' ['The European protection order: A step forward in the protection of victims'], 2 *Cuaderno Electrónico de Estudios Jurídicos* (2014) p. 91 at p. 92.

[21] M. Martín Martínez, *supra* n. 8, p. 408.

[22] M. Sanz-Díez De Ulzurrun Lluch, 'La orden Europea de protección de las víctimas de delitos: Análisis de la Directiva 2011/99/UE' ['The European protection order for victims of crime: Analysis of the Directive 2011/99/UE'], available at: *eciencia.urjc.es/bitstream/handle/10115/12122/La orden europea de protección de víctimas de delitos.pdf?sequence=1&isAllowed=y*, visited 15 june 2015, at p. 4.

[23] M. Carrasquero Cepeda, *supra* n. 20, p. 94; M. Sanz-Díez De Ulzurrun Lluch, *supra* n. 22, p. 3.

[24] M. Carrasquero Cepeda, *supra* n. 20, p. 98-99.

level of protection given by the different protection order schemes varies considerably.[25]

The remaining heterogeneity may affect the effectiveness of the European protection order for two reasons: Firstly, the executing state is not required to impose the same protection measures that were adopted in the issuing state, but it can adopt one of its national protection measures as long as that ensures an equivalent level of protection and is as similar as possible to the original protection measure.[26] Secondly, one of the grounds for the non-recognition of the European protection order that can be invoked by the judicial authority of the executing state (Article 10 Directive 2011/99/EU) is the non-fulfillment of the double criminality requirement, that is, the act for which the order was issued does not constitute a criminal offense under the law of the state of execution.[27] Thus, it may happen that the victim moves to another member state where gender violence is not punished in a similar form as in the state of origin, and it may not even be possible to obtain a protection order or a similar measure.[28]

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[25] S. Van der Aa, 'Protection Orders in the European Member States: Where Do We Stand and Where Do We Go from Here?', 18 *European Journal on Criminal Policy and Research* (2012) p. 183 at p. 204. This author analyzes the different protection schemes of the 27 European member states (Croatia is not included yet). Also on this matter: S. Van der Aa and J. Ouwerkerk, 'The European Protection Order: No Time to Waste or a Waste of Time?', 19 *European Journal of Crime, Criminal Law and Criminal Justice* (2012) p. 267, at p. 287; S. Van der Aa et al., *Mapping the legislation and assessing the impact of Protection Orders in the European member states* (Wolf Legal Publisher 2015); T. Freixes and L. Román, *Protection of the Gender-Based Violence Victims in the European Union: Preliminary study of the Directive 2011/99/EU on the European protection order* (Publicacions Universitat Rovira i Virgili, Publicacions Universitat Autónoma de Barcelona 2014).

[26] M. Sanz-Díez De Ulzurrun Lluch, *supra* n. 22, p. 8.

[27] On the procedure for the adoption of the European protection order in Spain, see M. P. Díaz Pita, 'La Directiva 2011/99/UE del Parlamento Europeo y del Consejo de 13 de diciembre de 2011, sobre la Orden europea de protección: Su aplicación en España a las víctimas de violencia doméstica y de género' ['The Directive 2011/99/UE of the European Parliament and of the Council of 13 December 2011 regarding the European protection order: Its applicability in Spain to the victims of domestic and gender-based violence'], 3 *Ciencia jurídica* (2013) p. 13 at 29.

[28] M. Morgade Cortés, 'La orden europea de protección como instrumento tuitivo de las víctimas de violencia de género' ['The European protection order as a protective instrument for victims of gender-based violence'], 3 *Cuaderno Electrónico de Estudios Jurídicos* (2014) p. 79 at p. 106.

In order to guarantee minimum standards of protection for women who are victims of gender violence throughout the Union, the solution lies in setting a common definition of gender violence in all its forms that must be punishable, through a legally binding normative instrument. This way, member states would be obliged to adopt specific regulations on the matter and be able to implement both preventive and punitive measures, as well as establish common protection measures for victims of gender violence.

It is necessary to refer to Article 83(1) TFEU concerning the harmonisation of substantive criminal law. The first part of paragraph 1 allows the European Parliament and the Council to establish the minimum rules regarding the definition of criminal offences as well as sanctions. This is provided only for particularly serious crimes with a cross-border dimension, which are listed in the second part of Article 83(1) TFEU. At the moment, only one type of gender violence is included in this list, which is the 'trafficking in human beings and sexual exploitation of women and children', because it has a transnational dimension, but not the others, such as domestic violence. It seems that if a criminal offence is not included in this list, there is no competence for the European Union to adopt a legally binding act aimed at the approximation of the definitions of a particular criminal offence.[29] According to that, the third part of Article 83(1) TFEU offers the possibility for the Council to add other crimes to the list by adopting a unanimous decision and after having obtained the consent of the European Parliament.[30]

Indeed, this could be the way to extend the European Union's competence in crimes related to gender violence, since the lack of protection for victims of gender violence can affect the freedom of movement of persons within the European Union's Area of Freedom,

[29] R. Letschert and C. Rijken, 'Rights of victims of crime: Tensions between an integrated approach and a limited legal basis for harmonization', 4 *New Journal of European Criminal Law* (2013) p. 226 at p. 236.

[30] Art. 83(1) TFEU: 'The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime. On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.'

Security and Justice. In the same vein, the Committee on Women's Rights and Gender Equality of the European Parliament declared that 'violence against women has a cross border dimension and needs to be tackled at the EU level. Considering people's mobility in Europe, potential victims should be protected no matter their location in the EU, for instance women from one member state, living in a second and working in a third EU country. There is a need for minimum standards and common definitions, need for common action to combat violence against women and ensure that more than half of the EU population fully benefits of the right of free movement across the EU'.[31]

4. Soft law in gender violence matters

Although the European Union has no current competence in gender violence, it must be emphasised that European institutions have issued several documents of soft law. In particular, the European Parliament has begun since 1997 awareness-raising through various resolutions.[32]

It should be reminded that the fight against gender violence is one of the five priority areas of the 'European Commission Strategy for Equality between women and men 2010-2015'.[33] The strategic areas mentioned in this document were established through the Women's Charter, a statement of the European Commission of 5 March 2010, on the occasion of the International Women's Day.[34] In this political declaration the principles of

[31] Parvanova Report of 31 January 2014 of the Committee on Women's Rights and Gender Equality with recommendations to the Commission on combating Violence Against Women, Texts tabled, A7-0075/2014. The text was adopted by European Parliament Resolution of 25 February 2014 with recommendations to the Commission on combating Violence Against Women, Texts adopted, P7_TA(2011)0126.

[32] For instance: European Parliament Resolution of 26 November 2009 on the Elimination of Violence against Women; European Parliament Resolution of 10 February 2010 on equality between women and men in the European Union; European Parliament resolution of 5 April 2011 on priorities and outline of a new EU policy framework to fight violence against women; and European Parliament resolution of 9 June 2015 on the EU Strategy for equality between women and men post 2015.

[33] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Strategy for equality between women and men 2010-2015', COM(2010) 491 final, Brussels, 21.09.2010.

[34] Communication from the Commission, 'A Strengthened Commitment to Equality between Women and Men – A Women's Charter: Declaration by the

equality between women and men, which had to inspire the action of the Commission itself, were set. Previously, the European Commission had adopted the Roadmap for equality between women and men, which represents the Sixth Environment Action Programme 2006-2010,[35] where the eradication of all forms of gender-based violence (including trafficking of women) was one of the six priority areas. In the same way, the European Council, through the 'European Pact for Gender Equality (2011-2020)',[36] sets among its objectives the fight against all forms of violence against women and the achievement of gender equality. In addition, member states are encouraged to take measures to eliminate all forms of violence against women.

5. Combating violence against women within the context of the Council of Europe

It is a fact that a legally binding regulation to combat gender-based violence in the framework of the European Union has not yet been adopted. However, within the Council of Europe (where the EU member states are contracting states), the approval of the Istanbul Convention on preventing and combating violence against women and domestic violence of 11 May 2011 (henceforth Istanbul Convention)[37] is considered a significant development. The so-called 'Istanbul Convention' is the only legally binding instrument in the European context aiming to fight gender-based violence,[38] and represents a landmark in this matter.

First of all, Article 3 of the Convention makes a terminological distinction between 'Violence against women', 'Domestic violence', and

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European Commission on the occasion of the 2010 International Women's Day in commemoration of the 15th anniversary of the adoption of a Declaration and Platform for Action at the Beijing UN World Conference on Women and of the 30th anniversary of the UN Convention on the Elimination of All Forms of Discrimination against Women', COM(2010) 78 final, Brussels, 05.03.2010.

[35] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, 'A Roadmap for equality between women and men 2006-2010', COM(2006) 92 final, Brussels, 01.03.2006.

[36] Council of the European Union, Conclusions of 7 March 2011 on European Pact for Gender Equality (2011-2020), 2011/C 155/02.

[37] Council of Europe, Convention on preventing and combating violence against women and domestic violence, Istanbul 11 May 2011, Council of Europe Treaty Series No. 210.

[38] M. Morgade Cortés, *supra* n. 28, p. 81.

'Gender-based violence against women'. 'Violence against women', which represents 'a violation of human rights and a form of discrimination against women', includes 'all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life'. 'Domestic Violence' represents one of the manifestations of the more comprehensive concept of 'Violence against women' and refers to 'all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim'. Finally, 'gender-based violence against women' is the violence that 'is directed against a woman because she is a woman or that affects women disproportionately'. This distinction is important because the difference between these three concepts does not always appear to be sufficiently clear, and it may lead to confusion and to improper use of the terms themselves.

Secondly, the Istanbul Convention provides a comprehensive approach to gender violence. Prevention measures (awareness-raising, education, training of professionals, preventive intervention and treatment programs, as well as participation of the private sector and the media),[39] protection and support measures (information, assistance in individual and collective complaints, specialist support services, shelters, telephone help lines, support for victims of sexual violence, protection and support for child witnesses),[40] and punitive measures are envisaged.[41]

Thirdly, most forms of gender violence are included. The Convention refers to physical violence, psychological violence, stalking, sexual violence, including rape, forced marriage, female genital mutilation, forced abortion, and forced sterilisation and sexual harassment.[42]

It would be appropriate that the European Union accedes to the Convention of Istanbul (as it was recommended by the European Parliament in 2014), as a demonstration of its willingness to eradicate gender violence.[43] In order for the Convention of Istanbul to become effective, signatory member states should review their current legislation, reform it where necessary, and in particular define as crimes all the offences covered by the Convention. In the same way, it is necessary that

[39] Arts. 12-17 of the Convention.
[40] Arts. 18-28 of the Convention.
[41] Arts. 29-58 of the Convention.
[42] M. Morgade Cortés, *supra* n. 28, p. 89.
[43] *Ibid.* p. 92.

member states harmonise their legislation, so that the European Protection Order is not devoid of significance and there is no adverse impact on freedom of movement. On the contrary, gender violence victims must not be left unprotected.

Conclusion

To conclude, a legal regulation where all sorts of violence against women are prevented and punished is necessary. Gender violence represents discrimination on the grounds of sex, which is specifically forbidden by Article 21 of the Charter of Fundamental Rights of the European Union.[44] Equality between women and men is a core value in the European society. Moreover, gender mainstreaming was introduced by the Treaty of Amsterdam as mandatory for the elimination of all inequalities between men and women.[45]

However, the absence of a specific legal basis for EU legislation renders it necessary to refer to other principles, such as the equality principle, the right to health, and other fundamental rights, in order to combat violence against women.[46]

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Díaz Pita M. P., 'La Directiva 2011/99/UE del Parlamento Europeo y del Consejo de 13 de diciembre de 2011, sobre la Orden europea de

[44] Through the approval of the Treaty of Lisbon, the Charter of Fundamental Rights of the European Union of 7 December 2000 has acquired the same legal value as the Treaties (Art. 6 TUE).

[45] Art. 8 TFEU (former art. 3(2) TCE): 'In all of its activities, the European Union shall aim to eliminate inequalities and to promote equality between men and women'.

[46] M. Martín Martínez, *supra* n. 8, p. 409.

protección: Su aplicación en España a las víctimas de violencia doméstica y de género', ['The Directive 2011/99/UE of the European Parliament and of the Council of 13 December 2011, regarding the European protection order: Its applicability in Spain to the victims of domestic and gender-based violence'], 2 *Ciencia jurídica* (2013) p. 13

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4. KEYNOTE SPEECH: THE EUROPEAN COMMISSION GIVES, THE EUROPEAN COMMISSION TAKES? TRACKING THE UNIQUE HITHERTO SUCCESSFUL EUROPEAN CITIZENS' INITIATIVE 'RIGHT2WATER'

IOANNIS PAPADOPOULOS*

Introduction

On the 20th of December 2013, the organisers of the European Citizens' Initiative 'The water and sanitation is a human right! Water is a public good, not a commodity' (henceforth the initiative 'Right2Water') officially submitted to the European Commission more than 1.6 million signatures of European citizens under the following text:

'The initiative calls upon the Commission "to propose legislation implementing the human right to water and sanitation as recognised by the United Nations, and promoting the provision of water and sanitation as essential public services for all" and requests:

- That the EU institutions and the member states be obliged to ensure that all inhabitants enjoy the right to water and sanitation.
- Water supply and management of water resources not be subject to "internal market rules" and that water services are excluded from liberalisation, and
- The EU increases its efforts to achieve universal access to water and sanitation.'[1]

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[1] *See* European Citizens' Initiative 'Right2Water', available at:

By the completion of three months, as provided for in the Regulation (EU) 211/2011,[2] namely on the 19th of March 2014, the Commission released a Communication containing its response to the initiative. The response was positive.[3] Responding to the appeal of citizens for action to be taken, the Commission announced some concrete measures, which it committed to take by itself, as well as new actions, which it pledged to prepare in order to meet the objectives of this initiative.[4]

Nevertheless, despite the seemingly fervent reception of the Commission, the stakeholders of the initiative 'Right2Water' themselves remained skeptical, if not directly dismissive in relation to the quality of the follow-up of this initiative. Consequently, at this point an important question arises, taking into account that this is the one and only – until now – European Citizens' Initiative that managed to overcome all the procedural hurdles and to obtain the Commission's approval: If this 'Right2Water' initiative ultimately did not result in any serious commitments by the EU towards its citizens who were mobilized all over the European continent, then what can we hope for the continuation of this new and innovative institution of direct democracy, and which could be those changes that would make the institution more functional as a tool of participatory democracy at the follow-up stage of the initiatives that will have successfully received at least one million signatures?

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ec.europa.eu/citizens-initiative/public/initiatives/finalised/details/2012/000003, visited 30 May 2015. On the European Citizens' Initiative 'Right2Water', *see* also M. Schiffler, 'Civil Society and the EU Concession Directive: David Beats Goliath, Using a Few Tricks', in M. Schiffler (ed.), *Water, Politics and Money: A Reality Check on Privatisation* (Springer 2015) p. 115. It is very interesting to notice that the label 'Right2Water' became so successful that it was subsequently used in a national context to single out an anti-austerity social movement that started as an online petition and evolved into a movement of protest asking the Irish Government to abolish domestic water charges and to respect the people's 'human right to water'; *see* R. Hearne, 'The Irish water war', 7 *Interface: A journal for and about social movements* (2015) p. 309 at p. 313.

[2] Art. 10(1) Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative, *OJ* [2011] L 65/1, 11.03.2011.

[3] European Commission, Communication to the European citizens' initiative 'Water and sanitation is a human right! Water is a public good, not a commodity', COM(2014) 177 final, Brussels, 19.03.2014, p. 12: 'The Commission welcomes the mobilisation of European citizens in support of access to safe drinking water and sanitation, in Europe as well as at the global level'.

[4] *See* the summary *supra* n. 3, p. 13.

This chapter is divided in two sections. In the first section, I will give a brief presentation of the European Commission's response to the successful initiative 'Right2Water' and the overall self-evaluation of the Commission concerning the current implementation of Regulation (EU) 211/2011. I will hereby argue that the Commission's communication, following the successful collection and submission of a European Citizens' Initiative, is structured – more or less – as a quasi-judicial reasoning, with a major and a minor premise and conclusions. I will demonstrate that the aim of these tactics is to give the impression that the Commission does not respond in a political, but rather in a technocratic manner towards the appeals of at least one million European citizens. In the second section, I will present a criticism concerning this particular attitude of the Commission, alongside with a number of proposals that have been published for the democratisation and the amelioration of the European Citizens' Initiative at the stage between its successful submission and the follow-up actions the Commission intends to take in order to fulfill the objectives of the initiative.[5]

1. The Communication of the Commission as a quasi-judicial reasoning

In its Communication of 19 March 2014 on the European citizens' initiative 'Water and sanitation are a human right! Water is a public good, not a commodity!', the Commission starts with a brief presentation of the purpose of the institution of the European Citizens' Initiative and the objectives of the specific initiative 'Right2Water'. The European Commission continues with explaining in detail and interpreting, as a major premise of the reasoning, the principles arising from the Treaty that are applicable to this particular case (subsection 1.a. of this chapter). Thereafter it proceeds, as a minor premise, to the subsumption of this

[5] For recent research critically discussing the restrictive reading of the European Citizens' Initiative Regulation by the European Commission, *see inter alia* M. Conrad, A. Knaut & K. Böttger (eds.), *Bridging the Gap? Opportunities and Constraints of the European Citizens' Initiative* (Nomos 2016); J. Organ, 'Decommissioning Direct Democracy? A Critical Analysis of Commission Decision-Making on the Legal Admissibility of European Citizens Initiative Proposals', 10 *European Constitutional Law Review* (2014) p. 422; P. Glogowski and A. Maurer, *The European Citizens' Initiative – Chances, Constraints and Limits* (IHS Political Science Series No. 134 April 2013); and Luis Bouza García & Justin Greenwood (eds.), 'Special issue on the European Citizens' Initiative', 13 *Perspectives on European Policy and Society* (2012) p. 251.

particular initiative to these general principles describing in detail both the secondary EU law, the financial actions and initiatives that put these principles in practice, as well as the actions that could be developed additionally in order for the objectives of the initiative to be fully achieved (subsection 1.b. of this chapter). Lastly, the Commission concentrates in some general conclusions its general evaluation of the initiative 'Right2Water', the actions it intends to take by itself, and those actions that it would encourage the member states to take (subsection 1.c. of this chapter). A year later, the European Commission conducted a comprehensive self-assessment for the implementation of all the European Citizens' Initiatives, as required by Article 22 of Regulation (EU) 211/2011,[6] in which it states its satisfaction for the successful up to date implementation of this new institution (subsection 1.d. of this chapter).

1.a. Major premise

According to the Commission, the strongest legal basis justifying the right to safe potable water and sanitation is none other than the right to life and human dignity, as well as the need (deriving from the latter) for an adequate standard of living.[7] The United Nations and the Council of Europe have recognized the right to safe potable water and sanitation by decisions or declarations.[8] These principles also inspired commitments for actions at EU level, both in primary[9] and in secondary EU law.

The general principles deriving from the TFEU concern more specifically three policy sectors: accessibility to good quality water and sanitation at an affordable price, provision of water services in the internal market, and EU global action. With regard to the first policy area,[10] the Commission's Communication analytically presents the EU legislation that sets minimum requirements for water quality, the holistic approach regarding water management, and EU Cohesion Policy, to the extent that the latter supports financially the access to potable water and to sewage

[6] Art. 22 (Review) Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative: 'By 1 April 2015, and every three years thereafter, the Commission shall present a report to the European Parliament and the Council on the application of this Regulation'.
[7] *Supra* n. 3, p. 3. *See* Charter of Fundamental Rights, Chapter I: Dignity, Art. 2(1) (Life), Art. 1 (Human Dignity), Title IV: Solidarity, Art. 34(3) (Social insurance and social assistance), and Art. 37 (Environmental Protection).
[8] *Supra* n. 3, p. 3.
[9] *See supra* n. 7.
[10] *Supra* n. 3, p. 4.

treatment services. Furthermore, it draws the attention to the fact that the competence of water pricing policy is not attributed to the European Union, but is purely national and usually local in particular, except for some basic principles for water pricing policies in member states, such as the principle of cost recovery contained in the Water Framework Directive.[11]

As regards the second policy sector,[12] the touchstone of the Commission Communication is the so-called 'principle of neutrality', according to which the EU should remain neutral concerning the ownership status of public services of member states,[13] for water and sanitation services in this particular case. Thus, public authorities have full discretion to delegate water management and implementation of water and sanitation projects to internal public entities or to external private companies (concessionaires) or to joint management bodies. Therefore, the rules of the EU internal market fully respect the competence of public authorities to ensure the required quality of service in the manner that they will consider as the optimal one. This also addresses the request of the initiative 'Right2Water' for the exclusion of water and water resources management from market liberalisation: the Commission, prompted by the same philosophy as this initiative's, confirms that the new legislation concerning public procurement does not apply to the production, transmission or distribution of potable water services supplied by the local authorities themselves,[14] while concessions in those sectors are excluded from the scope of both the European legislative framework for the award of concessions and the Services Directive.[15]

Regarding the third policy sector,[16] the Commission's Communication lists in detail the initiatives both at the UN level (Millennium Development Goals) and at the EU level (EU water initiative) to provide safe potable water to all countries of the Earth. In this policy sector there is

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[11] Art. 9 Directive 2000/60/EC of the European Parliament and of the Council of the 23 October 2000 for the establishment of a framework for Community action in the field of water policy, *OJ* [2000] L 327/1, 22.12.2000.

[12] *Supra* n. 3, p. 5.

[13] *See* Art. 345 TFEU: 'The Treaties shall in no way prejudice the rules in member states governing the system of property ownership'.

[14] According to Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, *OJ* [2004] L 134/1, 30.04.2004.

[15] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, *OJ* [2006] L 376/36, 27.12.2006.

[16] *Supra* n. 3, p. 6-7.

no EU primary law, but the focus is given on the initiatives that make the EU the largest donor in the water sector worldwide.

1.b. Minor premise

In this part of the analysis, the Commission makes the subsumption of this particular initiative to the aforementioned general principles and seeks to identify possible deficiencies and areas where there should be further efforts, at the EU and the national levels. The aim is to deal with the reasons of concern due to which citizens addressed a demand calling for action.[17] Here the analysis is roughly structured around the three policy sectors, which we discussed in the development of the major premise. It is a mixture of a presentation of the EU secondary legislation and of EU initiatives and financing actions that already address quite sufficiently – according to the opinion of the Commission – the concerns of citizens, alongside with the Commission's proposals for improvement of the current situation.

As for the accessibility to good quality water and sanitation at an affordable price,[18] the axis of European policy continues to be the Water Framework Directive, to which the Commission 'will propose any necessary amendments'.[19] The Commission announces (but does not specify whether this would happen because of the initiative 'Right2Water') the intensification of efforts for full implementation as well as the continuation of the overall review of EU legislation on water resources, in close cooperation with member states and collaborating institutions. Furthermore, the Commission also recalls the importance of the 7th Environment Action Program, which is the Union's main financial instrument for environmental actions. Finally, it points out once again that the issue of the affordability of water prices is not a European, but a national competence, and the Commission invites the member states to respect and fully implement the Water Framework Directive. To sum up, in the first policy sector there has been no specific commitment by the Commission to take a special legislative initiative in response to the successful collection of one million signatures from a European Citizens'

[17] *Ibid.* p. 7.
[18] *Ibid.* p. 7-9.
[19] *Ibid.* p. 8.

Initiative, except for the acceleration of an already planned revision of the Water Framework Directive.[20]

Regarding the provision of water services in the internal market,[21] the Commission assures that it will unswervingly observe the key principle of the neutrality of water services, which is placed at the heart of the initiative 'Right2Water', and stresses emphatically that 'Following public concerns expressed during the legislative process, the Commission proposed to explicitly exclude drinking water concessions, as well as certain concessions for waste water treatment, from the scope of such rules. This responds also to concerns raised by the Right2Water initiative'. The only new element contributed by the Commission is the commitment, based on article 14 of the Water Framework Directive,[22] that it will continue to develop new initiatives to improve transparency for citizens concerning the quality of water and services in water management, in combination with the examination of the possibility of benchmarking of water quality by establishing a broader set of indicators and benchmarks for water services 'as a way of empowering European citizens'.[23] Therefore, neither in this policy sector is there an announcement of any specific legislative commitment on the part of the Commission.

Lastly, as regards EU action at the global level,[24] the Commission solemnly declares that it 'is committed to ensuring that the human rights dimension of access to safe drinking water and sanitation remains at the heart of its development policy'.[25] This declaration is followed by a reference to the Union's financial and humanitarian activities of development aid related to the water sector, sanitation and hygiene (WASH) and to synergies between water, energy and food security in the programming period 2014-2020. The new element that is contributed by the Commission is its commitment that it will assess the potential of non-profit partnerships in the water sector, and will support partnerships between public bodies. It also announces the continuation of its efforts to

[20] Art. 19(2) Directive 2000/60/EC: 'The Commission will review this Directive at the latest 19 years after the date of its entry into force and will propose any necessary amendments to it'.
[21] *Supra* n. 3, p. 9-10.
[22] Art. 14(1) Directive 2000/60/EC: 'member states shall encourage the active involvement of all interested parties in the implementation of this Directive, in particular in the production, review and updating of the river basin management plans'.
[23] *Supra* n. 3, p. 10.
[24] *Ibid.* p. 10-12.
[25] *Ibid.* p. 12.

give effect to the Rio+20 conference of the United Nations so as to ensure universal access to safe potable water and sanitation. In summary, the Commission publishes a wish list in the third policy sector as well, which of course is understandable inasmuch as it concerns the external action of the Union in the framework of international organisations and not the legislative process of the EU itself.

1.c. Conclusion

After all the above considerations, remarks, and announcements, 'The Commission underlines the importance of the human rights dimension of access to safe drinking water and sanitation and will continue to ensure that these principles remain at the heart of its policies'.[26] It also affirms that it will continue to ensure the EU neutrality, as regards the choices made at national, regional and local level for the provision of water services, and it will focus future efforts to increase transparency for its citizens in this area. At the international level it will continue to actively promote access to safe drinking water and sanitation and to integrated water resources management in the context of its development policy. As a general conclusion – that is at the same time a self-assessment of the Commission's action in this policy area – arises the following conclusion: 'The Commission will also remain attentive to public concerns about the specificity of water services, as it has done in the context of the legislative process on EU concession rules'.[27]

The Communication concludes with a summary of new measures that the Commission will undertake itself as well as the new actions that it is committed to prepare in order to respond to the call of citizens to take action in areas directly related to the initiative and its objectives:[28]

- Reinforcement of the implementation of already existing legislation on water quality;
- Launch of an EU-wide public consultation on the Drinking Water Directive;
- Improvement of transparency in the management of urban waste and of drinking water and exploration of the idea of benchmarking water quality;

[26] *Ibid.* p. 12.
[27] *Ibid.* p. 12.
[28] *Ibid.* p. 13.

- Development of a more structured dialogue between stakeholders on transparency in the water sector;
- Cooperation with existing initiatives to provide a wider set of benchmarks for water services;
- Stimulation of innovative approaches for development assistance, promotion of the sharing of best practices between member states and identification of new opportunities for cooperation;
- Advocacy of universal access to safe potable water and sanitation as a priority area for future Sustainable Development Goals.

The above list of actions clearly demonstrates that there is no reference whatsoever to the undertaking of a new, special legislative initiative by the Commission as a follow up to the initiative 'Right2Water'.

1.d. General self-assessment of the Commission on the implementation of the European Citizens' Initiatives

On 31 March 2015, a year after the initiative 'Right2Water', the European Commission presented its first three-yearly report evaluating the implementation of Regulation 211/2011.[29] Based on the feedback from the interested parties themselves, on information collected by the Commission Expert Group on the European Citizens' Initiative, but also on bibliographical research, the Commission analysed the current situation and ran through the successive stages of an initiative's lifecycle to identify problems in the implementation of the Regulation and to propose solutions to them.

According to the overall assessment of the Commission, the European Citizens' Initiative 'has been fully implemented'.[30] Regarding the initiative 'Right2Water', the fact that its follow-up is ongoing 'confirms that the necessary procedures and mechanisms are in place to ensure that the ECI is operational'.[31] This assessment is ironic since, in fact, only one initiative ('Right2Water') has reached this stage among the fifty-one applications made for the registration of initiatives.

In its self-assessment, the Commission notes the scope for improvements that still exists, whether these improvements relate to technical aspects or

[29] Report from the Commission to the European Parliament and the Council on the application of Regulation (EU) No 211/2011 on the citizens' initiative, COM(2015) 145 final, Brussels, 31.03.2015; *see supra* n. 6.
[30] *Supra* n. 29, p. 14.
[31] *Ibid.* p. 14.

to more political issues. One of these possible proposed improvements specifically refers to the stage after the release of the Communication with which the Commission assesses a successful initiative. Some initiatives' organisers and other stakeholders consider that at this stage there is neither a sufficient dialogue and interaction with the Commission nor a more structured process of examination and monitoring in which they could participate to a bigger extent.[32] With this observation a major issue is touched upon, albeit briefly, which emerged from the follow-up process of the initiative 'Right2Water': the issue of the lack of any commitment from the Commission to submit a legislative initiative as a follow-up of a European Citizens' Initiative that meets all the preconditions and has been positively assessed by the Commission itself.

2. Critical evaluation of the Commission's position and suggestions for the democratisation and the improvement of the European Citizens' Initiative

As we have observed throughout this chapter on the successful initiative 'Right2Water', the structuring of the Communication of the European Commission, following the gathering of at least one million signatures of European citizens, as a quasi-judicial reasoning aims at giving the impression to the citizens that the Commission does not take a *political* but a *technocratic* approach instead of complying with the bottom-up calls for the launching of a legislative initiative. We have also observed that the Commission has not, in fact, committed itself at all to undertake a special legislative initiative, notwithstanding the positive evaluation of this particular European Citizens' Initiative by the institution itself. The abovementioned remarks confirm that the Commission is strategically using this new institution of participatory democracy as a way of enhancing its institutional influence alongside with the enhancement of the democratic legitimacy of the institutional framework of the EU as a whole.

A series of basic institutional players – especially the European Ombudsman and the European Parliament – as well as the stakeholders have expressed themselves critically towards this attitude of the Commission, making specific suggestions for the improvement of the functioning of this institution in general. I will focus on those suggestions regarding the 'follow-up' stage of a successful European Citizens' Initiative and I will try to draw some general conclusions.

[32] *See ibid.* p. 16.

2.1. The proposals of the European Ombudsman

After having received a series of complaints from European citizens, the European Ombudsman Ms. Emily O'Reilly initiated a *proprio motu* investigation on 18 December 2013 regarding whether the procedure being followed during the European Citizens' Initiatives is the best possible one.[33] The investigation found some problematic elements of the procedure and resulted in the publication, on 4 March 2015, of eleven proposals for the technical legal improvement – on the first given occasion – of the Regulation (EU) 211/2011.

Opinions on the procedure have been delivered by many stakeholders, as by the European Commission in a letter addressed to the European Ombudsman on 6 October 2014.[34] More specifically, regarding the stage of the examination by the Commission of an initiative that has successfully fulfilled all the procedural prerequisites of Regulation (EU) 211/2011, the Commission replied that, although it agrees in principle with the need, already pointed out by the European Ombudsman, for the participation of experts and stakeholders in the examination process of a European Citizens' Initiative, the timeframe is not sufficient to organize such a serious deliberation with the abovementioned participants. The reason is that one should take into account the fact that under normal circumstances, a public deliberation on behalf of the Commission lasts twelve weeks (which is exactly equivalent to the duration of an initiative's examination) for completion, while the studies and impact assessments usually take almost a year to be completed. Besides, the three months the Commission has in order to examine a European Citizens' Initiative are not sufficient for a discussion with the Council and the European Parliament.[35]

[33] European Ombudsman, Case OI/9/2013/TN.

[34] Comments of the Commission on the European Ombudsman's own initiative inquiry - Ref. OI/9/2013/TN, available at: http://www.ombudsman.europa.eu/el/cases/correspondence.faces/el/59067/html.bookmark, visited 30 May 2015.

[35] *See supra* n. 34, p. 2-3.

The position of the European Ombudsman on this subject is of great interest:[36] Given the fact that the cornerstone of the European Citizens' Initiative is the empowerment of citizens in their co-determination of the EU on the basis of participatory democracy, it is not mandatory for the Commission to reach the conclusion that a legislative proposal is necessary in every case. The public dialogue that opens through the process of a European Citizens' Initiative offers procedural value and legitimacy to the Union, regardless of the outcome of the procedure, provided that this dialogue is, as far as possible, inclusive and transparent. According to the European Ombudsman, it is sufficient for the Commission to clearly articulate its evaluation on the contribution of a European Citizens' Initiative to the European public dialogue and to the legitimacy of the process of European integration.[37] In addition, given the fact that the European Parliament is in charge of the organisation of a public hearing with the representatives of a successful initiative, the Commission is obliged, in collaboration with the Parliament, to find ways to ensure the participation in the hearing of representatives of both the Council and the entities involved in order to have a lively discussion, with arguments for and against the respective initiative, in favor of the European citizens.[38] Lastly, the European Ombudsman believes that, in any case, the Commission is obligated to explain in detail and in a transparent manner its *political* choices to the European citizens, decoupling this obligation from the *legal* follow-up that it will or will not give to each initiative, granted that 'the transparency in the justification of its choices gives a boost to a constructive and open dialogue, enhancing thus the European public sphere and democracy at the EU level, while reinforcing the importance of the dialogue *per se*'.[39]

This is a very important distinction between the legal conclusions of the Commission on the admissibility of a European Citizens' Initiative, which can also be reviewed by the European Ombudsman, and of its political conclusions on the substance of the initiative and that can be discussed in the European Parliament. This distinction has already been made by Ms. O'Reilly's predecessor, Professor Nikiforos Diamantouros, in his contribution to the public deliberation on the European Citizens'

[36] The decision under which the European Ombudsman closed the *proprio motu* investigation OI/9/2013/TN on March 4 2015 is available at: http://www.ombudsman.europa.eu/el/cases/decision.faces/en/59205/html.bookmark, visited 30 May 2015.
[37] *Supra* n. 36, para. 21 and conclusions number 3 and 4.
[38] *Ibid.* para. 22 and conclusion number 5.
[39] *Ibid.* paras. 23-24 and conclusion number 6.

Initiative on 29 January 2010. Throughout his intervention, Mr. Diamantouros foresaw the issues that would arise in a number of cases because of the publication of a Communication by the Commission, due to the lack of specific criteria regarding its form, content and quality. He also emphasised that it is a *purely political decision* regarding whether an initiative should or should not be followed by a certain legislative proposal on behalf of the Union, hidden under the cloak of a *bureaucratic decision* in the form of a logical syllogism.[40]

2.2. The stakeholders' position

The citizen committees that have been involved in the European Citizens' Initiatives are clearly more critical towards the European Commission than the European Ombudsman. The representatives of the 'One of Us' initiative, which gathered over a million signatures of European citizens yet the Commission refused to take any follow-up measures,[41] decries the situation. In his contribution to the public deliberation organized by the European Ombudsman,[42] the representative of the initiative wonders why the Commission, a non-elected 'administrative body', should think that it has fulfilled its obligations towards the EU law with a simple communication, regardless of its form and content, and why it should take the political decision to put a halt to the development of a successful initiative without even consulting the two legislative organs of the Union (the European Parliament and the Council). In other words, the representative of this initiative, that gathered almost 1.7 million signatures, is unable to comprehend with what democratic legitimacy can the Commission – which has already performed an admissibility test of the initiative in the registration phase – stop the examination of a successful initiative by the European legislator.

[40] Cf. the response by the initiative 'One of Us' in the deliberation of the European Ombudsman on 10 June 2014.
[41] *See* the Communication of the Commission on the European Citizens' Initiative 'One of Us' COM(2014) 355 final, Brussels, 28.5.2014.
[42] Letter by Grégor Puppinck to the European Ombudsman Emily O' Reilly in the name of the initiative 'One of Us', Strasbourg, 10 June 2014, available at: http://www.ombudsman.europa.eu/en/cases/correspondence.faces./en/56982/html.bookmark, visited 30 May 2015.

It is possible that the position of the representative of the 'One of Us' initiative was influenced by his bitter feelings because of its unsuccessful outcome. However, the same position is expressed among the representatives of the successful initiative 'Right2Water'.[43] The vice-president of the 'Right2Water' initiative directly stated his disappointment with the fact that the Commission did not submit any legislative proposal that would recognize the human right to water. In its contribution to the public deliberation organized by the European Ombudsman on behalf of the 'Right2Water' initiative, the European Federation of Public Service Unions believes that the most efficient and rewarding improvement of the procedure would be that the Commission takes the commitment that any European Citizens' Initiative gathering more than a million signatures should be binding for it, i.e. should be necessarily followed by a legislative proposal, instead of the current situation where 'the Commission is only obliged to answer to one European Citizens' Initiative, which leaves so much room for action (on behalf of the Commission) that it gives us the impression that we have been heard but not understood'. The same applies to the European Water Movement, which does not understand why the Commission claims to have positively replied to the 'Right2Water' initiative although it has, to a great extent, done the opposite.[44]

2.3. The proposals of the European Parliament

The European Parliament may be the most important European institution that has been actively involved in the matter, as indeed is expected, since it is the only institutional organ of the EU that enjoys direct political legitimacy as democratically elected by the European citizens. There are two basic actions on behalf of the Parliament that have shown its practical interest towards the issues raised by the European Citizens' Initiative and that have proposed solutions: a study that it ordered from its Policy Department on the first conclusions drawn from the application of this new institution and that was published in May

[43] European Federation of Public Service Unions (EPSU) press communication, 'Commission lacks ambition in replying to first European Citizens' Initiative', 19 March 2014, available at:
http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/54514/html.bookmark, visited 30 May 2015.

[44] Letter of the European Water Movement to the European Ombudsman Emily O'Reilly, available at:
http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/54510/html.bookmark, visited 30 May 2015.

2014,[45] and a Resolution that it has voted on 8 September 2015 regarding the follow-up of the citizens' initiative 'Right2Water'.[46]

2.3.1 The proposals of the European Parliament Policy Department

One of the main issues observed by the significant study of the Policy Department of the European Parliament concerns the 'finite manner of the tools for application, which leads to the danger of a decreased credibility of the European Citizens' Initiative'.[47] After a literature review and interviews with stakeholders, the study demonstrates that some uncertainties exist as to the follow-up stage, as to the legal reasoning of the European Commission that determines whether a European Citizens' Initiative is successful or not, and also as to the role of the organisers. The main underlying problem though is the vagueness of the nature of the European Citizens' Initiative: is it a tool that raises issues for discussion in the political agenda of the Union, or is it a part of the right to initiate legislation?

A basic issue that was underscored by all stakeholders and that has been recorded in the study of the Parliament is the lack of institutionalised communication channels between the organisers of a successful initiative and the Commission that would allow the involvement of the stakeholders via deliberation in the preparatory phase of a legislative proposal by the Commission. Given the fact that the organisers of the successful initiative 'Right2Water' themselves were not satisfied with the follow-up of their initiative by the Commission, the study proposes a modification of the procedure after the successful collection of one million statements of support from European citizens, for example by ensuring the participation of the organisers of the initiative in a group of experts advising the

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[45] European Parliament, Directorate-General for Internal Policies, Policy Department C (Citizens' Rights and Constitutional Affairs), *European Citizens' Initiative – First lessons of implementation*, PE 509.982, study by M. Ballesteros, E. Canetta and A. Zaciu requested by the Committee on Petitions and the Committee on Constitutional Affairs (2014). The study is available at: http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU%282014%29509982, visited 30 May 2015.

[46] Resolution of 8 September 2015 regarding the follow-up of the European Citizens' Initiative 'Right2Water', Texts adopted, P8_TA-PROV(2015)0294, after an own initiative report of the MEP Lynn Boylan (Committee of Environment, Public Health and Food Security) of 14 July 2015.

[47] *Supra* n. 45, p. 7, 8 and 48-52.

Commission on the measures that should be taken during the follow-up phase.[48]

The study considers admissible the request of many organisers that the European Citizens' Initiative be integrated in the European Commission's power of legislative initiative, making it thus obligatory for the Commission to process and propose legislation. However, the practical difficulty of such project has been emphasized as well, since during the pre-legislative phase the Commission carries out a mandatory examination of compliance with the principles of subsidiarity and proportionality, as well as an impact assessment after consultation with the stakeholders; consequently, the automatic *de jure* promotion of a subject for legislation is not conceivable if the above reviews have not been made.[49] In any case, the perplexity and/or frustration of European citizens are understandable, since after many months of struggling to overcome the significant procedural, financial, organisational and technical problems in order to gather one million statements of support, they realise that the Commission does not really provide them the right of legislative initiative, whilst at the same time it encourages them to promote European Citizens' Initiatives in order to cover the democratic deficit of the EU.

The proposals suggested by the study are groundbreaking. If the ambiguity of this new institution is dissolved and the clarification is made that a European Citizens' Initiative is nothing else than an agenda-setting tool aiming at the resurgence of the European public sphere, then the need for so many procedural prerequisites is strongly questioned. The registration of a new initiative could be significantly simplified for the purpose of increasing the level of public discussion regarding issues of European interest. Alternatively, a binary system could be enforced (with a reform of the Treaty):

a) curtailment of the signature limit to half a million so that the European citizens can apply for the submission of a legislative proposal to the European Commission without constraining the latter (as is the case today, since the Commission holds the exclusive right to the legislative initiative in most areas of EU policies),[50] and

[48] *Ibid.* p. 51.
[49] *Ibid.* p. 50.
[50] Art. 17(2) TFEU: 'Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise. Other acts shall be adopted on the basis of a Commission proposal where the Treaties so provide'.

b) incorporation of the European Citizens' Initiative into the formal legislative procedure following the successful collection of at least one million signatures, which will oblige the European Commission to bring a legislative proposal.[51]

2.3.2. The proposals of the European Parliament in the context of the follow-up of the initiative 'Right2Water'

With its Resolution of 8 September 2015 regarding the follow-up of the ECI 'Right2Water', the European Parliament seized the opportunity to announce to all those interested that it would prefer that the Commission go much further than its initial Communication, which the Parliament thinks 'lacks any real ambition'. The European Parliament even considers that the Commission's Communication 'does not meet the specific demands made in the ECI and limits itself to reiterating existing commitments'.[52] With this non-legislative resolution, the Parliament embraced the initiative 'Right2Water' and adopted a critical stance upon the Commission, which was accused for its timidity to fulfill the promise made by the Treaty that the new institution of the ECI would promote participatory democracy at the EU level.[53]

In the opinion of the majority of the Members of the European Parliament, 'the response given by the Commission to the 'Right2Water' ECI is insufficient, as it does not make any fresh contribution and does not introduce all the measures that might help to achieve the goals'.[54] The general recommendations made by the Parliament to the Commission concerning successful initiatives is that it should ensure the utmost transparency during the two-month analysis phase after their submission, that it should grant them proper legal support, advice and publicity, and that promoters and supporters should be kept fully informed and updated throughout the ECI process.[55] The main criticism that is articulated against the Commission for its flawed follow-up of the initiative 'Right2Water' is that it should 'come forward with legislative proposals, and, if appropriate, a revision of the WFD, that would recognise universal access and the human right to water'.[56] Some of the Parliament's specific positions concerning the right to water supply and sanitation in the internal market

[51] *Supra* n. 45, p. 52.
[52] *Supra* n. 46, para. 6.
[53] *Ibid.* para. 1.
[54] *Ibid.* para. 6.
[55] *Ibid.* para. 2.
[56] *Ibid.* para. 10.

are the basis for a call upon the Commission 'to advocate that universal access to safe drinking water and sanitation be recognized, to recognize that water is not a commodity but a public good vital to human health and dignity for all the European citizens',[57] to permanently exclude water and wastewater disposal from internal market rules, from any trade agreement,[58] and from the Concessions Directive,[59] and to exclude any form of privatisation of water and sewage undertakings in the future.[60] In the meanwhile, the European Parliament calls on the Commission and the member states to ensure a comprehensive water supply with no discrimination in the access to water services[61] via a genuine Social Agreement for Water and other mechanisms for social action.[62] When it comes to the EU development and foreign policy on water, the Parliament emphasises that 'EU development policies should fully integrate universal access to water and sanitation' and that 'the development policies of the member states should recognise the human rights dimension of access to safe drinking water and sanitation'.[63] Last but not least, the European Parliament even encourages water companies to 'reinvest economic revenues generated from the water management cycle in maintaining and improving water services and protecting water resources', and 'recommends putting an end to practices where economic resources are diverted from the water sector to finance other policies'.[64] The Parliament attributes such a great importance to the matter that it 'calls on the Commission to make a renewal of ageing drinking water networks a priority in the Investment Plan for Europe by placing these projects on the list of Union projects'.[65]

Conclusion

Until now, our short experience with the ECI leads us to the general conclusion that the ambiguity surrounding the nature of this new tool – is it, after all, an agenda-setting tool that sets issues for discussion in the political agenda of the EU, or is it a part of the right to legislative

[57] *Ibid.* para. 10. *See* also paras. 22 and 29.
[58] *Ibid.* paras. 22 and 47.
[59] *Ibid.* para. 53.
[60] *Ibid.* paras. 22 and 45.
[61] *Ibid.* paras. 25 and 27.
[62] *Ibid.* para. 59.
[63] *Ibid.* para. 77.
[64] *Ibid.* para. 64.
[65] *Ibid.* para. 97.

initiative? – breeds *institutional tension* by the civil society and the European institutions that are the closest to citizens (European Ombudsman, European Parliament). The simultaneous effort of the European Commission to solidify the ECI as a tool of participatory democracy and to preserve the exclusivity of legislative initiative for itself seems to impinge on, rather than increase, its institutional prestige, and more generally the democratic legitimacy of the Union. The vague nature of the commitments that the Commission assumes towards successful initiatives, such as the one concerning the 'Right2Water', collides with the unwillingness of their acceptance by the organisers, the European institutions and, ultimately, of the European citizens themselves, who feel alienated and would rather have a more active involvement in the policymaking at European level. The fear of dissapointment, and due to it, the deepening of the legitimisation crisis that plagues Europe is still lurking. Radical changes will be required in order to make this new tool more attractive to citizens and to give it back the dynamic that the democratic functioning of the European institutions demands.

PART 2:

CHALLENGES IN THE PUBLIC SECTOR AND IN THE COMPANY LAW OF THE MEMBER STATES AND THE EU

5. URBAN PLANNING IN EUROPE: FROM COMMON HISTORY TO COMMON POLICY?

ADAMANTIA ZISOPOULOU*

Introduction

During the past two centuries, the urban morphology and planning of European cities has been affected by common theories, institutions and implementation practices. The reasons for this common approach of urban development are the common history of European countries and the common needs. The implementation of urban planning has, to some extent, been based on similar institutions and tools.

While the European Union has no competence over urban planning and there is no official EU urban planning policy, it can be observed through research that there is a tentative common approach on urban planning issues, and many official EU policies have clear urban planning side-effects.

The objective of this chapter is to briefly highlight the elements which could tentatively constitute a European urban planning policy, as a continuation of the European urban planning history. Hence, the first part presents the most important social urban theories which have influenced European urban planning since the Industrial Revolution, together with a summary of European city history. The second part presents the way that the EU approaches urban areas, and the prevailing priorities that may lead to future policies related to the morphology and functions of European cities.

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1. Ideas and tendencies which shaped European cities

The city has always had an important role in the history and development of European countries. Cities are spheres of development for science, technology, culture, innovation, individual and collective creativity. But they are also the source of many social problems. The urban environment as a basic human action milieu directly affects the quality of residents' lives on different levels (social, economic, etc.).

According to the theories that emphasise the social nature of the city, the city is perceived as the projection of society on the ground.[1] In other words, any given society creates cities that serve its social structure.[2] Hence, the city is influenced by the society to which it refers. The question is whether the opposite is also true, i.e. whether the society can be affected by city morphology.

Social urban theories are deeply rooted in time. Alcaeus, a Greek poet who lived around 600 B.C., had already expressed the idea that 'not the house finely roofed or the stones of walls well built, nay, nor canals and dockyards make the city, but the men able to use their opportunity'.[3] The social theories of urban space that prevailed in Europe, especially after the industrial revolution, help us to understand the importance of the city in the modern history of Europe. Pahl argued that the purpose of urban sociology is to address the complexity of the city.[4]

In the middle of the 19th century, the German Ideology was developed, with Marx and Engels being its main representatives. They analysed the historical development of society in the light of the productive forces and the relations of people within production. The creation of the city marked the transition from barbarism to civilisation. The contrast between urban and rural areas reflects the contrast between manual and mental labour and is considered to be a key feature of capitalist society. The city attracts the largest population, production tools, capital and needs. The countryside, on the other hand, is increasingly isolated. The existence of the city leads to the need of self-government and urban policy.

According to Marx, the city is not an autonomous unit that operates with its own laws, but a derivative of a particular social structure. The

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[1] H. Lefebvre, *Le Droit à la ville* (2nd ed., Anthropos 1968) p. 168.
[2] G. Sarigiannis, *Basic concepts and definitions for the city and urban planning* (Edra 1979) (in Greek) p. 5.
[3] E.R. Pahl, *Readings in Urban Sociology: Readings in Sociology* (Pergamon 1968) p. 3.
[4] G. Kafkalas and M. Giaouzi, *The city in the capitalist system* (Odysseus 1997) (in Greek) p. 11.

dominant mode of production determines the functions and the broader organisation of urban space.[5] Engels, in his works 'The Condition of the Working Class in England' and 'The Housing Question', focused on housing conditions of the working class in the capitalist mode of production and the role of housing in the class composition of the city. Prominent features of social housing are the high cost, restricted area and degraded quality. As a solution to the problem of housing, Engels proposed society transformation and the elimination of the rural-urban contrast.

In the early 20th century, Max Weber argued that the city consists of a composition of institutions (economic, social, political, religious etc.), which results in close relationships between people. The institutions are initially equal, and historical analysis signifies which one becomes dominant for every given period.[6] He theorised that different cultural and historical conditions result in different city types. His analysis was limited to attempting to categorise institutions into a typology without examining the causes that led to the social structure of cities.

During the interwar years, the urban theory of human ecology (or the Chicago School) was developed. In 1925, R. Park, E.W. Burgess and R.D. McKenzie published a series of Articles (The City Book), in which they focused on physical and social city development. A city is an ecosystem, a social organisation with distinct segments linked together with internal procedures. The competition between different social groups for the acquisition and control of urban land results in the diversification of city areas.[7] Robert Park, in particular, argued that the city is not just an artificial construct. It is a product of human nature and is directly related to the vital processes of the people who inhabit it.[8]

The urban theory of functionalism was a modernist sociological theory, developed during the interwar years, with Le Corbusier as its main representative. The Athens Charter, the name given to the interpretation of the IV CIAM conclusions by Le Corbusier, explained the social phenomena through the concept of 'function'. Functionalism, as a modernist theory, was considered a useful tool for solving urban

[5] S. Nikolaidou, *The social organisation of urban space* (Papazisi 1993) (in Greek) p. 172.
[6] G. Kafkalas and M. Giaouzi, *supra* n. 4, p. 28.
[7] S. Nikolaidou, *supra* n. 5, p. 181.
[8] R. Park, 'The City: Suggestions for the Study of Human Nature in the Urban Environment' 20 *American Journal of Sociology* (1915) p. 577.

problems, since according to modernism, social problems are a result of low environmental quality.[9]

The social perception of the city is changing in time. The problems that cities have had to face are the common component of all social theories on urban space. From the Middle Ages to the present, the social, cultural and economic development of Europe has been based on cities. The modern history of Europe brought distinct changes to European cities.

In the late 18th century, Europe was in crisis, and revolutionary changes were made due to institutional reforms, scientific evolution in production, as well as economic and demographic development. The development of the industrial city, that effectively addressed the current needs, led to the 'liberal' city. The main features of urban governance are the limited role of the state and private economic initiatives.

The European city completely transformed itself from the mid-18th to the late 19th century. It also acquired many features of a modern city, such as high population and building density, extensive suburban development, concentration of activities in urban centers, charges for certain traffic routes, and uniformity of construction. At the same time, many problems made their appearance: social segregation and alienation, psychological alienation, and sanitary problems.[10]

In the mid-19th century, urban problems and city organisation became government priorities in various countries, and public intervention seemed to be the only solution. Major planning interventions took place in Paris and London as part of a broader urban policy with economic, social and political aspects.[11] In the late 19th century, urban planning became a recognised scientific discipline and was considered to contribute substantially to organised urban development. Public urban planning is a tool for the construction of the modern city that is characterised by both public and private governance initiatives.

After the First World War, the need for re-evaluation is strong. The interwar period is characterised by economic and social crises. Cities have to face serious socio-economic and demographic changes, as well as social problems. During the 1920s, a creative outburst and shift in European culture takes place. New forms of art and science are formed within a globalised environment and result in unique examples of architectural design. An extensive housing rehabilitation programme is developed aiming at life quality improvement. It is promoted by the dominant political and economic class in order to balance labour unrest

[9] S. Nikolaidou, *supra* n. 5, p. 196.
[10] D. Karidis, *The seven books of Planning* (Papasotiriou 2006) (in Greek) p. 81.
[11] L. Benevolo, *The European City* (Ellinika Grammata 1997) (in Greek) p. 273.

and leftist political forces. The idea was to promote a concept that would bring harmony to all aspects of social and private life. But soon it became clear that the poor organisation of these programmes led to the strengthening of private market and undermined state intervention. The economic crisis of the 1930s suspended these programmes. The urban planning practice of the interwar period showed that such projects may only have limited application and may not offer a solution to the uneven distribution of goods among different social groups.

Many conferences on modern architecture took place during the interwar period in Europe. Right from the First CIAM Conference (1928, La Sarraz), emphasis was placed on municipal functions. The Fourth CIAM Conference was decisive, and its conclusions, known as the 'Charter of Athens', are considered as the manifesto of modern architecture. The functions that the city should provide are dwelling, work, recreation and transport. These functions were the basis for the strict zoning and new planning concepts.

During the Second World War, European cities suffered extensive damage and in many cases entire city areas were flattened. After the war, an urban planning renewal began. In the early postwar decades, the movement of 'post-modernism' dominated, and a development of the interwar modernism movement was never implemented. The theoretical principles of the Charter of Athens served as a reference framework for urban development for several years after the war. During the urban reconstruction of European cities, the free provision of buildings, the depreciation of every trace of pre-existing urban structure, the increased height of buildings, and the synthesis of building blocks with open spaces were the urban morphological trends. Urban design was based on the theory of functionalism (zoning) in order to tackle social problems. The implementation of the functional approach resulted in strict urban planning, which disrupted the unity of social space, fragmented urban structure and did not limit social inequality.[12]

The hostilities of the Second World War exhausted societies and created the need for peace and cooperation among European states. The European Movement was created in 1948 to promote European integration. The Treaty establishing the European Coal and Steel Community was signed in 1951, based on the Schuman Declaration of 1950, which aimed, through the common market for coal and steel, to contribute to economic expansion, employment growth, and a rising

[12] S. Nikolaidou, *supra* n. 5, p. 197.

standard of living. Despite its economic profile, it was obvious that the Treaty would ultimately have a political significance.

2. EU policies and instruments shaping European cities

The European Atomic Energy Community and the European Economic Community (EEC) were established in 1957. The EEC aimed to bring about economic integration between its member states, including a common market and a customs union. Despite its initial momentum, since the early 1970s and for over a decade, the EEC went through a period of intense turmoil and pessimism as regards the prospects of the integration process.

The Treaty of the European Union, known as the Treaty of Maastricht, was signed in 1992, introducing the three pillars of the European Union: one supranational pillar consisting of three European Communities, which include the ECSC, the EAEC and the EC (European Community); the Common Foreign and Security Policy (CFSP) pillar; and the Justice and Home Affairs (JHA) pillar. It also introduced the subsidiarity principle for the transfer of powers from a national to a supranational level. The Treaty of Amsterdam was signed in 1997 and extended the co-decision procedure, through which the European Parliament enjoys proper legislative power together with the Council of the EU in most policy areas; thus the federalist characteristics of the EU were strengthened at the expense of intergovermentalism. The Treaty of Amsterdam established the duty to integrate environmental protection into all EU sectoral policies with a view to promoting sustainable development. The Treaty of Nice was signed in 2000 and reformed the institutional structure of the European Union so as to withstand enlargement. The Treaty of Lisbon, which was signed in 2007, aims at modernizing the European Union and reinforces the role of the European citizens in the formulation of EU policies.

The many and complex changes in the Treaties should not overshadow the fact that every subsequent modification has systematically increased the EU fields of competence. The EU is no longer just a common market. However, there is no doubt that member states have ultimate jurisdiction over the delegation of powers to the Union and retain the competence to wield competences (*Kompetenz Kompetenz*).

No explicit competence in the field of urban planning is given to the European Union. However, during the last two decades, the EU shows its intention to develop an urban agenda and policy, part of which is urban planning. The reasons for this intention are mainly economic, social and

environmental, and the aim is not the development of a morphological model for the European city. The interest of the EU in urban areas, which initially were considered a source of problems, was gradually intensified.

The first references to the urban areas in official EU documents were part of a concern about the quality and the protection of the urban environment. The term 'urban area' made its first appearance in 1970 in two European Directives. The first Directive concerns the protection of the urban environment from noise,[13] and the second one from air pollution.[14] The Council of the EU considered the urban environmental degradation a major problem and a negative factor affecting residents' life quality and health. Urban expansion was characterised as uncontrolled, and urban development as unregulated.[15]

Residents of European cities were disenchanted with urban life because of factors such as bad housing and living conditions, air pollution, noise, the de-humanising of towns caused by the way they are partitioned into zones reserved for different purposes, the 're-development' of areas without regard for the wishes of the public, haphazard urban development, the shortage of recreational areas, the congestion of town centres through excessive use of the car and the inadequacy of public transport, and so on.[16]

In 1990, the EU Commission published the Green Paper on the Urban Environment,[17] which analysed environmental problems of European cities and their causes, and suggested future policy directions. For the first time, an overall approach to urban issues and a series of actions on a

[13] Council Directive 70/42/EEC of 6 February 1970 on the approximation of the laws of the Member states relating to the permissible sound level and the exhaust system of motor vehicles, *OJ* [1970] L 42/16, 23.02.1970.

[14] Council Directive 70/221/EEC of 20 March 1970 on the approximation of the laws of the Member states relating to liquid fuel tanks and rear protective devices for motor vehicles and their trailers, *OJ* [1970] L 76/23, 06.04.1970.

[15] Council of the European Communities and of the Representatives of the Governments of the Member States, Declaration of 22 November 1973 on the programme of action of the European Communities on the environment, *OJ* [1973] C 112/1, 20.12.1973.

[16] European Economic and Social Committee, Opinion on the proposal for a multiannual environmental research and development programme of the European Community (indirect action): 1976 to 1980, *OJ* [1976] C 35/29, 16.02.1976; European Economic and Social Committee, Opinion on the programme of the European Foundation for the Improvement of Living and Working Conditions, *OJ* [1976] C 35/31, 16.02.1976.

[17] European Commission, Communication to the Council and Parliament, Green Paper on the Urban Environment, COM(90) 218 final, Brussels, 27.6.1990.

European level, stressing the importance of cooperation and integration of EU policies, were proposed. The city was considered as crucial for the further economic and social development of Europe. Although the Green Paper was undoubtedly a major step for the future of cities and urban policy, the lack of a broader vision for the European city was obvious.

In 1995, the European Commission set out a vision for the urban environment, focusing on an economic and social approach. Urban areas should provide a focal point for their regions and provide the dynamic for economic development. This economic development should empower all citizens and provide them with decent jobs, dwellings and social welfare.[18] The Aalborg Charter, as it is commonly known, was drafted in 1994 at the First European Conference on Sustainable Cities and Towns. The Charter emphasised that sustainable economies, social justice, and environmental sustainability are linked, and cities and towns must work toward achieving sustainability in a balanced way. Member states that signed the Charter committed to pursue the sustainability aims through engagement and planning processes using a wide array of political and technical tools.

City development must be approached from a global, innovative viewpoint, based on advanced models of urban organisation and blending together the heritage of the past, the restoration of social equilibrium, and the development towards a 'value-added' economy.[19] In 1997, the European Commission published a Communication on an urban agenda in the European Union, and emphasised the need to develop an integrated urban approach to both tackle the serious problems faced by cities and to make use of their opportunities for economic growth and prosperity.[20] In 2000, according to the prevailing view, the poor quality of urban space is the direct result of old spatial planning policy, services and infrastructure quality, inadequate or non-existent maintenance, and collective and individual lifestyles.[21] In 2004, the Commission announced the thematic

[18] European Committee of the Regions, Opinion on urban development and the European Union, *OJ* [1996] C 100/78, 02.04.1996.

[19] European Commission, Working Paper, 'Towards The 5th Framework Programme: Scientific And Technological Objectives', COM(97) 47 final, Brussels, 12.02.1997.

[20] European Commission, Communication 'Towards an urban agenda in the European Union', COM(97) 197 final, Brussels, 06.05.1997.

[21] European Economic and Social Committee, Opinion on the Proposal for a Decision of the European Parliament and of the Council on a Community Framework for cooperation to promote sustainable urban development, *OJ* [2000] C 204/35, 18.07.2000.

strategy on the urban environment.[22] The overall aim of the strategy was to improve the environmental performance and quality of urban areas and to secure a healthy living environment for Europe's urban citizens, reinforcing the environmental contribution to sustainable urban development, while taking into account the related economic and social issues. The European towns and cities should be attractive, healthy, high quality places to live in that they allow their communities and their economies to flourish.

The vision for European cities of the 21st century is to be designed, constructed and managed in order to support a healthy, vibrant, inclusive and environmentally efficient economy, to support the well-being, to meet the needs of its citizens in a sustainable manner, and to be sensitive to, and work in harmony with, the natural systems which sustain it. In 2007, the member states' Ministers responsible for Urban Development agreed upon common principles and strategies for urban development policy. The Ministers committed themselves to the Leipzig Charter on Sustainable European Cities.

In 2007, the Treaty of Lisbon introduced a third dimension of EU cohesion: territorial cohesion. On the basis of Article 174 TFEU,[23] more and more projects on urban and spatial planning are funded by the Structural and Investment Funds. Moreover, Article 192 TFEU, which deals with the special procedure for taking measures in the field of environment and other sensitive areas for the member states, such as taxation, town and country planning, and energy policy, has strong references to spatial and urban planning.[24] Through this Article, it is

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[22] European Commission, Communication to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Towards a thematic strategy on the urban environment, COM(2004) 60 final, Brussels, 11.02.2004.

[23] Art. 174 TFEU: 'In order to promote its overall harmonious development, the Union shall develop and pursue its actions leading to the strengthening of its economic, social and territorial cohesion.
In particular, the Union shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions.
Among the regions concerned, particular attention shall be paid to rural areas, areas affected by industrial transition, and regions which suffer from severe and permanent natural or demographic handicaps such as the northernmost regions with very low population density and island, cross-border and mountain regions.'

[24] Art. 192(2) TFEU: 'By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 114, the Council acting unanimously in accordance with a special legislative procedure and after

possible to adopt measures that intervene on Town and Country Planning Laws, provided that unanimity in the Council is achieved.

At this point, it is worth explaining the concept of the term 'planning', which is referred to in Article 192(2) TFEU. The French translation is 'aménagement du territoire'. According to the French interpretation, the term 'planning' refers to spatial planning and it does not integrate the urban dimension. On the contrary, according to the Belgian and Dutch interpretation, the term 'planning' clearly expands to urban planning. This interpretation is also apparent in the English translation 'town and country planning'. According to the prevailing view, the term 'planning' in Article 192 TFEU must be considered to include urban planning.[25]

In 2011, the European Economic and Social Committee considered that it is necessary to launch a 'new urban renaissance' that 'prioritises an integrated urban regeneration model and that focuses attention on demographic change, social cohesion, the review of the urban economic base, the re-assessment of the natural heritage, dematerialisation, energy-efficient cities and biodiversity'.[26] In the same year, the European Commission indicated the common ground for a common European urban development model, while indicating new urban governance methods. The importance of a stronger territorial dimension in future cohesion policy is also underlined.[27]

Conclusion

Initially, the approach to the development of urban areas was through the EU environmental policy. The EU recognised the decline of European cities and analysed their problems. The interest over the years increased,

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consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt:
[…]
(b) measures affecting:
- town and country planning,
[…]
- land use, with the exception of waste management; […]'.

[25] F. Haumont, *Le droit européen de l'aménagement du territoire et de l'urbanisme* (2nd ed., Bruylant 2007) p. 23-24.

[26] European Economic and Social Committee, Opinion on 'The need to apply an integrated approach to urban regeneration (exploratory opinion)', para. 1.5, *OJ* [2011] C 21/1, 21.01.2011.

[27] European Commission Directorate General for Regional Policy, 'Cities of tomorrow: Challenges, visions, ways forward', Brussels, October 2011.

as the EU realised the potential of urban space and its relation to development and prosperity. The principle of subsidiarity, however, and the need for immediate development of other policies (environment, energy, etc.) set urban areas in second priority.

Two decades ago, the EU announced its intention to develop an urban policy, but the objective has not yet been achieved. Due to the lack of such an agenda, there is too little consistency at the EU level between the different policy initiatives and subsidy programs, and not every policy initiative achieves the desired tangible results. The issue of a European urban policy has been discussed and analysed, and it could be argued that member states are ready for such a development, but the EU so far avoids the announcement of such a policy. It could be argued that one of the reasons for the EU's delay in an urban agenda establishment is the lack of legal basis. However, after the Lisbon Treaty, the concept of territorial cohesion can constitute a legal basis for the implementation of urban interventions and for enhancing national, regional and local urban policies.

The city and urban planning have been affected by institutions and theories throughout modern European history. European cities have common morphological elements due to their common history and needs, but in all cases their development is influenced by the prevailing institutional and political factors. European integration can only enhance such cross-fertilisation. Certainly, the EU in the next years will be a powerful factor in morphological and functional evolution of European cities. Already, many of the EU official actions and policies directly or indirectly affect the image and function of urban areas.

When will the EU declare a common European urban policy, and how will the economic, social and spatial interventions affect the image of the modern European city? Will this urban policy be a first step for an informal or formal urban planning policy? Is this urban policy an expected continuation of the historical European city? These questions become all the more relevant in view of increasing inequalities within the EU and, most importantly, the pressing housing needs provoked by the ongoing migration crisis.

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6. ARTICLE 345 TFEU AND PRIVATISATION OF PUBLIC UTILITIES: IS THERE STILL A PLACE FOR PUBLIC OWNERSHIP IN EUROPE?

ILEKTRA ANTONAKI*

Introduction

The question whether to privatise or to nationalise has always been at the centre of public discourse on state intervention in the market, raising crucial economic, political and legal issues. Historically associated with Margaret Thatcher, privatisation[1] has been championed by proponents of laissez-faire capitalism,[2] as an economic policy leading to increased economic efficiency of previously state-owned enterprises (SOEs)[3] and to

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[1] According to the definition given by the OECD, 'privatisation' is any material transaction by which the state's ultimate ownership of corporate entities is reduced. This definition includes direct divestment by the state, divestment of corporate assets by government-controlled investment vehicles, as well as the dilution of state positions in state-owned enterprises (SOEs) by secondary share offerings to the non-state shareholders. *See* OECD, 'Privatisation in the 21st Century: Recent Experiences of OECD Countries', Report on Good Practices (January 2009).

[2] It should be noted, however, that from the 1990s, both conservative and socialist governments undertook privatisation schemes as part of their reform agendas.

[3] OECD, *supra* n. 1; A.P. Bartel and A.E. Harrison, 'Ownership versus environment: Disentangling the sources of public sector inefficiency', 87 *The Review of Economics and Statistics* (2005) p. 132; M. Ghosh and J. Whalley, 'State Owned Enterprises, Shirking and Trade Liberalization', 25 *Economic Modelling* (2008) p. 1206; W.L. Megginson and J.M. Netter, 'From State to Market: A Survey of Empirical Studies on Privatisation', 39 *Journal of Economic Literature* (2001) p. 321; M. MacCarthaigh, 'Managing State-Owned Enterprises in an Age of Crisis: An Analysis of Irish Experience', 32 *Policy Studies* (2011) p. 215; K.L. Dewenter and P.H. Malatesta, 'State-owned and privately-owned firms:

a significant alleviation of public finances through the use of cash revenues for the purposes of redeeming public debt.[4] The first privatisation wave started in the mid-1980s as part of the policy agenda followed by Margaret Thatcher in order to curb the power of trade unions.[5] The doctrine of unrestrained privatisation and deregulation became the orthodox thinking in both politics and economics, and the drive to cut state intervention soon spread to the rest of Europe at a remarkable rate.[6] After the fall of the Berlin Wall and the subsequent decline of Communism in Europe, Central and Eastern European countries employed large privatisation schemes in order to reduce the large public sectors associated with the former totalitarian regimes and to increase revenues into state coffers. A second wave of privatisations came in the mid-2000s, as European economies sought to cash-in on buoyant markets.[7] Today, Europe is experiencing the third privatisation wave: European states with high public indebtedness (particularly Greece) have committed to implement an extensive privatisation programme of state-owned assets in a number of key sectors, such as banking, energy, gaming, ports, airports, motorways, railways, mining, water and waste management, defence industries, and real estate, with a view to reducing the level of public debt.

The ideological espousal of this economic policy is predicated on the efficiency gains generated by the privatisation of public utilities. International experience has shown that this holds true – to a certain extent. However, there are many legitimate economic and non-economic arguments in favour of state ownership in the economy. In particular, the fulfilment of recurring social objectives, such as public-service delivery and the maintenance of state control over sectors considered of 'strategic' national interest, such as oil and gas, are considered to be two of the most important reasons justifying the existence of public companies.[8] Furthermore, state ownership can be regarded as a way of correcting market failures, particularly in countries with weaker regulatory frameworks or in

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an empirical analysis of profitability, leverage, and labor intensity', 91 *American Economic Review* (2001) p. 320.

[4] B. Bortolotti et al., 'Privatisation around the world: evidence from panel data', 88 *Journal of Public Economics* (2004) p. 305.

[5] 'Privatisation – The $9 trillion sale', *The Economist*, 11 January 2014.

[6] E. Loeffler et al., *Liberalisation and privatisation in the EU: Services of general interest and the roles of the public sector* (Multi-Science Publishing European Union 2012).

[7] 'State-owned assets – Setting out the store', *The Economist*, 11 January 2014.

[8] OECD, 'The Size and Sectoral Distribution of SOEs in OECD and Partner Countries', (OECD Publishing 2014).

'network industries' characterised by natural monopoly, such as electricity and gas distribution, water provision and railways.[9] Natural monopolies have traditionally been perceived as rendering competition undesirable or even unfeasible, as the duplication of the network is economically and environmentally difficult and in some cases even impossible.[10] In the absence of competitors, privatisation of a natural monopoly, linked to the performance of 'universal service obligation', might lead to a situation in which private monopolists could produce and fix prices at levels which are not socially optimal. This situation could lead to the abuse of a dominant position in the relevant market.[11] Additionally, it has been argued that SOEs are not necessarily less efficient than private companies.[12] Finally, state ownership can also be used to foster sectors that are considered economically desirable and that would not otherwise be developed through private investment: for instance, private investors might be reluctant to finance research if the gains are difficult to capitalise on.[13]

These arguments explain why, despite ambitious privatisation programmes undertaken in recent decades, many governments nonetheless maintain state ownership in commercial enterprises in strategically sensitive sectors, such as electricity and gas, transportation and finance. More precisely, according to a recent OECD report on state ownership in 34 countries (of which 31 are OECD members), state-owned enterprises value at over USD 2 trillion and employ about 6 million people.[14] Interestingly, the largest SOE sectors in the OECD are found in four European countries: Norway, France, Slovenia and Finland.[15] Despite the fact that from the late 1990s SOEs appeared to be in retreat worldwide, European states have tried to maintain their power over strategic industries. The legal framework established by the Treaties ostensibly allows them to do so by virtue of Article 345 TFEU,[16] a provision with historic and symbolic importance, which essentially protects the right of member states to determine their property ownership system, thereby allowing them to opt for either a

[9] P. Kowalski et al., 'State-Owned Enterprises, Trade Effects and Policy Implications', No 147 *OECD Trade Policy Papers* (2013).
[10] R. Whish and D. Bailey, *Competition Law* (Oxford University Press 2012) p. 10.
[11] P. Kowalski et al., *supra* n. 9.
[12] H. Christiansen, 'The Size and Composition of the SOE Sector in OECD Countries', No 5 *OECD Corporate Governance Working Papers* (2011).
[13] P. Kowalski et al., *supra* n. 9.
[14] OECD, *supra* n. 8, p. 7.
[15] OECD, *supra* n. 8.
[16] Art. 345 TFEU: 'The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership'.

public or a private ownership status of national undertakings. The aim of this contribution is to investigate the role of this provision in the European economic edifice and its interaction with the free movement of capital laid down in Article 63 TFEU.[17] For this purpose, Section 1 starts with a brief overview of how the emergence of Europe's economic constitution encouraged the policy of privatisation and sought to diminish the public sector in Europe, while at the same time trying to safeguard some core social values. Section 2 focuses on Article 345 TFEU and develops a threefold interpretative scheme based on the different interpretations that have been adopted by the Court and some legal scholars.

1. Privatisation in EU law

The dilemma between private or state ownership has shaped the political debate in Europe. Since its very creation, the European project has been conceived as an arduous endeavour to achieve a political compromise between different national interests, on the one hand, and to strike a balance between economic integration and societal values, on the other. The origins of the EU were characterised by a significant degree of state intervention in the economy, which was largely needed to rebuild the devastated economies of post-war Western Europe. A prime example of this interventionist economic policy pursued at that time is the leading case on the principle of supremacy of EU law, *Costa* v *Enel*,[18] which concerned the nationalisation of the Italian electricity industry. Although a few years later, with the *Dassonville*[19] and *Cassis de Dijon*[20] judgments and the introduction of the principle of mutual recognition, the Court of Justice became the engine of negative (market-enforcing) integration,[21] it

[17] Art. 63 TFEU: '1. Within the framework of the provisions set out in this chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.
2. Within the framework of the provisions set out in this chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited'.

[18] ECJ 15 July 1964, Case 6-64, *Flaminio Costa* v *E.N.E.L.*

[19] ECJ 11 July 1974, Case 8-74, *Procureur du Roi* v *Benoît and Gustave Dassonville*.

[20] ECJ 20 February 1979, Case 120/78, *Rewe-Zentral AG* v *Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*.

[21] M.A. Pollack, *The Engines of European Integration: Delegation, Agency, and Agenda Setting in the EU* (Oxford University Press 2003); F.W. Scharpf, 'Negative and Positive Integration in the Political Economy of European Welfare States', in G. Marks et al. (eds.), *Governance in the European Union* (Sage 1996) p. 15.

was not until the 1990s that the Commission formally adopted the position that state regulation was one of the most persistent barriers to economic integration.[22] Since then, there has been a clear shift in the economic policy and the objectives pursued by the European Commission, and a growing orientation towards the liberalisation of markets, privatisation of state-owned assets, and state provision of welfare services.[23] The establishment of an Internal Market based on free movement of goods, persons, services and capital shows a clear ideological endorsement of a liberal market economy with a diminished public sector. The Treaty provisions on the four freedoms and their interpretation by the Court of Justice constitute the legal foundations of the political economy of European integration. In addition, Article 119 TFEU[24] provided that the economic policy of the member states and the Union shall be conducted in accordance with the principle of an 'open market economy with free competition'. It has been argued that this provision elevated a policy directed at effective competition to the level of a constitutional

[22] European Commission, *XXth Report on Competition Policy* (1990) p. 50: 'Whilst many barriers to intra-Community trade and competition are created by companies themselves, and competition policy will as in the past constitute to tackle these problems, it is felt that at the present stage of economic integration in the Community the barriers are greatest in markets currently subject to State regulation'.

[23] E. Szyszczak, *The Regulation of the State in Competitive Markets in the EU* (Hart Publishing 2007) p. 3.

[24] Art. 119 TFEU: '1. For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the *principle of an open market economy with free competition* [emphasis added].
2. Concurrently with the foregoing, and as provided in the Treaties and in accordance with the procedures set out therein, these activities shall include a single currency, the euro, and the definition and conduct of a single monetary policy and exchange-rate policy the primary objective of both of which shall be to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Union, in accordance with the principle of an *open market economy with free competition* [emphasis added].
3. These activities of the Member States and the Union shall entail compliance with the following guiding principles: stable prices, sound public finances and monetary conditions and a sustainable balance of payments'.

imperative.[25] The four fundamental freedoms of the Internal Market, together with the rules on competition and the provisions on the Economic and Monetary Union, constitute the core of Europe's economic constitution. This rigid legal framework and its interpretation by the Court admittedly facilitated the transition from a coordinated market economy based on significant state intervention to a liberal market economy premised on deregulation and liberalisation (often confused with privatisation) of key sectors of the economy.

However, while it is convincingly argued that this legal framework and the negative integration pursued by the Court is structurally biased in favour of liberalisation,[26] there is nonetheless a number of provisions in the Treaty that require the EU to play a more active role in pursuing social objectives. In particular, the rules comprising the puzzle of Social Europe include amongst others: i) Article 3(3) TEU,[27] which introduces for the first time the concept of 'a social market economy' as one of the major objectives of the EU; ii) the social clause contained in Article 9 TFEU;[28] iii) the group of provisions forming the framework for services of general economic interest (Article 14 TFEU,[29] Article 106(2) TFEU,[30] Protocol

[25] L. Flynn, 'Competition Policy and Public Services in EC Law after the Maastricht and Amsterdam Treaties', in D. O'Keeffe and P.M. Twomey (eds.), *Legal issues of the Amsterdam Treaty* (Hart Publishing 1999) p. 185 at p. 186.

[26] F.W. Scharpf, 'The Double Asymmetry of European Integration Or: Why the EU Cannot Be a Social Market Economy', 8 *Socio-Economic Review* (2010) p. 211.

[27] Art. 3(3) TEU provides that: '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* [emphasis added], aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance'.

[28] Art. 9 TFEU provides that: 'In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health'.

[29] Art. 14 TFEU provides that: 'Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council,

26[31] and Article 36 of the Charter);[32] and of course iv) the Charter of Fundamental Rights.

Societal values have always played an important role in the model of European governance, reflecting the deeply embedded social traditions in various member states, which resulted from historical compromises between political ideologies elevating either the state or the market as 'regulator' of the economy. Although the state and the market have traditionally been contrasted as two diametrically opposed ways of organising the economy, in Europe some would argue that we have achieved the coveted reconciliation of the two. The aforementioned provisions constitute a powerful – and yet rebuttable – assumption that the state and the market coexist harmoniously within the framework of the

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acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services'.

[30] According to Art. 106(2) TFEU: 'Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union'.

[31] According to Protocol (No 26) on Services of General Interest, 'Article 1: The shared values of the Union in respect of services of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union include in particular:

- the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users;
- the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;
- a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.

Article 2: The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest'.

[32] Article 36 of the Charter of Fundamental Rights under the title 'Access to services of general economic interest' provides that: 'The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union'.

Treaties, thereby safeguarding the protection of social values that are of crucial importance for European societies. For instance, during the lively debate of the mid-1990s about the liberalisation of services of general interest, the Commission issued a Communication in which it stressed the importance of those services to the European citizens and the role which they play in promoting social and economic cohesion.[33] The Communication elevated services of general interest from a mere derogation to a core element of European culture and a factor promoting European cohesion and solidarity.[34] Today the provision of services of general economic interest is being regarded as 'one of the pillars of the European model of society'.[35]

Similarly, the inclusion of Article 3(3) TEU in the Lisbon Treaty marked a new stage in the process of European economic integration, and encapsulated the fundamental coexistence of a market economy with free competition and social justice. The introduction of the concept of a 'social market economy' was the culmination of a long-standing effort to strengthen the 'social dimension' of Europe. The concept of a 'social market economy' is associated with economic policies in the post-World War II Federal Republic of Germany, and its origins can be traced to the Freiburg School theorists Wilhelm Röpke, Walter Eucken, Egon Tuchtfeldt, Ludwig Erhard and Alfred Müller-Armack.[36] Although it evolved from ordoliberalism, this concept was different in that it emphasises the state responsibility to actively improve market conditions and simultaneously to pursue social justice.[37] It is argued that the social market economy does not lie halfway between state and market, but represents a qualitatively different approach.[38] It is used to describe a market system organised by a comprehensive and well-structured regulatory framework that defines the boundaries of competition.[39] It is 'a regulative policy which aims to combine, on the basis of a competitive economy, free initiative and social

[33] European Commission, *Services of General Interest in Europe, OJ* [1996] C 281/3, 26.9.1996.
[34] A. Jones and B. Sufrin, *EU Competition Law* (Oxford University Press 2014) p. 589.
[35] European Commission, *White Paper on services of general interest*, para. 2.1, COM(2004) 734, 12.05.2004.
[36] J. Krieger (ed.), *The Oxford Companion to Politics of the World* (Oxford University Press online version 2004).
[37] C. L. Glossner and D. Gregosz, *The Formation and Implementation of the Social Market Economy by Alfred Müller-Armack and Ludwig Erhard: Incipiency and Actuality* (Konrad Adenauer Stiftung 2011).
[38] J. Krieger (ed.), *supra* n. 36.
[39] *Ibid.*

progress.'[40] Delia Ferri and Mel Marquis tried to develop a European model of a social market economy.[41] While accepting that the EU still has only limited competences to establish a socially progressive and inclusive supranational polity, they nevertheless insisted that the EU is capable of pursuing social objectives, whilst at the same time respecting the boundaries of the economic system established by the Treaties.[42] Those social objectives can be found in the social clause contained in Article 9 TFEU, which refers to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, a high level of education, training and protection of human health. As Scharpf put it in a very eloquent way, 'the finalité of the European political economy is going to be redefined by the ideas that have shaped the socially inclusive and institutionally coordinated social market economies on the Continent and in Scandinavia, rather than by the liberal market economies of the Anglo-Saxon countries and some of the new member states. Or so one might think.'[43]

2. The nebulous provision of Article 345 TFEU and its interpretations

Arguably, Article 345 TFEU could be added to this group of provisions aiming at reinforcing the social dimension of the European project. Although Article 345 TFEU does not make any reference to social considerations, it can nevertheless be regarded as safeguarding the right of member states to intervene in their national property ownership system in order to protect social interests that could potentially be affected by unrestrained market forces. In particular, pursuant to Article 345 TFEU, the Treaties shall in no way prejudice the rules regarding how member states are governing the system of property ownership. This provision establishes the *principle of neutrality* of the Treaties with respect to the property ownership systems of the member states.[44] The 'agnosticism' as

[40] A. Müller-Armack, 'The Meaning of the Social Market Economy', in A. Peacock and H. Willgerodt (eds.), *Germany's Social Market Economy: Origins and Evolution* (Macmillan 1989) p. 83.
[41] D. Ferri and M. Marquis, 'Inroads to Social Inclusion in Europe's Social Market Economy: The Case of State Aid Supporting Employment of Workers with Disabilities', 4 *European Journal of Legal Studies* (2011) p. 44.
[42] *Ibid.* p. 53.
[43] F.W. Scharpf, *supra* n. 26, p. 212.
[44] R. Kovar, 'Nationalisations-privatisations et droit communautaire' in J. Schwarze (ed.), *Discretionary Powers of the Member States in the Field of*

to the regime of ownership means that the mere fact that an economic activity is carried out by public or private undertakings is not contrary to the Treaties.[45] Accordingly, the Treaties do not preclude, as a general rule, either the nationalisation of undertakings[46] or their privatisation.[47] In formal terms, Article 345 TFEU protects the sovereign right to choose between public or private ownership systems.[48]

But what is the actual scope of Article 345 TFEU? What does 'property ownership system' mean and how does the principle of neutrality operate within the framework of European economic law? In his recent comment on the *Essent* case, Pieter Van Cleynenbreugel distinguished two interpretations of Article 345 TFEU; (1) the *shield* interpretation, according to which Article 345 TFEU completely shields or exempts the property ownership rules from the Court's internal market scrutiny, and (2) the *sword* interpretation, according to which Article 345 TFEU does not mean that national property ownership choices are not subject to the fundamental rules of the Treaty.[49] The present comment builds on and further extends this distinction. In particular, it is argued here that one could distinguish three different interpretative approaches with respect to this nebulous and enigmatic provision, corresponding to three different degrees of acceptance of state interventionism into the market: (1) the 'maximalist shield' interpretation; (2) the 'reductionist shield' interpretation; and (3) the 'sword' interpretation.

Economic Policies and their Limits under the EEC Treaty: Contributions to an International Colloquium of the European University Institute held in Florence on 14–15 May 1987 (Nomos 1988) p. 97.

[45] P. Craig and G. De Búrca, *EU Law: Text, Cases and Materials* (Oxford University Press 2011) p. 1073.

[46] ECJ 15 July 1964, Case 6-64, *Flaminio Costa* v *E.N.E.L.*, p. 598.

[47] ECJ 8 November 2012, Case C-244/11, *Commission* v *Greece*, para. 17.

[48] For a comprehensive overview of Art. 345 TFEU *see*: P. Van Cleynenbreugel, 'No privatisation in the service of fair competition? Article 345 TFEU and the EU market-state balance after Essent', 39 *European Law Review* (2014) p. 264; B. Akkermans and E. Ramaekers, 'Article 345 TFEU (ex Article 295 EC), Its Meanings and Interpretations', 16 *European Law Journal* (2010) p. 292; F. Losada Fraga et al., 'Property and European Integration: Dimensions of Article 345 TFEU', 148 *Tidskrift utgiven av Juridiska föreningen i Finland* (2012) p. 203; W. Devroe, 'Privatisations and Community Law: Neutrality Versus Policy', 34 *Common Market Law Review* (1997) p. 267; R. Kovar, *supra* n. 44.

[49] Van Cleynenbreugel, *supra* n. 48.

2.1. The 'maximalist shield' interpretation

The 'maximalist shield' interpretation was expressed by Advocate General Ruiz-Jarabo Colomer in his opinion of July 2001 in the first three 'golden shares' cases.[50] The cases concerned restrictions in the acquisition of shares imposed by legislative provisions that conferred special rights to Portugal, France and Belgium in privatised undertakings active primarily in the energy sector.[51] More precisely, in his opinion, Advocate General Colomer first underlined the historical importance of Article 345 TFEU, noting that it was the only provision of the Treaties to be directly inspired by the Schuman declaration of 9 May 1950. Its position in Part Seven of the TFEU, devoted to 'General and Final Provisions', and its forceful and unconditional expression 'in no way' reinforce its 'specific nature and symbolic importance'.[52] Regarding its actual meaning, Advocate General Colomer suggested that a literal interpretation would not be appropriate, as its terms were rather imprecise and the expression 'system of property ownership' was not a legal but an economic concept.[53] Because of its programmatic nature, only a historical and teleological interpretative approach could ensure its effectiveness. In this regard, the *travaux préparatoires* of the Treaty demonstrated that the aim of Article 345 TFEU was to declare the neutrality of the Treaty with respect to the ownership *of the undertakings* in the economic sense, i.e. *as means of production*. Thus, the expression 'system of property ownership' contained in Article 345 TFEU refers not to the civil rules concerning property relationships but to *any* interventionist measure which allows the

[50] ECJ 4 June 2002, Case C-367/98, *Commission* v *Portugal*; ECJ 4 June 2002, Case C-483/99, *Commission* v *France*; ECJ 4 June 2002, C-503/99, *Commission* v *Belgium*.

[51] The Portuguese legislation imposed a cap on foreign investment and an authorisation procedure for the acquisition of a holding in certain Portuguese undertakings in excess of a specified level; similarly, the French legislation imposed an authorisation procedure of the acquisition of shares exceeding certain limits as well as an opposition procedure regarding corporate decisions to transfer or use as security the majority of the capital of four subsidiaries of Société Nationale Elf-Aquitaine; and finally, the Belgian legislation provided an opposition procedure with respect to certain management decisions regarding the transfer of strategic assets or decisions contrary to the country's energy policy.

[52] Opinion of Advocate General Ruiz Jarabo Colomer 3 July 2001, Cases C-367/98, C-483/99 and C-503/99, *Commission* v *Portugal, France and Belgium*, paras. 43-45.

[53] *Ibid*. para. 47.

state to contribute to the organisation of the national economy.[54] This includes not only rules which determine the public or private ownership status of undertakings, but also rules on special prerogatives ('golden shares') that member states retain in privatised, strategically important undertakings, as public interventionist means of implementing national economic policy objectives.[55] This reasoning echoed the common-sense maxim invoked by the Spanish Government 'he who is able to do the most, can also do the least'.[56] In this way, Advocate General endorsed a 'maximalist shield' interpretative approach of Article 345 TFEU, which in principle *shields/exempts* any measure of state intervention regarding the property ownership systems of undertakings as means of production from the rules of the Internal Market. This, however, does not mean that Article 345 TFEU detracts from the application of the fundamental rules of the Treaty, in particular the prohibition of discrimination on grounds of nationality.[57] It simply means that those measures are not considered to be *per se* incompatible with the Treaty, as they are covered by the presumption of validity conferred on them by the legitimacy of Article 345 TFEU.[58] Their compliance with the Treaty must be assessed specifically, by means of a case-by-case examination of their nature and their implications for the functioning of the Internal Market.[59] Not surprisingly, the Court rejected this interpretation. It held that Article 345 TFEU is irrelevant to the 'golden shares' case law, as 'it merely signifies that each member state may organise the system of ownership of undertakings as it thinks fit, whilst at the same time respecting the fundamental freedoms enshrined in the Treaty'.[60]

2.2. The 'reductionist shield' interpretation

Contrary to Advocate General Colomer, the Commission was of the opinion that Article 345 TFEU was not relevant to 'golden shares', since these rules did not concern the public or private ownership system of a company, but rather certain rights and powers relating to the distribution

[54] *Ibid.* paras. 54-56.
[55] *Ibid.* paras. 61 and 91.
[56] *Ibid.* para. 66.
[57] *Ibid.* para. 67.
[58] *Ibid*.
[59] *Ibid.* para. 90.
[60] ECJ 4 June 2002, Case C-367/98, *Commission* v *Portugal*, para. 28; ECJ 4 June 2002, Case C-483/99, *Commission* v *France*, para. 23; ECJ 4 June 2002, C-503/99, *Commission* v *Belgium*, para. 22.

of property ownership of that company between private persons.[61] Once the member state has proceeded to privatisation, it should ensure that the privatised undertaking functions in full accordance with the principles of a liberal market economy. Therefore, 'golden shares' are not covered by the presumption of validity of Article 345 TFEU.

However, when it comes to *stricto sensu* property ownership rules, the Commission purports to remain reverently neutral: it 'has always scrupulously ensured neutrality in its dealings with different forms of ownership'[62] and 'has nothing to say on whether companies responsible for providing general interest services should be public or private and is therefore not requiring privatisation'.[63]

This view was also defended by Advocate General Jääskinen in the *Essent* case[64] concerning the prohibition of privatisation of the Dutch energy distribution system. In this case, the Court was called upon to appraise the compatibility of the Dutch legislation concerning ownership unbundling of energy suppliers and distributors with the free movement of capital under Article 63 TFEU. The request for a preliminary ruling was made by the Hoge Raad der Nederlanden in proceedings between the Staat der Nederlanden and four companies active in the generation/production, supply and trade of electricity and gas in the Netherlands (Essent NV, Essent Nederland BV, Eneco Holding NV and Delta NV). The national provisions at issue imposed three prohibitions: first, the 'prohibition of privatisation' (prohibiting the sale to private investors of shares held in the electricity and gas distribution system operators active in the Netherlands); second, the 'group prohibition' (prohibiting any ownership or control links between, on the one hand, companies which are members of the same group as an operator of such distribution systems and, on the other, companies which are members of the same group as an undertaking which generates/produces, supplies or trades in electricity or gas in the Netherlands); and third, 'the prohibition of unrelated activities' (banning engagement by such an operator and by the group of which it is a member in transactions or activities which may adversely affect the operation of the system concerned).

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[61] *Ibid.* paras. 41-42.

[62] European Commission, 'Bulletin of the European Commission' (1991, No 7/8, Vol. 24) section 1.2.75.

[63] European Commission, Communication 'Services of general interest in Europe', COM(96) 443 final p. 5.

[64] ECJ 22 October 2013, Joined Cases C-105/12 to C-107/12, *Staat der Nederlanden* v *Essent NV, Essent Nederland BV, Eneco Holding NV and Delta NV*.

This legislation was adopted with a view to transposing the Second Energy Package,[65] which imposed the obligation of the *legal unbundling* of transmission and distribution networks from the commercial activities of electricity and gas companies (production and supply of energy). However, the rules imposed by the Dutch legislation (particularly the group prohibition and the prohibition of unrelated activities) amounted to an *ownership unbundling*, and as such it went further than was required under the Second Energy Package in force at that time. The ownership unbundling was introduced only with the Third Energy Package,[66] which, however, was not applicable, *ratione temporis*.[67] Nevertheless, the Dutch government decided to impose an ownership unbundling of the distribution networks, considering that this form of ownership unbundling was most appropriate to pursue the objective of combating cross-subsidisation in the broad sense, including exchange of strategic information, in order to achieve transparency in the electricity and gas

[65] Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, *OJ* [2003] L 176/37, 15.7.2003; Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, *OJ* [2003] L 176/57, 15.7.2003; Regulation (EC) 1228/2003 of the European Parliament and of the Council on conditions for access to the network for cross-border exchanges in electricity, *OJ* [2003] L 176/1, 15.7.2003; Regulation (EC) 1775/2005 of the European Parliament and of the Council of 28 September 2005 on conditions for access to the natural gas transmission networks, *OJ* [2005] L 289/1, 3.11.2005.

[66] Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, *OJ* [2009] L 211/55, 14.8.2009; Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, *OJ* [2009] L 211/94, 14.8.2009; Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003, *OJ* [2009] L 211/15, 14.8.2009; Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005, *OJ* [2009] L 211/36, 14.8.2009.

[67] For the sake of completeness, it should be noted that the Third Energy Package only introduces the ownership unbundling between the transmission networks and the production/supply of energy. The ownership unbundling of the energy distribution networks pursued by the Dutch legislation is still not required by EU law.

markets and to prevent distortions of competition.[68] With respect to the prohibition of privatisation, the Dutch government argued that it constitutes a body of rules governing the system of property ownership within the meaning of Article 345 TFEU. Therefore, this ban is excluded from the scope of application of Internal Market rules. In other words, according to the Dutch government, the rules on free movement of capital were not applicable.[69]

In his Opinion, Advocate General Jääskinen distinguished the situation at issue from the 'golden shares' case law.[70] More precisely, he explained that 'golden shares' could only exist in *already privatised* companies. Thus, the granting of 'golden shares' to the state *presupposes privatisation* of the companies in question. As the state has already exercised its sovereign right in favour of privatisation, the privileged treatment it retains for itself within an essentially *private* property ownership system is not exempted from the Treaty provisions on fundamental freedoms. However, in the case at hand, the Netherlands had not applied a privatisation policy. On the contrary, the national legislation at issue established a *prohibition of privatisation* of the energy distributor system operators. This ban flowed ineluctably from the public ownership of the Dutch energy distribution system, and as such it was covered by the presumption of validity of Article 345 TFEU.[71] To the extent that it constituted an *intrinsic consequence* of the ownership system chosen by the Netherlands, it could not be regarded as an obstacle to the free movement of capital, insofar as this system is not discriminatory. On the contrary, any restrictive *indirect consequences* other than those directly and inevitably stemming from the public or private system of ownership were to be subject to the fundamental freedoms of the Treaty.[72]

Thus, the Commission, together with Advocate General Jääskinen, adopt a 'reductionist shield' interpretation of Article 345 TFEU, according to which Article 345 TFEU creates a shield against internal market scrutiny only with respect to measures intrinsically connected to the ownership system established in a member state (such as a prohibition of privatisation), but not with respect to measures that relate only indirectly to that ownership system (such as 'golden shares'). This interpretative

[68] *Supra* n. 64, para. 49.
[69] *Ibid.* para. 24.
[70] Opinion of Advocate General Jääskinen 16 April 2013, Joined cases C-105/12 to C-107/12, *Staat der Nederlanden* v *Essent NV, Essent Nederland BV, Eneco Holding NV and Delta NV*, para. 46.
[71] *Ibid.* para. 49.
[72] *Ibid.* para. 42.

approach is methodologically consistent, as it protects the fundamental right of member states to opt for either a private or public ownership status of undertakings, whilst at the same time subjecting state privileges ('golden shares') to the internal market scrutiny.

2.3. The 'sword' interpretation

However, the 'reductionist shield' interpretation was not accepted by the Court. Contrary to Advocate General Jääskinen and the Commission, the Court adopted the third interpretative approach – the 'sword' interpretation of Article 345 TFEU – which corresponds to the least possible degree of state intervention into the market. In the words of Peter Van Cleynenbreugel, 'rather than creating a shield against internal market scrutiny, Article 345 TFEU neutrality should be interpreted as providing a sword to establish an even more refined balance between economic freedom and state intervention in the market'.[73] While recognising the *competence* of the member states to determine their property ownership systems, the Court subjects the *exercise* of this competence to the rules of the Internal Market. Following this classic *mantra*, the Court rejected the application of Article 345 TFEU in the 'golden shares' cases, ruling that that this provision merely signified that each member state may organise as it thinks fit the system of ownership of undertakings, whilst at the same time respecting the fundamental freedoms enshrined in the Treaty.[74] In general, Article 345 TFEU has been construed narrowly so as not to prevent the application of fundamental rules of the Treaties. In *Fearon*, the ECJ ruled that '[…] although [Article 345 TFEU] does not call in question the member states' right to establish a system of compulsory acquisition by public bodies, such a system remains subject to the fundamental rule of non-discrimination which underlies the chapter of the Treaty relating to the right of establishment'.[75] The narrow scope of Article 345 TFEU has also been recognised in the field of intellectual property rights. In particular, it has been established that this provision 'does not exclude any influence whatever of Community law on the exercise of national

[73] P. Van Cleynenbreugel, *supra* n. 48, p. 265.
[74] ECJ 4 June 2002, Case C-367/98, *Commission* v *Portugal*, para. 28; ECJ 4 June 2002, Case C-483/99, *Commission* v *France*, para. 23; ECJ 4 June 2002, C-503/99, *Commission* v *Belgium*, para. 22.
[75] ECJ 6 November 1984, Case 182/83, *Robert Fearon & Company Limited* v *Irish Land Commission*, para. 7.

industrial property rights'[76] and 'cannot be interpreted as reserving to the national legislature, in relation to industrial and commercial property, the power to adopt measures which would adversely affect the principle of free movement of goods within the common market as provided for in and regulated by the Treaty'.[77] Thus, although the system of property ownership continues to be a national competence under Article 345 TFEU, that provision does not have the effect of exempting such a system from the fundamental rules of the Treaty.[78]

Similarly, in the *Essent* case, while recognising that the prohibition of privatisation of distributor system operators fell within the scope of Article 345 TFEU, the Court nonetheless held that this did not exclude the application of the free movement of capital enshrined in Article 63 TFEU.[79] Such a prohibition constituted an 'impediment' for the purposes of Article 63 TFEU since, firstly, it was liable to prevent or limit the acquisition of shares in the undertakings concerned or to deter investors of other member states from investing in their capital[80] and, secondly, it constituted an obstacle to the raising of capital by the undertakings concerned, since the acquisition of shares was being restricted.[81]

This interpretation is susceptible to criticism, mainly because it seemingly renders Article 345 TFEU devoid of any meaning whatsoever. This approach has profound consequences for the European economic model, as it essentially means that there should be no public ownership in Europe. But is this really what the Treaties prescribe? And is it up to the Court to determine the core of the economic policy pursued by the member states, especially when there is secondary legislation on the matter?

Being aware of the sensitive nature of the case and the far-reaching consequences of its judgment, the Court tried to moderate its approach; with an enigmatic and ambiguous language, it implicitly accepted that

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[76] ECJ 13 July 1966, Joined Cases 56 and 58-64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH* v *Commission*, p. 345.
[77] ECJ 18 February 1992, Case C-30/90, *Commission* v *UK*, para. 18.
[78] ECJ 1 June 1999, Case C-302/97, *Klaus Konle* v *Republik Österreich*, para. 38; ECJ 4 June 2002, Case C-367/98, *Commission* v *Portugal*, para. 48; ECJ 15 May 2003, Case C-300/01, *Doris Salzmann*, para. 39; ECJ 23 September 2003, Case C-452/01, *Margarethe Ospelt and Schlössle Weissenberg Familienstiftung*, para. 24.
[79] ECJ 22 October 2013, Joined Cases C-105/12 to C-107/12, *Staat der Nederlanden* v *Essent NV, Essent Nederland BV, Eneco Holding NV and Delta NV*, para. 37.
[80] *Ibid*. para. 41.
[81] *Ibid*. para. 42.

Article 345 TFEU could be used as the ground that could justify restrictions on movements of capital. Even though in earlier case law it had explicitly excluded the possibility of invoking Article 345 TFEU in order to justify a restriction on the rules relating to the free movement of capital,[82] it nonetheless explained that the interest underlying the choice of the legislature in relation to the rules on the public or private ownership of the electricity or gas distribution system operator could be taken into consideration as an overriding reason in the public interest.[83] The Court made clear that the argument that Article 345 TFEU could not be used as justification for restriction on capital movements was limited only to the case law concerning 'golden shares'. It emphasised that the *Essent* case should be clearly distinguished from the 'golden shares' case law, as the former related to 'an absolute prohibition of privatisation', whereas the latter 'concerned a restriction created by privileges which the member states attached to their position as a shareholder in a privatised undertaking'.[84] For these reasons, the Court accepted that the reasons underlying the choice of a public ownership system under Article 345 TFEU could be taken into consideration as circumstances capable of justifying restrictions on the free movement of capital resulting from an absolute prohibition of privatisation.[85] With respect to the other two prohibitions, the Court acknowledged that the objectives of combating cross-subsidisation in the broad sense, including exchange of strategic information, in order to achieve transparency in the electricity and gas markets and to prevent distortion of competition, could be regarded as overriding reasons in the public interest justifying restrictions on the free movement of capital.

Conclusion

The privatisation of public utilities is a particularly complex economic policy issue, which involves different stakeholders and different interests that need to be protected. Some argue that privatisation should be a priority for national governments, as it brings significant efficiency gains and it reduces the level of public debt, while others believe that privatisation is not always desirable, especially when it comes to public

[82] ECJ 8 July 2010, Case C-171/08, *Commission* v *Portugal*, para. 64.
[83] ECJ 22 October 2013, Joined Cases C-105/12 to C-107/12, *Staat der Nederlanden* v *Essent NV, Essent Nederland BV, Eneco Holding NV and Delta NV*, para. 53.
[84] *Ibid.* para. 54.
[85] *Ibid.* para. 55.

utilities that are essential for the society as a whole, and network industries in particular, where it is difficult or even impossible to achieve well-functioning competitive markets. The legal framework of the European economic system seems to favour the privatisation of national undertakings active in strategically sensitive sectors. However, Article 345 TFEU could be regarded as one of the Treaty provisions that aim at safeguarding social values so that they will not be sacrificed on the altar of economic integration. This provision proclaims the principle of neutrality with respect to the property ownership systems adopted by the member states. Its strong symbolic importance and its nebulous wording have given rise to different interpretations of its meaning. In this chapter, a threefold interpretative scheme was developed: (1) the 'maximalist shield' interpretation; (2) the 'reductionist shield' interpretation; and (3) the 'sword' interpretation. The Court of Justice in its recent *Essent* case regarding the prohibition of privatisation of the Dutch energy distribution network operators opted for the 'sword' interpretation, thereby confirming that national rules relating to the property ownership of the member states cannot be excluded from the scrutiny of the Internal Market rules. However, it did accept that the reasons underlying the choice of a public ownership system under Article 345 TFEU could be used as a justification for restrictions on capital movements imposed by a prohibition of privatisation. Therefore, this judgement could be regarded as an effort to reconcile capital liberalisation with the objective of a 'highly competitive social market economy' enshrined in Article 3(3) TEU.

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ECJ 18 February 1992, Case C-30/90, *Commission* v *UK*
ECJ 1 June 1999, Case C-302/97, *Klaus Konle* v *Republik Österreich*
ECJ 4 June 2002, C-503/99, *Commission* v *Belgium*
ECJ 4 June 2002, Case C-367/98, *Commission* v *Portugal*
ECJ 4 June 2002, Case C-483/99, *Commission* v *France*
ECJ 15 May 2003, Case C-300/01, *Doris Salzmann*
ECJ 23 September 2003, Case C-452/01, *Margarethe Ospelt and Schlössle Weissenberg Familienstiftung*
ECJ 8 July 2010, Case C-171/08, *Commission* v *Portugal*
ECJ 8 November 2012, Case C-244/11, *Commission* v *Greece*
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7. THE EU APPROACH FOR CORPORATE GOVERNANCE OF PUBLIC SECTOR ENTITIES: NEW FORM OF GOVERNANCE

CIPRIAN DRUMAȘU*

1. What is Corporate Governance?

The term 'governance' comes from 'to govern' and, according to the Merriam-Webster dictionary, it is 'the way that a city, company, etc., is controlled by the people who run it'.[1] According to M. Ghiță,[2] governance means leadership and involves all activities of the entity falling under the entity management. If the term 'governance' refers to 'lead' or to 'manage', the term 'corporate governance' brings something extra, namely 'leadership' / 'management' of an organisation. Therefore, the concept of corporate governance means the integral management of an organisation in its entirety, by accepting all internal components, that work together, which will eventually be integrated to the leadership and implementation of risk management within the organisation, as well as the financial management and internal control management system, including internal audit.[3]

1.1. The appearance of the concept of Corporate Governance

The appearance of the term 'Corporate Governance' (CG) at the international level took place in the context of cases of repeated, serious

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1 'Governance', *Merriam-Webster dictionary*, available at: www.merriam-webster.com/dictionary/governance, visited 30 June 2015.

2 Ghiță M., *Guvernanța Corporativă* (Ed. Economică 2008) p. 13.

3 *Ibid.*, p. 13. *See* also A. Matei and C. Drumașu, 'Corporate Governance and public sector entities', 26 *Procedia Economics and Finance* (2015) p. 495 at p. 496.

fraud and financial abuse in countries with developed capital economies (USA, UK, Italy).[4] It was not only the private sector that faced financial failure and fraud, but the public sector too. Some illustrative examples are: Metropolitan Police (1995), where the Deputy Director of Finance stole over £5 million during the period 1986-1994, Inland Revenue (1997), where a corrupt senior tax inspector was found guilty for receipt of bribery, including luxury holidays abroad and 'cash-for-questions' (1994), including the case of the European Commission (1999/2002), where 15 members resigned following accusations of fraud and bad management.

As a response to these financial failures and cases of fraud, national governments and different competent bodies manifested concern and initiated changes, by toughening the CG laws and introducing sanctions which meant to determine companies to adopt ethical and transparent policies. These concerns and changes were translated into CG codes.[5] In the context of the 1970-1990 scandals, the mission of Corporate Governance was that of balancing and equally dividing power between shareholders, administrators and executive management, with the purpose of preventing the appearance of new instances of fraud and financial abuse, and especially of regaining the society's trust in the business environment.[6]

1.2. Defining the concept of Corporate Governance

In the relevant literature there is no universally applicable definition for the concept of corporate governance. For that reason, in this research the two following definitions will be used: Sir Adrian Cadbury (1992) defined CG as the 'system by which companies are lead and controlled',[7]

[4] Watergate (1970), Guinness (1986), Polly Peck International (1989), Maxwell (1991), The International Trade and Credit Bank (1991), Barings Futures (1995), etc.

[5] A. Matei and C. Drumașu, *supra* n. 3, p. 496, who explain that 'the great majority of developed and developing countries have a Corporate Governance Code, issued by different ruling bodies (according to www.ecgi.org, at global level there are 409 developed corporate governance codes). Among them, the best knows are Actual Sarbanes-Oxley, in the USA, developed as response to the failures and scandals that took place in the USA, the Cadbury Code and the updating of the United Kingdom code, as a reaction to the failures of companies listed in the British Stock Exchange'.

[6] *Ibid.*

[7] Cadbury Report, *Report of the Committee on the Financial Aspects of Corporate Governance* (The Committee on the Financial Aspects of Corporate Governance and Gee and Co. 1992) para. 2.5.

while a 1999 OECD report specifies that CG 'refers to mechanisms by which companies are managed, especially the means by which those who control current operations are being held accountable for their performance.'[8]

1.3. Corporate Governance Principles

The Cadbury Report had the privilege of being the first to define the concept of Corporate Governance.[9] The Cadbury Report also established the first set of principles to guide organisations in the Corporate Governance process. The three principles set by the Cadbury Report are:[10]

Openness: 'Openness on the part of companies, within the limits set by their competitive position'. This is the foundational element for the level of trust that needs to exist between the business and all those who have an interest in its success.

Integrity: 'Integrity means both straightforward dealing and completeness'.

Accountability: 'Boards of directors are accountable to their shareholders and both have to play their part in making that accountability effective'.

1.3.1. OECD Principles

Based on the principles set by the Cadbury Report in 1999 the OECD developed the key principles of Corporate Governance, which set the establishment of a Corporate Governance framework, and which are the following:[11]

- Protection and facilitation of the rights of shareholders. The CG framework should protect shareholders' rights.
- The equitable treatment of shareholders. The CG framework should ensure the equitable treatment of all shareholders, including

[8] OECD, *Principles of Corporate Governance* (OECD Publications 1999, revised 2004).
[9] *See* Section 1.2.
[10] Cadbury Report, *supra* n. 7, paras. 3.2-3.4.
[11] *Ibid.* para. 4. The OECD principles were first published in 1999, revised in 2004, and revised again and endorsed by the G20 in 2015, and are available at the website https://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf (visited 18 May 2016). *See* also K. H. Spencer Pickett, *The Essential Handbook of Internal Auditing* (John Wiley and Sons 2005), available at: http://www.slideshare.net/kvonstauffenberg/the-essentialhandbookofinternalauditing (visited 18 May 2016).

minority and foreign shareholders. All shareholders should have the opportunity to obtain effective redress for violation of their rights.
- The role of stakeholders in corporate governance. The CG framework should recognise the rights of stakeholders as established by law, and encourage active co-operation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises.
- Disclosure and transparency. The CG framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company.
- The responsibilities of the board. The corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability to the company and the shareholders.

A new chapter was added in the new version of 2015 in order to address 'the need for sound economic incentives throughout the investment chain, with a particular focus on *institutional investors* acting in a fiduciary capacity' and the disclosure of conflicts of interest that 'may compromise the integrity of proxy advisors, analysts, brokers, rating agencies and others that provide analysis and advice that is relevant to investors'[12].

1.3.2. Principles of public sector corporate governance – Nolan principles

The Committee on Standards in Public Life was established in October 1994 as an advisory non-departmental public body of the United Kingdom Government, in response to concerns that conduct by some politicians was unethical (for example the 'cash-for-questions' affair). In its First Report in 1995, it set the following seven principles of public life:[13]

- Selflessness: Holders of public office should act solely in the public interest. They should not act in order to gain financial or other benefits for themselves, their family or their friends.

[12] G20/OECD Principles of Corporate Governance, *supra* n. 11, p. 5.
[13] UK Committee on Standards in Public Life, *The 7 principles of public life*, 31 May 1995, available at: https://www.gov.uk/government/publications/the-7-principles-of-public-life/the-7-principles-of-public-life--2 (visited 18 May 2016).

- Integrity: Holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that might seek to influence them in the performance of their official duties.
- Objectivity: In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.
- Accountability: Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.
- Openness: Holders of public office should be as open as possible about all the decisions and actions they take. They should give reasons for their decisions, and should restrict information only when the wider public interest clearly demands it.
- Honesty: Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.
- Leadership: Holders of public office should promote and support these principles by leadership and example.

Two years later, the Committee for Public Life Standards expanded the seven principles of public life towards the staff involved / employed in the local public administration.[14]

1.4. Characteristics of Corporate Governance

The main characteristics of Corporate Governance, which are met both in the private companies and in the public sector entities, are: internal control, risk management, internal audit, and external audit.

a) Internal control: The International Organisation of Supreme Audit Institutions (INTOSAI) June 1992 Guidelines for Internal Control Standards defines internal control structure as 'the plans of an organisation, including management's attitude, methods, procedures, and other measures that provide reasonable assurance that the following general objectives are achieved:

[14] *See* also A. Matei and C. Drumașu, *supra* n. 3, p. 501-502.

- promoting orderly, economical, efficient, and effective operations and quality products and services consistent with the organisation's mission;
- safeguarding resources against loss due to waste, abuse, mismanagement, errors, fraud and other irregularities;
- adhering to laws, regulations, and management directives; and
- developing and maintaining reliable financial and management data and fairly disclosing that data in timely reports.'[15]

The Institute of Internal Auditors defines internal control as a process within an organisation designed to provide reasonable assurance regarding the following primary corporate objectives:

- the reliability and integrity of information
- compliance with policies, plans, procedures, laws and regulations
- the safeguarding of assets
- the economical and efficient use of resources
- the accomplishment of established objectives and goals of operations or programmes.[16]

Internal control is a process effected by an entity's board of directors, management, and other personnel, designed to provide reasonable assurance regarding the achievement of objectives relating to operations, reporting, and compliance.[17]

In agreement with the two abovementioned definitions of internal control, there are the following characteristics for internal control:

- it is geared to the achievement of objectives,
- it is a process consisting of ongoing tasks and activities,
- it is effected by all employees,
- it is meant to provide reasonable assurance for senior management and board of directors of an entity,

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[15] International Organisation of Supreme Audit Institutions – INTOSAI, Guidelines for Internal Control Standards (INTOSAI Professional Standards Committee, June 1992) p. 8.

[16] *See* http://www1.worldbank.org/publicsector/pe/befa05/ExecutionInternalcontrol.doc.

[17] American Institute of Certified Public Accountants (AICPAs), *Internal Control - Integrated Framework: Executive Summary, Framework and Appendices, and Illustrative Tools for Assessing Effectiveness of a System of Internal Control* (3 volume set) (AICPA 2013) p. 1.

- it is flexible to the entity structure.

b) Risk Management: The Committee of Sponsoring Organisations of the Treadway Commission, Enterprise Risk Management (COSO ERM) defines entity risk management as 'a process effected by an entity's board of directors, management and other personnel, applied in strategy setting and across the entity, designed to identify potential events that may affect the entity and manage risk to be within its risk appetite, to provide reasonable assurance regarding the achievement of entity objectives.'[18]

In general, risk management is the 'process undertaken to identify, assess, manage and control potential events or situations, and to provide reasonable assurance regarding the achievement of organisational objectives'.[19]

The main objectives of risk management are:

- Ensuring that the organisation's objectives are achieved,
- Protecting the organisation's resources,
- Ensuring the existence and functioning of internal control systems for crisis management.

c) Internal auditing: It is 'an independent, objective assurance and consulting activity designed to add value and improve an organisation's operations. It helps an organisation accomplish its objectives by bringing a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, control and governance process.'[20]

The scope of an internal audit covers all the activities of an organisation. It includes all the organisation's operations, resources, staff, services and responsibilities to other bodies.

d) External audit: It is defined as 'a periodic examination of the books of account and records of an entity carried out by an independent third

[18] The Committee of Sponsoring Organizations of the Treadway Commission, *Enterprise Risk Management - Integrated Framework*, Executive Summary (Committee of Sponsoring Organizations of the Treadway Commission 2004) p. 2, available at http://www.coso.org/documents/coso_erm_executivesummary.pdf (visited 18 May 2016).

[19] *Ibid.* p. 8.

[20] According to the definition given by the Institute of Internal Auditors, available at: https://na.theiia.org/standards-guidance/mandatory-guidance/Pages/Definition-of-Internal-Auditing.aspx (visited 18 May 2016).

party (the auditor), to ensure that they have been properly maintained, are accurate and comply with established concepts, principles, accounting standards, legal requirements and give a true and fair view of the financial state of the entity.'[21]

All these components are not new. Corporate Governance put all these, already existing elements into a common framework in order to increase benefits by using minimal resources. In order to achieve this result, these elements of CG must be interconnected and must relate to each other. In addition, the elements constituting CG can be applied to any type of entity (private, public or non-governmental), with the necessary adjustments and adaptations (the goal of the entity, the size, the legal and economic context, the national/organisational culture, etc.).

2. The EU approach to Corporate Governance of Public Sector Entities

Given the current socio-economic context and the challenges that European countries are facing (increasing budget deficits, rising public debt levels, the global economic crisis, etc.), new forms of governance need to be identified. In the context of budgetary pressures imposed to European countries, as well as increasingly strident demands for efficient spending of public finances, during the PIFC Conference Organised by the European Commission (DG Budget) in September 2009, the decision was taken to produce a comprehensive overview of Public Internal Control (PIC) systems in EU member states.[22]

In 2011, DG Enlargement, DG Development and Cooperation, and DG Budget of the European Commission, in collaboration with SIGMA of the OECD (which is well known for its experience in public administration and public finance management reforms), produced the 'Compendium of the public internal control systems in the EU member states 2012'.[23] The

[21] According to the Chartered Institute of Management Accountants, *Guidelines on the contribution external audit experience may make towards a successful application for membership of CIMA*, available at: http://www.cimaglobal.com/Documents/ImportedDocuments/external_audit_guidelines_practical_experience_04.pdf (visited 18 May 2016).

[22] The PIFC concept is a state-of-the-art model for Public Internal Control that complies with international standards such as INTOSAI and IIA IPPF, and European good practice. *See* http://ec.europa.eu/budget/pic/compendium/intro/index_en.cfm.

[23] European Commission, *Compendium of the public internal control systems in the EU Member States 2012* (Publications Office of the European Union 2011).

Compendium, which was published within the Conference on Public Internal Control Systems in EU member states (Brussels, 27-28 February 2012), puts together in a common framework the solutions that have been selected by other EU member states on the PIC, risk management, accountability arrangements, internal audit and external audit. The Compendium also constitutes a valuable source of solutions for all stakeholders, and especially for practitioners in the field of general state governance.

I will present a comparative framework regarding the implementation of the main characteristics of corporate governance in the 27 EU member states until 2012 (Table 1).

Table 1. Comparative framework of CG's characteristics implemented in 27 EU member states until 2012

EU Country	Internal Control	Risk Management	Internal Audit	External Audit
Austria	YES	YES	YES	YES
Belgium	YES	YES	YES	YES
Bulgaria	YES	YES	YES	YES
Cyprus	YES	YES	YES	YES
Czech Republic	YES	YES	YES	YES
Denmark	YES	YES	YES	YES
Estonia	YES	YES	YES	YES
Finland	YES	YES	YES	YES
France	YES	YES	YES	YES
Germany	YES	YES	YES	YES
Greece	YES	YES	YES	YES
Hungary	YES	YES	YES	YES
Ireland	YES	YES	YES	YES
Italy	YES	YES	YES	YES
Latvia	YES	YES	YES	YES
Lithuania	YES	YES	YES	YES
Luxembourg	YES	YES	YES	YES
Malta	YES	YES	YES	YES
Netherlands	YES	YES	YES	YES
Poland	YES	YES	YES	YES
Portugal	YES	YES	YES	YES
Romania	YES	YES	YES	YES

Slovakia	YES	YES	YES	YES
Slovenia	YES	YES	YES	YES
Spain	YES	YES	YES	YES
Sweden	YES	YES	YES	YES
United Kingdom	YES	YES	YES	YES

Source: Author (based on the European Commission Compendium of the public internal control systems in the EU member states, 2012)

There are many conclusions based on the Compendium regarding the characteristic elements of Corporate Governance in the member states.

In relation to internal control: Some countries (see Luxembourg and Spain) describe 'internal control' as the entire control system within the public administration and the sum of all institutions involved in controlling public funds ('internal', in this context, is understood as internal within the executive, as opposed to 'external' control, which is exercised by the SAI and the national parliament). Other countries (such as Denmark, the Netherlands, Sweden, the United Kingdom and the 12 new member states) understand the 'public internal control system' to mean the conceptually comprehensive and harmonised approach of government to ensure that all public entity managers establish, maintain and monitor their integral management processes.

Responsibility for and reporting on internal control – setting up, monitoring and reporting on the functioning of the respective internal control systems within public entities – is part of the management responsibilities in those countries that have explicit, decentralised internal control policies. This reporting requirement is usually combined with an annual report or an annual financial statement prepared by the entities.

As regards risk management: For most countries with an explicitly decentralised internal control system, risk management is also a mandatory requirement for public management. In Estonia, for example, the government regulation on strategic planning stipulates that any state authority is to submit a summary of risk analysis and an analysis of the activity environment. Other countries, such as Ireland, indicate that formal risk management strategies are not in place in general, but they are implemented informally by some departments. A few countries, on the other hand, do not explicitly mention risk assessments at all as a part of their internal control arrangements (Germany, Italy, Luxembourg and Spain).

Regarding internal audit, there are four elements to be taken into account:

a) Existence of internal audit and legal basis: The vast majority of the member states have already established an internal audit function. The majority of countries that have internal audit have established this function in specific laws or regulations (with the exception of the United Kingdom and Germany).
b) Internal audit coverage: Most internal audit systems neither cover all parts of the public sector, nor every part in the same way. Even the coverage of the central government part varies from country to country.
c) New challenges, new types of audit: The extension of the scope of internal audit services is also reflected in the various and increasing types of audits regularly conducted by internal audit functions: compliance, inventory, financial, financial assurance, management, operational, systems and IT audits are often mentioned. Security, information security and performance audits are also frequently mentioned.
d) Internal audit in relation with external audit: With a few exceptions, there seem to be continuous, and in some cases elaborate, working relations between public internal audit and external audit entities (SAIs).

The wave of public administration reforms, which started in some countries in the beginning of the 1980s, has become to some extent a 'pan-European movement', conducted by national governments in accordance with elements of CG. As the Compendium shows, none of the EU member states has remained unaffected.

Conclusion

Integration and alignment with the EU rules represented a decisive factor in reforming the public sector and public entities within all member states. Both member states and candidate countries have focused their efforts on getting improved performance and results in the public sector as a central objective. The public sector entities have to be adapted to the current needs of contemporary society (rapid delivery service, financing of public entities, preventing the growth of budget deficits, etc.), as an exponential factor of their activity.

The evolution of the characteristic elements of Corporate Governance in the EU public entities (internal control, risk management, internal audit, external audit) was an upward one, causing public entities to pay attention to their own objectives and management of performance, risk management

and governance as a whole, including responsibility of the people involved in public life, the quality of service delivery and effectiveness entities in terms of costs.

As a consequence of these developments (between the 1990s and 2010s, according to the Compendium), specific elements of the private sector were introduced into the public sector (as good practices), such as: national and international standards of internal control, national and international standards of internal audit, national and international standards of external audit, risk management systems, internal audit committees etc., all in order to achieve better performance in the public entities and better management of public funds.

Public administration reform in general, and reforms in public internal control in particular, are never finalised. As in the past, public administrations with all kinds of administrative traditions will have to remain creative when adapting to new requirements. Corporate Governance as a model of coordination and control is a viable solution to the challenges faced by public entities of the EU member states. This is why the European Commission has worked towards a PIC Network, made up of the European Commission and Internal Control specialists of all 28 EU Member States, which has held its PIC Conference on 26/27 November 2015, in Paris, France.[24] The discussion was centered not only to Principles of Public Internal Control, but also to new topics, such as an Optimal Internal Control environment[25] and a Central Harmonisation Function for all public entities. This demonstrates the challenge that the EU faces regarding sound public administration in all member states.

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[24] http://ec.europa.eu/budget/pic/conference/index_en.cfm.

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8. KEYNOTE SPEECH: SOME REMARKS ON THE CROSS-BORDER ESTABLISHMENT OF COMPANIES IN THE EU

MIGUEL GARDEÑES SANTIAGO*

Introduction

The aim of this chapter is not to make an exhaustive presentation of the case law of the Court of Justice of the European Union (henceforth ECJ) on cross-border establishment of companies, but simply to make some remarks on key issues that, in my opinion, deserve to be highlighted.[1] In

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[1] This work has been undertaken within the framework of the research project, in which I participate, 'Desarrollo del Derecho de Sociedades en la Unión Europea: libertad de establecimiento, fiscalidad e interacción con los ordenamientos nacionales' [*Development of Company Law in the EU: Freedom of Establishment, Taxation and Interaction with National Legal Systems*], financed by the *Subdirección General de Proyectos de Investigación* of the Spanish Ministry for Economy and Competitiveness, reference DER2013-46535-P for the period 2014-2017. The main researchers are C. Górriz López and R. Arenas García, while other specialists in Private International Law, Commercial Law and Taxation Law participate in the project. More information is available at: 'Desarrollo del Derecho de sociedades en la UE' [*Development of Company Law in the EU*], in Blogs.uab.cat/sociedadesue. This project was preceded by two other research projects in the field of international company law: 'Adecuación de los tipos y de las estructuras de las sociedades y demás personas jurídicas a las exigencias derivadas de la integración económica mundial' [*Adaptation of the types and structures of Companies and other Legal Persons to the Requirements of Global Economic Integration*], (reference SEJ2005-06811/JURI, directed by R. Arenas García for the period 2005-2008), and 'Interacción entre la autonomía de la voluntad y la protección de los intereses generales en la regulación de la actividad internacional de las sociedades' [*Interaction between Party Autonomy and the Protection of General Interests in the Regulation of the International Activity of*

this context, the key provision is Article 54 of the Treaty on the Functioning of the European Union (henceforth TFUE), which extends the freedom of establishment to 'companies or firms formed in accordance with the law of a member state'.[2] It is precisely in the field of establishment of companies that the ECJ has laid down one of its most relevant lines of case law on the freedom of establishment,[3] which has had a great impact on the private international law of companies in Europe.

This line of judicial doctrine can be traced back to the *Daily Mail* case,[4] which at that time could be perceived as a rather timid approach by the Court.[5] The line restarted and developed quickly since the well-known

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Companies], (reference DER2009-09039, JURI subprogramme, directed by R. Arenas García, from 2010 to 2013).

[2] For the purposes of this chapter, 'companies or firms' should be understood in a broad sense, because according to Art. 54(2) TFEU, this expression encompasses 'other legal persons governed by public or private law, save for those which are non-profit-making'; the exclusion of non-profit entities should be understood in a narrow sense, because for the purposes of this Art. 54 TFEU, a legal person would be considered profit-making as long as it offers goods or services for payment, even if the income obtained is not intended to be distributed among the members of the entity. *See*, among others, J. Renauld, *Droit européen des sociétés* (Bruylant / Vander Éditeur 1969) para. 1.11-1.13.

[3] In a previous work on the evolution of the freedom of establishment since 1993, I already had the opportunity to underline the case law on the establishment of legal persons as one of the main developments of the freedom of establishment in the last twenty years. Another key development was the 'import' of the *Cassis de Dijon* doctrine implying that the provisions of the Treaty apply not only to discriminatory measures, but also to those which are indistinctly applicable but nevertheless unnecessary or disproportionate, inaugurated in the field of the free movement of goods (ECJ 20 February 1979, Case 120/78, *Cassis de Dijon*), into the realm of the freedom of establishment, since the *Kraus* case (ECJ 31 March 1993, Case C-19/92, *Dieter Kraus* v *Land Baden-Württemberg*). *See* M. Gardeñes Santiago, 'La libertad de establecimiento en la Unión Europea tras veinte años de mercado interior' [*The Freedom of Establishment in the European Union after Twenty Years of Internal Market]*, 39 *Revista Aranzadi de Unión Europea* (2012) p. 105.

[4] ECJ 27 September 1988, Case C-81/87, *The Queen* v *H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc*.

[5] *Daily Mail* was preceded by ECJ, 10 July 1986, Case 79/85, *Segers* v *Bestuur van de Bedrijfsvereniging voor Bank-en Verzekeringswezen, Groothan-del en Vrije Beroepen*, that dealt with the case of a director of a company formed under English law but doing business only in the Netherlands. Dutch authorities refused to grant Mr. Segers the benefits of the national health care system, because the company he directed was incorporated under the law of another member state. The ECJ ruled that this was contrary to the freedom of establishment. Interestingly enough,

Centros ruling (1999),[6] which was followed by many others: *Überseering* (2002),[7] *Inspire Art* (2003),[8] *SEVIC Systems* (2005),[9] *Cartesio* (2008),[10] *National Grid* (2011),[11] *VALE Építési* (2012),[12] *Impacto Azul Lda* (2013),[13] *Kornhaas* (2015),[14] and *KA Finanz AG* (2016).[15] There are also many interesting ECJ judgments on companies dealing with tax law issues, such as corporate tax, taxation on dividends or 'exit taxes' – mainly from the perspective of the freedom of establishment and the free movement of capital.[16] In this chapter I will not deal with them, as I will limit the analysis to the company law aspects, and only from the perspective of freedom of establishment, leaving aside the other internal market freedoms.[17] Having said this, it ought to be pointed out that the underlying problem in some of the cases on the establishment of companies has been fiscal, even

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Segers did not attract very much attention in the middle 1980s, as it passed relatively unnoticed. The Court did not even mention it in *Daily Mail*; in this sense, *see* the interesting remarks by M. Gelter, '*Centros*, the Freedom of Establishment for Companies, and the Court's Accidental Vision for Corporate Law', *Law Working Paper Nº 287/2015,* Fordham University and ECGI, p. 13, available at http://ssrn.com/abstract=2564765 (visited 5 May 2016). By contrast, more than twenty years after, the ECJ took the *Segers* precedent into consideration when deciding *Centros* (*see* paras. 17 and 20).

[6] ECJ 9 March 1999, Case C-212/97, *Centros Ltd* v *Erhvervs-og Selskabsstyrelsen*.

[7] ECJ 5 November 2002, Case C-208/00, *Überseering BV* v *Nordic Construction Company Baumanagement GmbH (NCC)*.

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[14] ECJ 10 December 2015, Case C-594/14, *Simona Kornhaas* v. *Thomas Dithmar.*

[15] ECJ 7 April 2016, Case C-483/14, *KA Finanz AG* v *Sparkassen Versicherung AG Vienna Insurance Group*.

[16] For an overall view of the impact of the Treaty freedoms on company taxation, *see* N. De Grove-Valdeyron, *Droit du marché intérieur européen* (Librairie Générale de Droit et Jurisprudence 4th ed. 2014) p. 152-158; and, specifically from the perspective of the free movement of capital, p. 197-199.

[17] As for the impact on company law of the Treaty provisions on the free movement of capital ('golden shares' case law), *see* J. Armour and W.-G. Ringe, 'European Company Law 1999-2010: Renaissance and Crisis', *ECGI Law Working Paper Nº. 175/2011*, available at http://ssrn.com/abstract=1691688, p. 16-22 (visited 5 May 2016).

if this did not appear in an explicit manner in the Court's reasoning. Therefore, one may wonder about what the real influence was of the underlying fiscal problem on the solution regarding the compatibility with the Treaty of national legislation affecting an intended corporate operation.[18]

After this short introduction, the time has come to make some remarks: the first concerns a dogmatic error in the basis of the judicial doctrine inaugurated in *Centros*, while the remaining ones deal with some consequences and subsequent developments of this case law.

1. A dogmatic error in the foundation stone of the ECJ case law

As is well known, the *Centros* case concerned a Danish couple, residing in Denmark, who set up a private limited company in England. They tried to open a branch of the company in Denmark, and the Danish registrar refused the inscription of the branch, on the grounds that Centros had no real activity in England, that in fact the principal establishment was in Denmark, and that the reason for incorporating in England was to circumvent the requirements of Danish law as to the minimum capital of a private limited company, since the law of the United Kingdom imposed no requirement to private limited liability companies as to the provision for and the paying-up of a minimum share capital. The Court concluded that the refusal to register Centros' branch in Denmark was an obstacle to the freedom of establishment, and that it was not justified, even if the company had no real trade activity in the UK.

In the following sections I will discuss in more detail the consequences of this doctrine. I will focus on what, in my opinion, constitutes an important dogmatic error in the Court's reasoning. This error is found in

[18] This was clearly the case in *Daily Mail*, in which a company formed in the UK wanted to move its central management and control to the Netherlands for fiscal reasons. Under UK law, an authorisation of British tax authorities was required for that operation. This important link with the fiscal aspects has been highlighted by R. Arenas García, 'Transferencia intraeuropea de la sede de dirección de la empresa: Derecho privado, fiscalidad y libertad de establecimiento' [*Intraeuropean Transfer of the Place of Effective Management of the Undertaking: Private Law, Taxation and Freedom of Establishment]*, *La Ley* (nº 7848 of 30 April 2012; available at diariolaley.laley.es) p. 1. In his opinion, more than twenty years after *Daily Mail*, the Court had the opportunity to clarify its case law in the *National Grid* judgment, in which it distinguished the company law aspects from those relating to taxation.

paragraph 27, second sentence. It states: 'The right to form a company in accordance with the law of a member state *and to set up branches in other member states* is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty.'[19] As R. Arenas García has rightly pointed out, this argument confuses two different freedoms; the freedom of establishment of the founders of the company, and the freedom of establishment of the company itself. The wording of paragraph 27 of the judgment would imply that the right to set up branches in other member states is an extension of the right of the founders, and it is not because, once founded, the company itself is an autonomous legal person holding the right of establishment. This right of the company – and not of its founders – encompasses the possibility of setting up branches. Therefore, an adequate differentiation of the right of establishment of the founders and that of the company would have led to a different conclusion; Centros itself would be a beneficiary of the right of primary establishment, and consequently it could not be considered established in the country of its incorporation if it did not undertake economic activities there. In the same way, as a natural person who is a national of a member state would not be considered established, for the purposes of Article 49 of the Treaty, in the country of its nationality, but in the country where it would undertake its main economic activity.

It ought to be remembered that Article 54(1) TFEU draws an analogy between companies formed under the law of a member state and natural persons who are nationals of member states, when it provides that such companies 'shall be treated in the same way as natural persons who are nationals of member states'. Therefore, following this analogy, one should conclude that the place of establishment of a company is not necessarily the place where it is incorporated (its 'nationality'), but rather the place where it undertakes its main economic activity. Consequently, if the company has no activity in the member state where it is founded or incorporated, then it is doubtful that it can be considered established there.[20]

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[19] Emphasis added by the author.

[20] R. Arenas García, 'Sombras y luces en la jurisprudencia del TJUE en materia de derecho internacional privado de sociedades' [*Shadows and Lights in the Judicial Doctrine of the ECJ on Private International Law of Companies]*, in C. Esplugues Mota and G. Palao Moreno (eds.), *Nuevas fronteras en el Derecho de la Unión Europea: Liber amicorum José Luis Iglesias Buhigues* [*New Frontiers in the Law of the European Union: Liber amicorum José Luis Iglesias Buhigues]* (Tirant lo Blanch 2012) p. 739 at 746-747.

2. Obligation to recognise the legal personality of a company formed under the laws of another member state and pseudo-foreign corporations

For a long time, the question whether the provisions of the Treaty included or not an implicit obligation of recognition of companies formed under the laws of the member states was subject to debate.[21] Many considered that this was doubtful, and that the issue of recognition was a *prius*, in the sense that only corporations duly recognised could benefit from the freedom of establishment.[22] This argument was based on the former Article 220 of the European Economic Community Treaty,[23] which encouraged member states to enter into negotiations with a view to securing the mutual recognition of companies or firms.[24] This could

[21] The key question was if countries following the 'real seat' theory in international company law could refuse or not to recognize companies incorporated under the laws of other member states, which however did not have their principal administration or main establishment in the state of incorporation. As for the terms of this debate during the 1960s and 1970s, *see* the interesting work of M. Gelter, *supra* n. 5, p. 4-12.

[22] For instance, in the 1988 edition of their textbook, Gavalda and Parléani supported the view that, as far as freedom of establishment of companies was concerned, the recognition of companies from other member states was a 'question préalable'. According to these authors, Art. 58 EEC Treaty (now Art. 54 TFEU) oriented itself towards an implicit recognition, but it did not specify the conditions and effects of such recognition. Therefore, in spite of Art. 58 EEC Treaty, a general principle of mutual recognition of companies did not exist in the (then) European Economic Community; *see* Ch. Gavalda and G. Parléani, *Droit communautaire des affaires* (Litec 1988) p. 154-156.

[23] Art. 220 EEC Treaty became Art. 293 EC Treaty after the Treaty of Amsterdam (1997). This provision has been later suppressed by the Treaty of Lisbon. As A. Borrás Rodríguez recalls, when the Amsterdam Treaty gave a new competence on judicial cooperation in civil matters to the EU, this provision was never used again. Given the new competence of the EU, the call to conventions concluded among member states was not justified any more, and this would have explained the suppression of this provision by the Lisbon Treaty; A. Borrás Rodríguez, 'La cooperación judicial en material civil' *[Judicial Cooperation in Civil Matters]*, in J. Martín y Pérez de Nanclares (coord.), *El Tratado de Lisboa: La salida de la crisis constitucional [The Lisbon Treaty: The Way Out of the Constitutional Crisis]* (Iustel 2008) p. 440.

[24] Apart from the mutual recognition of companies or firms, Art. 220 EEC Treaty referred also to 'the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between

legitimately lead to the conclusion that this result was not directly granted by the Treaty, and that further action by member states was needed.[25]

Centros, Überseering and *Inspire Art* gave a clear-cut and rather abrupt answer to this question. Under the doctrine laid down in these cases, member states are obliged to recognise the legal personality of a company formed according to the laws of any other member state, even if the company pursues no activity in the country of incorporation.[26] The consequence would be that company founders would be able to choose the law under which they would like to incorporate the company, even if the company envisaged would have no genuine or real link with the country of incorporation.[27]

It could be argued that this doctrine undermines the policy objectives intended by national legislators, such as the protection of shareholders or creditors,[28] and that it facilitates the spreading of pseudo-foreign corporations and a 'Delaware effect' in Europe, and, ultimately, a 'race to the bottom' in company law as a result of a competition between legal

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companies or firms governed by the laws of different countries' as possible objectives of the conventions among member states.

[25] However, this conclusion could also be nuanced, because Art. 220 EEC Treaty did not oblige member states to enter into negotiations in any case, but only 'so far as is necessary'. In fact, on the basis of that Article, the founding members of the European Economic Community drafted the Brussels Convention of 29 February 1968 on the mutual recognition of companies and legal persons, which never entered into force; on that convention *see*, *inter alia*, S. Rammeloo, *Corporations in Private International Law* (Oxford University Press 2001) p. 34-37.

[26] *See,* for instance, paras. 27 to 30 of the *Centros* ruling.

[27] *See* M. Gelter, *supra* n. 5, p. 2. As he puts it, founders of companies can in principle 'pick and choose' the best legal form from all member states (in a similar sense, J. Carrascosa González thinks that Art. 54 TFEU, as interpreted by the Court, would set a powerful limit to national conflict-of-laws rules on company law, as they will not apply if they constitute an obstacle to the freedom of establishment). Thus, after *Centros, Überseering* and *Inspire Art*, Art. 54 TFEU would require a 'mutual recognition' of companies entitled to the freedom of establishment in all member states, J. Carrascosa González, 'Sociedades fantasma y Derecho internacional privado' [*Letterbox Companies and Private International Law]*, 27 *Revista Electrónica de Estudios Internacionales* (2014) available at www.reei.org (visited 5 May 2016) p. 18-19.

[28] *See*, for instance, F. Esteban de la Rosa, 'El establecimiento de sociedades ficticias en la Unión Europea y en el entorno globalizado' *[The Establishment of Letterbox Corporations in the European Union and in a Globalised Context*], 7 *Revista de la Facultad de Derecho de la Universidad de Granada* (2004) available at ugr.es/festeban/documentos/RFDUG_SOCIEDADES_FICTICIAS.pdf p. 10 (visited 5 May 2016).

systems.[29] It is clear that, given the limited scope of harmonisation of substantive company law in Europe, the *Centros* doctrine makes possible such an evolution. A closer look, however, can show that, from the point of view of business people, the decision to set up a pseudo-foreign corporation may also have some drawbacks, and therefore this would not always be an advantageous solution. In other words, some advantages of a given foreign corporate law (for instance, particularly lax conditions as to minimum capital) may be counterbalanced by other factors, such as the need to obtain legal and administrative support in a foreign jurisdiction,[30] support that will be needed not only when the company is formed, but also through its lifetime and operation.[31] Besides this, there is also another factor that should not be overlooked: under existing rules on international jurisdiction,[32] a company or other legal person is considered to have its domicile where it has its statutory seat,[33] its central administration or its principal place of business. Supposing these three elements are not located in the same member state, any of the three may be considered the legal person's domicile, and consequently it may be sued there in conformity

[29] For example, F. Esteban de la Rosa affirms that this would amount to replacing the legal harmonisation of company law by the EU institutions with an 'indirect harmonisation' as a result of a competition between national legal systems, which would tend to the more lax or less strict solutions; *supra* n. 28, p. 17.

[30] In this sense, F. Esteban de la Rosa points out that establishing the statutory seat and the real seat in different countries may be a source of difficulties in issues such as the presentation of accounts, taxation, insolvency or international jurisdiction; *supra* n. 28, p. 10.

[31] A clear example would be that of periodical submitting of accounts or reporting duties. In this sense, M. Gelter (*supra* n. 5, p. 26) refers to the 'hidden cost' of incorporation in the UK, as far as the annual filing of financial statements is concerned.

[32] *See* Art. 60 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* [2001] L 12/1, 16.1.2001 and, since 10 January 2015, Art. 63 of the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* [2012] L 351/1, 20.12.2012. They are the so-called 'Brussels I' and 'Brussels I bis' Regulations. According to the transitional provision in Art. 66(1) of the latter, its jurisdiction rules will apply to legal proceedings instituted on or after 10 January 2015.

[33] However, as far as Ireland, Cyprus and the UK are concerned, Art. 63(2) of the Regulation 1215/2012 (*supra* n. 32) provides that 'statutory seat' means the registered office or, where there is no such office, the place of incorporation or, where there is no such place, the place under the law of which the formation took place.

with the general rule on jurisdiction,[34] which points at the defendant's domicile, save from the exceptions established in the Regulation.[35] Therefore, founders choosing to incorporate their company under the law of one member state while establishing its central administration or main place of business in another one (the typical situation of pseudo-foreign corporations) have to bear the risk of being sued in more than one member state, because potential plaintiffs may rely on any of the domiciles of the company. In addition, for the application of the jurisdiction rules of the Regulation, it would be enough that any of the three places mentioned in Article 63 is in the territory of a member state.[36] To sum up, the rule analysed tends to protect persons who might need to sue the company (shareholders, creditors, employees...) by facilitating their access to a competent forum. Therefore, if founders decide to incorporate their company (be it or not a pseudo-foreign corporation) in a given country, they should bear the risks inherent to this decision.

For the reasons explained, the decision to set up a pseudo-foreign corporation might not always be advantageous. If one looks at this issue from a more general point of view, there are studies on the competition between legal orders telling us that it is a rather complex process, in which many factors and specific circumstances of each case or sector should be taken into account. In short, it would not be an 'automatic' process.[37] In the specific case of company law in the EU, available evidence shows that certain forms of companies – mainly private limited companies from the UK – have enjoyed the favour of many founders intending to set their

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[34] In this sense, *see* P. Vlas, 'Comment on Article 60 of Regulation 44/2001', in U. Magnus and P. Mankowski (eds.), *European Commentaries on Private International Law: Brussels I Regulation* (Sellier, European Law Publishers 2007) p. 702-704.

[35] Arts. 4 and 5 of the Regulation 1215/2012, *supra* n. 32.

[36] In this sense, *see* P. Vlas, *supra* n. 34, p. 703. For instance, if the central administration is in a member state and the statutory seat is in a third country, the jurisdiction rules of the Regulation apply, provided that the forum is an EU member state. This means that the company could be sued in the country of its domicile in the EU, but also in other member states, according to the other jurisdiction rules of the Regulation (for instance, the special rules on contracts or torts). If none of the domiciles of the company is in a member state, national courts will assess their jurisdiction according to their national law (Art. 6(1) of the Regulation 1215/2012, *supra* n. 32). Obviously, in case proceedings were brought before the courts of a third state, the courts of that state would apply their own rules of jurisdiction.

[37] J.M. Sun and J. Pelkmans, 'Regulatory Competition in the Single Market', 33 *JCMS* (1995) p. 67 at p. 68 and 78-86.

companies outside the UK, even before the Court issued the *Centros* judgment.[38] This tendency would have increased after the *Inspire Art* judgment of 2003,[39] which clearly reinforced the doctrine started in *Centros*. According to M. Gelter, there is evidence that this evolution led to some degree of 'defensive regulatory competition' by other member states, such as Germany or France, which amended some of their laws, or admitted special forms of companies with less formalities and requirements. Shortly after, some legal amendments in UK law (Companies Act of 2006) introduced stricter conditions, and many pseudo-English companies were removed from the registrar for failure to submit their mandatory accounts. This would have led to a reduction of the number of pseudo-English companies in Europe since 2006.[40] In conclusion, even if regulatory competition in company law has remained limited, in the sense that it has not been full-scale or has not led to massive 'migration' of companies towards the legal systems of other member states,[41] available data suggests that there has been some degree of regulatory competition. Moreover, regulatory competition would have also an invisible dissuasive effect for member states when envisaging the imposition of their policies on companies in their respective territories. As M. Gelter has rightly observed, member states have to consider the possibility of a 'flight' to other member states when they attempt to impose a specific policy on newly-founded companies.[42]

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[38] *See*, for instance, the facts in the 1986 *Segers* case, referred to *supra* n. 5.

[39] *See* M. Gelter, *supra* n. 5, p. 22, with further references. As is well known, in *Inspire Art* the Court held contrary to the freedom of establishment some Dutch provisions on pseudo-foreign corporations, which intended to make applicable some mandatory requirements of Dutch corporate law to those corporations, even if they were governed by a foreign corporate law. This limited significantly the possibilities for the host State of applying its corporate law policies to those corporations (*ibid.* p. 20-22). However, this 'success of UK private limited companies would not have been the same in all member states; it seems they became particularly successful in Germany' (*ibid.* p. 22-23); *see* also H. J. Sonnenberger, 'Etat de droit, construction européenne et droit des sociétés', 102 *Revue critique de droit international privé* (2013) p. 101 at p. 107. According to this author, after the *Überseering* ruling, several law offices offered their services in Germany for the setting up of English private limited companies registered in London, even though their activities were to be undertaken exclusively in Germany, and an important number of this type of companies was created.

[40] M. Gelter, *supra* n. 5, p. 23-27.

[41] *Ibid.* p. 35.

[42] *Ibid.* p. 30.

3. The possibility of preventing or sanctioning fraud

Even if the *Centros* ruling took an extremely liberal position as to the obligation for member states to recognise the legal personality of companies formed under the laws of other member states, the Court also admitted the possibility of fixing some limits in case of 'fraud' (paragraph 38), and it gave some orientations. First, it ruled that the fact that a national of a member state who wishes to set up a company chooses to form it in the member state whose rules are least restrictive 'is a normal exercise of the freedom of establishment, and cannot, in itself, constitute an abuse or fraud' (paragraph 27). And this is so, even if the company pursues no activity in the country where it is incorporated or registered (paragraph 29).

However, according to the Court (paragraph 38), member states may adopt 'any appropriate measure for preventing or penalizing fraud', either in relation to the company itself or to its members. This would mean that, for example, member states could adopt measures when the company is used to commit or hide an offence, to prevent or penalise tax evasion, or to prevent the company being formed to evade the obligations of the founders towards private or public creditors. Depending on the different cases, these measures could be either of a criminal, administrative or civil nature. Of particular interest here is the 'piercing the veil' doctrine, by which, under certain exceptional circumstances, the appearance of an autonomous corporation or legal person may be set aside.[43] Another example would be the exercise of the *actio pauliana*, by which creditors ask for the revocation of acts or contracts passed by the debtor in fraud of their rights; in the event that someone forms a company and transfers his or her assets to it in order to put them out of the reach of his or her creditors, this civil action could be used.[44] In this type of situation,

[43] For an example of application of this doctrine as far as tax obligations are concerned, *see* the interesting work by M.A. Sánchez Huete, 'Levantamiento del velo y tributación internacional' [*Piercing the Veil and International Taxation]*, in R. Arenas García et al. (eds.), *Autonomía de la voluntad y exigencias imperativas en el derecho internacional de sociedades y otras personas jurídicas [Private Autonomy and Mandatory Requirements in the International Law of Companies and other Legal Persons]* (Atelier 2014) p. 103. The author comments on Art. 43(1), letters g) and h) of the Spanish Ley General Tributaria (*General Law on Taxation*), which were introduced by Law 36/2006, on measures for preventing fiscal fraud.

[44] It ought to be remembered that in the well-known *Marleasing* ruling (ECJ 13 November 1990, Case C-106/89, *Marleasing SA* v *La Comercial Internacional de Alimentacion SA*) the ECJ said that a public limited company could only be

criminal law remedies will normally also be available for offences of concealment of assets or fraudulent bankruptcy.

In conclusion, the possibility for member states to combat fraud or even an abuse of rights granted by the Treaty can be traced back to a long-lasting doctrine of the ECJ, which would have inserted the principle of prohibition of abuse of rights in the realm of the EU legal system. One of the possible forms of this abuse is fraud to national rules committed via an abuse of EU law.[45] Of course, it is easier to accept the principle of prohibition of abuse in abstract terms than to establish its conditions and limits. A guiding criterion the ECJ seems to follow is that the existence of an abuse should be established in individual cases, taking into account the circumstances of each situation. For instance, in *Inspire Art*, the Court said that freedom of establishment cannot be impeded just because the company is not active in the country where it is incorporated 'save where the existence of an abuse is established on a case-by-case basis.'[46] Seen from this perspective, it has rightly been pointed out that, as far as the protection of certain interests is concerned (for instance, safeguarding creditors' rights), the Court would be pushing member states from an 'ex ante' to an 'ex post' approach, in the sense that the ECJ would tend to consider proportionate measures adopted ex post in an individualised

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declared null and void for one of the reasons exhaustively listed in Art. 11 of the First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Art. 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, *OJ* [1968] L 65/8, 14.3.1968. The lack of cause or unlawful cause, stemming from the fact that one of the founders had formed the company and transferred its assets to it for allegedly trying to escape from creditors, was not in that list, so the nullity of the company could not be declared. However, this would not impede the possibility of combating such an operation by other remedies, different from a nullity action, such as the *actio pauliana* foreseen in Arts. 1111, 1291 and 1297 of the Spanish Civil Code.

[45] In this sense, R. Ionescu, *L'abus de droit en droit de l'Union européenne* (Bruylant 2012) p. 17-29 and, specifically in the field of establishment of legal persons, p. 102-124.

[46] *Supra* n. 8, para. 143. In similar terms, Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, *OJ* [2006] L 376/36, 27.12.2006 reminds, in recital 79, that the ECJ has held that member states retain the right to take measures in order to prevent service providers from abusively taking advantage of the internal market principles, and adds that abuse by a provider should be established on a case-by-case basis.

fashion, such as criminal penalties or veil piercing.[47] However, in my opinion, this would not necessarily mean that all possible ex ante measures should be considered as not in conformity with the principle of proportionality. On the contrary, it cannot be excluded that general or preventive-type measures may also be appropriate for satisfying public interest goals, as long as they respect the conditions of non-discrimination and proportionality.[48]

4. The Court's apparent drive towards the incorporation model

In its case law, the Court seems to show great deference towards the law of the member state in which the company is incorporated, while, at the same time, it judges in a restrictive way the possibility of applying the laws of other member states. In other words, conditions imposed by the law of the country where the company is formed are treated rather leniently, whereas conditions imposed by the corporate laws of other member states are subject to much more severe scrutiny. A recent example of this deference towards the country of incorporation can be found in the 2013 *Impacto Azul Lda* case.[49] It dealt with the Portuguese regime of joint and several liability of companies vis-à-vis the creditors of their subsidiaries. However, according to Portuguese law, this liability regime applied only to parent companies having their seat in Portugal. Therefore, the question was whether this different regime depending on the presence or not of the seat of the parent company in the Portuguese territory was in conflict or not with the freedom of establishment. The ECJ held that Portuguese law was not contrary to that freedom: first, the national legislator was entitled to 'improve the treatment of claims of groups

[47] In this sense, M. Gelter, *supra* n. 5, p. 33-35.

[48] Examples of preventive measures may be found in other ECJ judgments on internal market law. For instance, the Court has admitted that, when this is necessary to satisfy public interest, states may introduce prior authorisation procedures before a product is placed in the market. Therefore, in these cases the Court accepts that, taking into account the risks at stake, ex ante authorisation procedures are necessary, that is to say, when less strict mechanisms of control (ex post inspections, once the product has been already introduced in the market) are not able to prevent the risk or danger. *See*, for instance, ECJ 22 January 2002, Case C-390/99, *Canal Satélite Digital SL* v *Adminstración General del Estado, and Distribuidora de Televisión Digital SA (DTS)*.

[49] ECJ 20 June 2013, Case C-186/12, *Impacto Azul Lda* v *BPSA 9 and Bouygues*.

present on its territory',[50] and moreover the exclusion of this stricter regime of group liability to parent companies having their seat in other member states 'is not such as to make less attractive' the exercise of the freedom of establishment.[51] It concluded, therefore, that Portuguese law did not restrict the right of establishment of parent companies having their seat in other member states.[52]

This deference towards the law of the country where the company is formed is quite clear. And in some of its judgments, the Court seems to have gone even further, pointing, at least apparently, at the law of the country of incorporation as the *lex societatis* or personal law of the company. The Court has not limited itself to saying that freedom of establishment imposes the obligation to recognise companies formed in other member states; it also seems to suggest which should be the law governing the personal status of such companies (the *lex societatis*) and which should be the extension or scope of such *lex societatis*. For this perception of the ECJ case law, the *Überseering* and *Inspire Art* cases are particularly relevant.[53] As is well known, *Überseering* concerned the lack of recognition in Germany of a company formed in the Netherlands, just because its real seat had been transferred to Germany, following the acquisition of the shares of the company by two German nationals. A drastic consequence of this non-recognition was that *Überseering* could not bring legal proceedings in Germany for breach of contract. The Court did not limit itself to saying that a company formed in the Netherlands should be recognised in Germany, which would have been the normal consequence of the *Centros* doctrine, but also that the capacity that the

[50] *Supra* n. 49, para. 35.
[51] *Supra* n. 49, para. 36.
[52] *Supra* n. 49, para. 38. Interestingly enough, para. 37 of the judgment indicates that: 'In any event, parent companies having their seat in a member state other than the Portuguese Republic may choose to adopt, through contractual means, a system of joint and several liability for the debts of their subsidiaries.' In my opinion, the suggested reason for this statement is that the Court intended to tackle, although very briefly, the argument that a stricter regime applicable to Portuguese groups could also be seen as a possible advantage for them, because it would improve the confidence of their creditors towards them. In other words, third parties dealing with a subsidiary might prefer to contract with it if the parent company has its seat in Portugal, because their credits would be better protected. It might well be the case, and that is why the Court feels the need to say that non-Portuguese groups might voluntarily offer similar conditions to parties contracting with them. Obviously, Portuguese law did not prevent them from doing so.
[53] *Supra* n. 7 and 8, respectively.

company had under Dutch law had to be recognised.[54] By doing so, the Court apparently seems to infer that the recognition of the legal personality of the company necessarily implies that its capacity should be governed by the law of the state of incorporation. It is true that usually the capacity of a legal person will be governed by that law, but this is not the only possible solution. It is possible that the reason for the wording in *Überseering* is the perception that the issue of capacity is very directly linked with the existence of the legal person, and therefore with its valid formation under a given law. However, it is one thing to recognise a company validly formed abroad as an entity with legal personality, and therefore capable of having rights and liabilities, and another to determine the law governing the conditions under which such capacity may be exercised (for instance, the kind of acts a legal person can do, its representation by its organs, the regime of *ultra vires* acts). Usually the law of the country of incorporation will govern these conditions, but it is also possible that a different law applies, at least in certain circumstances.[55]

This is even clearer if one considers other issues, apart from capacity, relating to the functioning of a legal person, such as the liability of directors, which was at stake in the *Inspire Art* case.[56] As it has rightly

[54] According to para. 95 of the *Überseering* ruling, the provisions of the Treaty require the host member state 'to recognise the legal capacity and, consequently, the capacity to be a party to legal proceedings *which the company enjoys under the law of its State of incorporation* (...)' (emphasis added by the author). According to H.J. Sonnenberger, at least implicitly, in *Überseering* the ECJ would have submitted the capacity, including the capacity to bring legal proceedings, to the law governing the formation of the company. *Inspire Art* would have confirmed this approach, because it would have made applicable the referred law to the company's whole personal status (*supra* n. 39, p. 106-107).

[55] In this sense, R. Arenas García, '*Lex societatis* y derecho de establecimiento', in R. Arenas García et al., *supra* n. 43, p. 127 at p. 136-137.

[56] First, there are cases in which the liability of directors will be based, not on corporate law, but on other grounds, such as torts or insolvency proceedings. In these cases, it is absolutely clear that a law different from the law of the country of incorporation may apply. Second, in cases where the liability of directors may be characterized as a corporate issue, usually the law of the country of incorporation will apply. However, it is also possible that a law which is not the law of incorporation applies, like for instance the law of the country where the principal administration of the company is placed (in this sense, R. Arenas García, *supra* n. 55, p. 138). On the law applicable to directors' liability, *see* also the detailed study by H. Zhang, *Directors' Liability from the Perspective of Private International Law* (PhD thesis, Universitat Autònoma de Barcelona 2014) p. 220-250 (available at publicacions.uab.es/tesis/fitxa_web.asp?ID=7281). In *Inspire Art*, the Court considered that the application of specific Dutch provisions on pseudo-foreign

been observed, the recognition of the legal personality of a company does not necessarily mean that the law of the country of incorporation should apply to all aspects of corporate life. The only aspects which, for logical reasons, should necessarily be governed by the law of the state of incorporation are those linked to the formation of the company: the duty to recognise legal persons incorporated in other member states implies, as a necessary consequence, that the valid formation of the company has to be assessed according to the law of the country of incorporation. It is, therefore, necessary to distinguish between the corporate law aspects relating to the formation or constitution of the company, which are necessarily governed by the law of the state under which it has been formed, and corporate issues relating, not to the formation, but to the functioning of the company. In my opinion, this point of view would have found support in the recent *Kornhaas* ruling of 10 December 2015.[57] In the context of insolvency proceedings in Germany against a private company limited by shares entered in the Companies Register in Cardiff (United Kingdom), the Court ruled that a German provision laying down the obligation for a managing director of a company to reimburse that company for the payments made after it had become insolvent 'in no way concerns the formation of a company in a given member state or its subsequent establishment in another member state, to the extent that that provision of national law is applicable only after that company has been formed, in connection with its business…', thus reaching the conclusion that such a provision did not affect freedom of establishment (paragraph 28). In this case, this conclusion could be easily justified, because in addition, the Court found that the German provision was a matter of insolvency law, even if it was contained in a company law statute. However, even in 'pure' corporate issues the distinction between those relating to the formation of the company and other issues is relevant: as already mentioned, the former are necessarily governed by the law of the State under which the company has been formed, whereas the latter will usually be governed by the law of the country of incorporation, but it is also possible that other laws apply.[58] Taking into account that, in the absence of harmonisation, Article 54 TFEU does not impose a specific solution on member states as to their conflict-of-laws rules for the

corporations to the liability of directors of English pseudo-foreign corporations doing their business in the Netherlands was not justified, in view of the circumstances of the case. On this case, *see* R. Arenas García, *supra* n. 55, p. 146-150.

[57] *Supra* n. 14.

[58] R. Arenas García, *supra* n. 55, p. 134-139.

determination of the *lex societatis* and its scope, it is for each member state to determine the law applicable to the different aspects of the legal person's functioning, through its own conflict-of-laws rules.

In addition, when trying to draw general conclusions from the case law as to which would be the *lex societatis* according to the Court's doctrine, prudence is necessary. First of all, the Court decides on a case-by-case basis only, and in each case it deals with the specific problem before it. Second, even in those cases that seem to be most favourable to the doctrine of the country of incorporation, it has never been said that laws different from that of the country of incorporation could not be applied. On the contrary, the Court admits the possibility of applying the law of the 'host' state – different from the country of incorporation – provided this is justified by a reason of general interest and that the usual conditions of non-discrimination and proportionality are met.[59] Therefore, from an *ex ante* perspective, it may be difficult to foresee if, in a given case, the law of the country of incorporation or another law will finally apply. This circumstance would militate in favour of an intervention by the EU legislator, which could harmonise conflict-of-laws rules designating the law governing the personal status of companies (the *lex societatis*), and which issues would be governed by this law. Advocates of this solution claim it would improve legal certainty.[60]

5. The Court's reconciliation with the 'real seat' model and the case law on the transfer of seat

After *Centros*, *Überseering* and *Inspire Art*, the real seat model seemed to be at odds with the freedom of establishment in the EU. However, two subsequent cases, *Cartesio*[61] and *VALE*, both concerning situations of transfer of seat, gave the Court the opportunity to reconcile its case law with the real seat model. At the same time, they gave the Court an

[59] *Ibid.* p. 152.

[60] *Ibid*. p. 151-157; H.J. Sonnenberger, *supra* n. 39, p. 101-112, especially p. 111-112. According to this author, harmonisation would have also the advantage of ensuring equality to companies in the different member states as to their conflict-of-laws regime, *ibid.* p. 112. It ought to be underlined that at present, the European Group for Private International Law (EGPIL) has begun to work in the field of the codification of the law applicable to legal persons in the EU (*see* a summary of the discussions held during the 2014 session that took place in Florence in http://www.gedip-egpil.eu/reunionstravail/gedip-reunions-24.htm#codification) (visited 5 May 2016).

[61] ECJ, *supra* n. 10.

opportunity to consolidate its distinction between restrictions imposed by the country of incorporation and those imposed by other countries.

Cartesio concerned a Hungarian company that wanted to transfer its seat to Italy but to retain its status of a company formed under Hungarian law. The Hungarian authorities refused *Cartesio*'s application on the ground that the Hungarian law did not offer companies the possibility of transferring their operational headquarters to another member state while retaining their legal status as a company governed by Hungarian law. Therefore, in order to change its operational headquarters, Cartesio would first have to be dissolved in Hungary and then reconstituted under Italian law.[62] Contrary to the Advocate General's opinion,[63] the Court found that a member state 'has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that member state and, as such, capable of enjoying the right of establishment, and that required if the company is to be able subsequently to maintain that status. That power includes the possibility for that member state not to permit a company governed by its law to retain that status if the company intends to reorganise itself in another member state by moving its seat to the territory of the latter, thereby breaking the connecting factor required under the national law of the member state of incorporation'.[64] This move in *Cartesio* has been judged a 'cautious turn',[65] or has even been criticised for not facilitating the freedom of establishment as previous ECJ case law did.[66] One could say, however, that the outcome of the case is no surprise. In fact, it plainly confirms the deference of the Court towards the law of the country of incorporation of the company, already present in previous cases, namely *Überseering* and *Inspire Art*.[67] At the same time, it links the case law started in *Centros* with the 1988 *Daily Mail* case, thus giving the ECJ the opportunity to reassess and complete its doctrine, giving a unitary

[62] Opinion by Advocate General M. Poiares Maduro of 22 May 2008, Case C-210/06, *Cartesio*, para. 3.
[63] *Ibid.* paras. 22 to 35.
[64] *Supra* n. 10, para. 110.
[65] M. Gelter, *supra* n. 5, p. 27.
[66] *See*, for instance, the critical opinion of C. Gerner-Beuerle and M. Schillig, 'The Mysteries of Freedom of Establishment after Cartesio', 59 *International and Comparative Law Quarterly* (2010) p. 303.
[67] The different treatment of conditions imposed by the country of incorporation and those imposed by another member state, where the company intends to exercise the freedom of establishment, appears very clearly in paras. 65 to 70 of the *Überseering* ruling (*supra* n. 7), and the *Cartesio* (*supra* n. 10) judgment is perfectly in line with them.

or coherent approach to what formerly could be apparently perceived as two lines of case law obeying to a different logic.[68]

The *Cartesio* doctrine was completed in 2012 by *VALE*, another case on transfer of seat.[69] This time it was an Italian company that wanted to transfer its seat to Hungary. The difference with *Cartesio* was that the company wanted to convert itself into a Hungarian entity, thus changing its *lex societatis*. The Court admits that in such a case the host State is entitled to establish the conditions that a company has to fulfil in order to become subject to that state's law,[70] and these conditions could include that the real seat of the company is established in its territory.[71] The specific circumstance in *VALE* was that, as the company intended to change its *lex societatis*, there were two states of incorporation, the former and the new. As the Court rightly points out, this change of incorporation state implies the consecutive application of the laws of the two countries.[72]

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[68] For this reason, R. Arenas García, *supra* n. 20, p. 755-756, affirmed that with *Cartesio* the Court would have 'culminated' a coherent line of case law starting in *Daily Mail*.

[69] *Supra* n. 12. On this case, *see* F.J. Garcimartín Alférez 'El cambio de *lex societatis*: una forma especial de transformación societaria. Comentario a la sentencia del TJUE (as. *Vale Építési kft*)' [*The Change of Lex Societatis: a Special Form of Company Transformation: A comment on the ECJ ruling (Case Vale Építési kft)]*, *La Ley* (28 December 2012, D-459, available at diariolaley.laley.es) p. 1 (visited 5 May 2016); J. Heymann, Comment, 102 *Revue critique de droit international privé* (2013) p. 247, and M. Gardeñes Santiago, *supra* n. 3, p. 117-118.

[70] *Supra* n. 12, paras. 29-33 and 49-54.

[71] F.J. Garcimartín Alférez, *supra* n. 69, p. 5 and 8. However, this author thinks that, although this is compatible with EU law, it is 'absurd' for a member state to require that the real seat be placed in its territory, because this condition could deter potential founders from incorporating the company under the law of that State. In his view, in a context of mutual recognition of companies in the EU, there are no reasons for keeping the real seat model, even if limited to the companies of the country following that model (*ibid.* p. 8-9). It is clear that, according to this position, a full-fledged incorporation model all around the EU countries would be preferable. Of course, this may be a matter for discussion. What is really important here is that, as the *Cartesio* and *VALE* rulings have recognized, this is not a question that can be solved by the direct application of Art. 54 TFEU. On the contrary, in the absence of harmonisation, it is for each member state to decide on the connecting factor needed for forming a company under its own law.

[72] *Supra* n. 12, paras. 37 and 44. Anyhow, such an operation implies some technical problems. A particularly delicate issue is the status of the company in the intermediate phase, between its cancellation in the registrar of its country of origin and its inscription in the new incorporation state. For instance, and quite

Therefore, as far as the 'real seat' condition is concerned, what appears clearly both in *Cartesio* and in *VALE* is that the fact that the real seat of the company is not established in the country of incorporation may not be used as an argument to refuse the recognition of its legal personality (as was the case in *Centros* and *Überseering*), but, on the contrary, this condition may be required by the state of incorporation when the company is set up, or when the company transforms itself into a company subject to the law of the new state of incorporation. So, in the example of *VALE*, assuming that Hungarian law would require that a company formed under this law should have its real seat in Hungary, or that this seat is transferred to Hungary, then the Hungarian authorities could impose such a condition, and this would not be contrary to the right of establishment. In short, the condition that the real seat should be placed in the country where the company is incorporated may not be used to refuse the recognition of the legal personality of a company formed in another member state, but it may be imposed by a member state as a condition that companies formed under its own law should fulfil. This seems to be a decisive argument in favour of the position that primary EU law does not impose a specific conflict-of-laws solution (namely, the principle of the country of incorporation). On the contrary, in the absence of harmonisation, member states remain free to choose the connecting factor required of companies formed under their own law.[73] As it has rightly been observed, the result of the Court's interpretation of primary law has been an important shift in the functioning of bilateral conflict-of-laws rules of member states, which would have evolved to work in a 'unilateralist' way, because they would determine only the scope of application of the law of the state enacting them.[74]

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surprisingly, the facts behind the *VALE* case reveal that a considerable period of time passed between the cancellation of the company in the Italian registrar and the demand for a new inscription in Hungary. *See* H.J. Sonnenberger, *supra* n. 39, p. 110-111, and J. Heymann, *supra* n. 69, p. 254-256.

[73] In this sense, *inter alia,* L. Liubertaite, 'The Impact of Primary EU Law on the Bilateral Conflict of Laws Rules of the Member States', in J.-S. Bergé et al. (eds.), *Boundaries of European Private International Law / Les frontières du droit International privé européen / Las fronteras del derecho internacional privado europeo* (Bruylant 2015) p. 555 at p. 563-565.

[74] In this sense, L. Liubertaite, *supra* n. 73, p. 577-579.

6. The need for a narrow construction of the scope of the *Centros* doctrine

The principles of the Court's case law explained so far have been of great importance and have had a considerable impact. However, they have to be kept within the limits of their own realm: the field of company law. On the contrary, they do not play any role in the field of other areas of law. For instance, regulatory legislation on specific sectors of activity may obey different principles, taking into account the specific needs or public interests at stake. An example would be Directive 2013/36/EU of 26 June 2013 on access to the activity of a credit institution.[75] Its Article 13(2) requires that the 'head office' is in the same member state as the 'registered office', thus demanding that the credit institution is incorporated in the country of its real seat. Of course, this obligation under EU secondary law is perfectly compatible with the *Centros* doctrine, because the scope of this doctrine remains limited to general aspects of company law, and does not affect 'regulatory' or public-law legislation in specific economic sectors. There is a clear indication of this in paragraph 26, first sentence, of the *Centros* ruling; when examining (and rejecting) the argument of the existence of a possible abuse of the provisions on the freedom of establishment, the Court affirms: 'In the present case, the provisions of national law, application of which the parties concerned have sought to avoid, are rules governing the formation of companies *and not rules concerning the carrying on of certain trades, professions or businesses.*'[76] In other words, the Court would have indicated that the main consequence of the *Centros* doctrine, i.e. the possibility of incorporating the company in a member state even if no activity is done in that state (and, therefore, the possibility of circumventing the law of the country of the real seat), is compatible with the freedom of establishment only as far as aspects related to the 'formation of companies' are concerned. This would explain why, in cases dealing with aspects different from company law, such as taxation, its doctrine has been different.[77]

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[75] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (Capital Requirements Directive), *OJ* [2013] L 176/338, 27.6.2013.

[76] Emphasis added by the author.

[77] An interesting example at hand is the *Cadbury Schweppes* ruling (ECJ (Grand Chamber) 12 September 2006, Case C-196/04, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd* v *Commissioners of Inland Revenue*). An

In addition, there are some fields of private law that have their own conflict-of-law solutions, which may lead to an application of a law different from the *lex societatis*. A very clear example would be that of the law governing insolvency proceedings: according to Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings,[78] the courts of the member state where 'the centre of a debtor's main interests' (the so-called 'COMI') is situated shall have jurisdiction to open insolvency proceedings according to Article 3(1), and these courts will apply their own law (Article 4). Therefore, as a result of this coincidence between *forum* and *ius*, the law applicable to the insolvency proceedings will be the law of the country within the territory of which the centre of main interests is situated. According to Article 3(1), in the case of companies or other legal persons, the place of the registered office shall be presumed to be the centre of its main interests 'in the absence of proof to the contrary'.

Therefore, as a result of the possibility of rebutting this presumption, insolvency proceedings against a pseudo-foreign corporation should be opened, not in the country of its incorporation, but in the country where it has its real seat, and the substantive law of the latter country would apply.[79] The *Kornhaas* ruling[80] is a clear example of this. The new 2015/848 Insolvency Regulation of 20 May 2015[81] keeps the same

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English company established a subsidiary in Ireland for reducing the taxes to be paid in the UK. The Irish subsidiary did no business in Ireland, and British authorities denied the tax benefits claimed by the company. The Court admitted that there was a restriction to the freedom of establishment, but it was justified as long as it applied only to 'wholly artificial arrangements aimed at circumventing the application of the legislation of the member state concerned' (para. 51); on this case, *see* J. Armour and W.-G. Ringe, *supra* n. 17, p. 11-12. A possible explanation for this apparent contradiction between *Centros* and *Cadbury* is that the former concerned only the avoidance of company law provisions through artificial structures, whereas *Cadbury* concerned the circumvention of tax laws. In short, the message seems to be that the freedom of establishment admits artificial arrangements to set up pseudo-foreign corporations in the EU, but not to avoid taxes.

[78] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, *OJ* [2000] L 160/1, 30.6.2000.

[79] On the interpretation of the concept of 'centre of main interests' and the related presumption in the case of legal persons, both by the ECJ and national jurisdictions, and on its application in the case of pseudo-foreign corporations, *see* J. Carrascosa González, *supra* n. 27, p. 22-52.

[80] *Supra* n. 14.

[81] Regulation (EU) No 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, *OJ* [2015] L 141/19, 5.6.2015.

solution, although it adds some clarification: according to the new Article 3(1), the centre of main interests 'shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.' Furthermore, it adds that, in the case of legal persons, the presumption pointing at their registered office shall not apply if the said registered office has been moved to another member state within the 3-month period prior to the request for the opening of insolvency proceedings.[82]

The examples explained so far clearly indicate that the doctrine established in *Centros* and the other judgments that followed should be confined to the field of company law. But, even in the realm of company law, a narrow construction of the principles contained in the referred judgments should be preferred. These principles should be limited to the very existence of the company, that is, its valid formation under the law of a given member state. In this area, the benefits of applying a principle of mutual recognition of companies are clear. On the contrary, it is not so clear that the same principle should be necessarily applied to other aspects, namely those relating to the 'functioning' of the company. Perhaps it ought to be remembered that, even in its seminal *Centros* judgment, the Court justified its solution with the argument that the national rules concerned 'the formation of companies'.[83] For these reasons, a reassessment or readjustment of the doctrine laid down in *Inspire Art* would be advisable. It is quite probable that this readjustment has already started with the *Kornhaas* judgment.

This interpretation of the *Centros* doctrine makes it possible to understand the compatibility of the 'liberal' approach, as far as the formation

[82] *Supra* n. 81, Art. 3(1)b. The provisions of the new Regulation shall apply to insolvency proceedings opened after 26 June 2017, as provided by Art. 84(1), with the exception of the provisions indicated in Art. 92. An obvious example of separate and specific conflict-of-laws solutions would be the area of contracts entered into by companies, their governing law being, not the personal law of the company, but the law applicable to the contract under the Rome Convention of 19 June 1980 or, if the contract is concluded after 17 December 2009, Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), *OJ* [2008] L 177/6, 4.7.2008. *See*, for instance, ECJ 7 April 2016, Case C-483/14, *KA Finanz AG* v *Sparkassen Versicherung AG Vienna Insurance Group*, especially paras. 49-59, in which the Court said that a merger by acquisition did not change the law applicable to contracts formerly entered into by the acquired company.

[83] *Supra* n. 6, para. 26.

of companies is concerned,[84] as compared to the 'realist' concept of establishment stemming from other ECJ judgments, such as the well-known *Factortame II* ruling of 25 July 1991,[85] as well as from EU secondary law in specific fields, such as the general Directive 2006/123/EC of 12 December 2006 on services in the internal market.[86] This last text defines 'establishment' in the sense of effective or real establishment (art. 4.5), in line with the definition provided in *Factortame II*.[87] In other words, if one takes the example of a service provider whose effective or real establishment is in Greece, although the provider in question is a company formally incorporated under English law that has set up a branch in Greece, according to the definition in Article 4(5), this provider could be considered as established in Greece for the purposes of Directive 2006/123, even if the undertaking in question had been incorporated under English law.

Conclusion

It follows from the previous remarks that ECJ case law on the establishment of companies should be interpreted in the sense that it does not impose a uniform conflict-of-laws system in the EU modelled on the country of incorporation doctrine. It is true that the Court apparently shows some preference for this model, but it does not impede that the laws of member states apply, where these are different from the country of

[84] However, even in the field of company law, the EU legislator would have made important exceptions to the *Centros* doctrine. A very clear example can be found in the Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE), *OJ* [2001] L 2941, 10.11.2001. According to its Art. 7, the registered office of the SE shall be located within the EU, in the same member state as its head office. In addition, member states may require SEs registered in their territory to establish their head office and their registered office in the same place.

[85] ECJ 25 July 1991, Case C-221/89, *The Queen* v *Secretary of State for Transport, ex parte Factortame Ltd and others*.

[86] *Supra* n. 46.

[87] This Article refers to 'the actual pursuit of an economic activity...by the provider for an indefinite period and through a stable infrastructure from where the business of providing services is actually carried out', *supra* n. 85, Art. 4(5). Recital 37 gives additional indications that help to clarify the definition in Art. 4(5). Among other things, it says: 'According to this definition, which requires the actual pursuit of an economic activity at the place of establishment of the provider, a mere letter box does not constitute an establishment.' *See* also the concept of 'legal person' contained in recital 38.

incorporation, provided that they are justified by the general interest and are not disproportionate. In addition, the Court has admitted very clearly that, in the absence of harmonisation, a member state is free to choose the connecting factor required to companies incorporating under its law.

In my opinion, the real contribution of the *Centros* doctrine is that it introduced, as far as the valid formation of companies from other member states is concerned, a method alternative to the bilateral conflict-of-laws rules. This is the so-called 'recognition method', which essentially means that a legal situation regularly created in a legal system should be recognised and accepted by the others. Specifically in the field of companies, this means that once a company is validly created in a member state, it must be recognised by the others, even if the conflict-of-laws solutions of the different states are not the same. As it has rightly been pointed out, this method would be appropriate in those situations creating a legal status for an indefinite period of time,[88] as happens when a company is registered. In addition, the recognition method is easier to apply than the traditional alternative of determining the 'applicable law' through bilateral conflict-of-laws rules (the practical problems linked to the proof of foreign law are well known), because the only thing to check would be the existence or incorporation of the company in its state of origin, and normally this check can be easily made through documents or evidence provided by the registrars or authorities of that state. For these reasons, I do not share the criticism that some authors have addressed to this method.[89]

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[88] In this sense, P. Lagarde, 'Développements futurs du droit international privé dans une Europe en voie d'unification: quelques conjectures', 68 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (2004) p. 225 at p. 231-232.

[89] H. J. Sonnenberger, *supra* n. 39, p. 109-110; the main argument for such criticism would be that, by endorsing the recognition method, the Court would be departing from the traditional savignian method based on bilateral conflict-of-laws rules, and this would be due to its lack of expertise in private international law. In my opinion, the assumption that the bilateralist method is in all cases the best possible solution is far from clear. At least in some cases or situations, alternative methods or techniques might be useful, and even more appropriate and easy to apply. No doubt that the savignian method based on bilateral conflict-of-laws rules is a refined theoretical model, indeed a remarkable achievement of legal science. However, mainly since the second half of the 20th century, the savignian bilateralist paradigm of conflict-of-laws has been deeply challenged and revised. As a result of such revision, 'methodological pluralism' is a widely accepted approach for dealing with conflict-of-laws issues. Therefore, one should apply the bilateralist model as long as it is useful and workable (and this will be the case on many occasions), but not convert it into an obstacle preventing the use of other

However, an important caveat must be made. The use of the recognition method does not mean that this recognition of legal situations created abroad is absolute or without conditions. On the contrary, in my opinion, this recognition is subject to two conditions: First, the public policy of the forum state. In other words, a state would not be obliged to accept a situation legally created in another country if this recognition would manifestly contradict the basic principles of its own legal system. Imagine, for instance, a foreign legal person, the aims of which would be clearly contrary to human rights or dignity. In this case, in principle quite exceptional, obviously there would be no obligation to recognise that entity. The second condition would be that there is a sufficient link between the situation and the state granting a given legal status. The aim of this second condition is to ensure that there is a sufficiently serious contact with the state creating the legal status to be recognised, in order to avoid situations of fraud. It is true that, specifically in the field of company law in the EU, the Court has interpreted this second condition in an extremely lax manner, because no real link is required with the state of incorporation. It is considered sufficient that the company is formed under its law.

In the event that the EU legislator undertook the task of harmonizing private international law of companies in the EU, I think that, as far as the question of the valid formation of the company is concerned, it would be convenient to do so according to the recognition method that the Court has fostered. That is because, for the reasons explained, I think it is appropriate in this field. This does not mean, however, that, when establishing the conditions for recognition, the EU legislator should necessarily stick to the 'liberal' approach followed in *Centros*. On the contrary, it could require a more serious link between the company and the state where it incorporates, as it has done, for instance, in the Regulation on the European Company Statute.[90] Of course, this is a matter for political decision, depending on what would be the general orientation of the new rules harmonised at the EU level.

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alternatives that in some cases might work better. As said before, the 'recognition method' would be appropiate for situations giving rise to a legal status for an indefinite period of time (the registration of a legal person would be a clear example): once this status is granted to a company by a state, other states should recognize it, with some exceptions.

[90] *See supra* n. 84.

PART 3:

PERSPECTIVES OF THE INTERNAL MARKET AND EXTERNAL TRADE

9. EUROPEAN TRANSNATIONAL COMPANY BARGAINING: TOWARDS A NETWORK-BASED EUROPEANISATION OF LABOUR RELATIONS

VASILEIOS KONIARIS*

Introduction

Transnational, or Framework, Agreements have reemerged as a form of regulation after the period of economic crisis in the EU. In accordance with the definition provided by the European Commission, a Transnational Company Agreement (henceforth TCA) is 'an agreement comprising reciprocal commitments, the scope of which extends to the territory of several states and which has been concluded by one or more representatives of a company or a group of companies on the one hand, and one or more workers' organisations on the other hand, and which covers working and employment conditions and/or relations between employers and workers or their representatives'.[1]

This chapter is based on three axes: Firstly, it will present existing literature on the effort to clarify these agreements under private international law, and the shortcomings that this approach entails. Secondly, it will identify the character of the actors involved in the process and their interests in the signature of these agreements. And thirdly, it will propose a new approach in the understanding of these agreements, outside existing legal approaches, as a result of labour networks of common interests that have the potential capacity to create European identities and to offer strategic advantages to multinational enterprises.

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[1] European Commission, Staff Working Document 'The role of transnational company agreements in the context of increasing international integration', SEC(2008) 2155 final, Brussels, 02.07.2008.

1. The first level of legal understanding of TCAs

The first level of analysis includes a vast bibliography and research by mainly legal scholars on the binding effect of TCAs, since their conclusion is the result of a bargaining process that takes place at the transnational level. It includes institutionalised actors such as European Trade Union Federations, European Works Councils and Global Union Federations. These agreements cover issues such as career and skills development, equal opportunities, diversity and anti-discrimination, fundamental rights of trade union members, health and safety issues, mobility of employees, protection of personal data and internet policy, recruitment/hiring policy, restructuring/impact of workforce, social dialogue, employee involvement and governance, sustainability and governance, transfer, subcontracting and outsourcing, as well as wages and benefits.[2]

The lack of a specific geographical coverage under the notion of 'transnational' is indicative of an increasingly central role of private actors as rule-makers in a multilevel system of governance as that of the EU.[3] Also, Transnational Collective Bargaining (henceforth TCB) draws elements from the particular legal space in which it is shaped, that has been referred to as 'global law'.[4] This concept describes a 'legal order characterised by empty spaces of regulation and situations that, as far as contractual relationships are concerned, cannot be explained with traditional interpretative tools'. In this respect, these hybrid phenomena have been labeled as 'tentative law' to emphasise their experimental character, their ambiguous legal foundation, and the aspiration to a stronger degree of institutionalisation'.[5] Under this aspiration to a stronger degree of institutionalisation, one can see that a dominant role in the conclusion of TCAs is undertaken by European Works Councils, which do not possess, in accordance with the Recast Directive, the ability to conclude any agreements with the management of the multinational company.

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[2] *See* Database on Transnational Company Agreements, available at: www.ec.europa.eu/social/main.jsp?catId=978 (visited 9 August 2015). *See* analysis, *supra* n. 1.

[3] I. Senatori, 'Transnational Company Bargaining and the Discourse of the European Commission: A Critical Overview' in E. Ales, I. Senatori (eds.), *The Transnational Dimension of Labour Relations: A New Order in the Making?* Proceedings of the 11th International Conference in commemoration of Prof. Marco Biagi (Giappichelli 2013).

[4] *See* I. Senatori, *supra* n. 3, p. 2 and references therein.

[5] *See* M. R. Ferarrese, *Prima lezione di diritto globale* (Laterza 2012).

A different element that needs to be highlighted is that, until now, there is no case law concerning the functioning of TCAs. This can lead to the assumption that these agreements have neither been canceled nor breached by one of the signatories. However, monitoring of the TCAs is explicitly performed either by committees created for that purpose or by the trade unions that conclude them. Additionally, the multinational companies that have already signed TCAs have strong union presence or, in the case of non-EU companies, have a big percentage owned by the state, meaning that conflict is less possible to appear between the management and the employees' side.

According to a number of researchers, legal intervention by the European Commission should move several steps back, and, more specifically, to the representativeness of the signing parties in TCAs.[6] However, this would also require a form of unification of national systems on Labour Relations, since different thresholds apply for each EU member state. For example, there are great differences between the representativeness threshold in the countries of the former Eastern Bloc (which is very low) and those in the countries of the Western EU. Consequently, if one takes into consideration the basic assumption that the employees' side is always in disadvantage when negotiating with the management of the company, the increase in the capabilities of the social partners would not constitute a countervailing force in the bargaining process.

Contrary to the above, it is argued that this power to the social partners, derived by Article 152 TFEU,[7] would enhance collective autonomy. It is further noted that soft law prevails in the majority of the cases concerning labour relations. The reason is that hard law, which would be interpreted by legally binding TCAs, would require the existence of a unified public authority that would have the capacity and, more importantly, the will to monitor any breaches in these agreements. It is evident that the intention of the European Commission is to leave this monitoring to the good will of the parties involved. As it is stated: 'This support [from the EU] needs to be: a) flexible, adapted to the needs of the

[6] S. Negrelli, 'Remarks on Deliberative Democracy, Social, and Civil Dialogue', in J. De Munck, C. Didry, I. Ferreras, A. Jobert (eds.), *Renewing Democratic Deliberation in Europe: The Challenge of Social and Civil Dialogue* (Peter Lang 2012) p. 187 at p. 200.

[7] Art. 152 TFEU: 'The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy. The Tripartite Social Summit for Growth and Employment shall contribute to social dialogue'.

companies and workers concerned, b) designed in close cooperation with the European Social Partners or, better still, initiated by them, c) optional, as companies and workers should be able to innovate and operate outside any instrument intended to support transnational company agreements. Parties should be free to negotiate and conclude agreements that are custom-built to their needs and to a specific situation'.[8] It appears that the European Commission focuses on the anticipation of change because of globalisation, as well as on the specific differences and business models that exist in multinational companies that operate in the EU. Emphasis is still given on the capacity of the European Social Partners, rather than their legal character, to initiate and monitor these agreements. It is further noted that internal monitoring, rather than hard law, will enhance TCAs.

It is therefore evident that a first stage analysis, using solely legal tools, would be inefficient due to all the above mentioned factors and the diversity in the national labour systems of the EU.

2. The actors that conclude Transnational Company Agreements

Negotiations for the conclusion of a TCA or a Global Framework Agreement include a number of actors such as Company Employee Representatives, European Works Councils (hereinafter EWCs), European Trade Union Federations, Global Union Federations and National Trade Unions. Table 1 indicates the initiators of these agreements, from the employees' side, during the period 1996-2015, based on data extracted from the Database on transnational company agreements from the DG Employment, Social Affairs & Inclusion[9] and on personal research. For the creation of this table I focus on the initiators of the bargaining process, since more than one party can eventually conclude the TCAs.[10]

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[8] European Commission, Staff Working Document 'Transnational Company Agreements: Realising the Potential of Social Dialogue', SWD (2012)264 final, Brussels, 10.09.2012.

[9] *See supra* n. 2.

[10] For the quantitative and qualitative analysis of TCAs *see* the analysis by V. Telljohann, I. Costa et al., 'European and international framework agreements: new tools of transnational industrial relations', in 15 *Transfer: European Journal of Industrial Relations and Research* (2009) p. 505 at p. 525. This is a different approach that I use than Telljohann et al. (2009) for the qualitative and quantitative analysis of the TCAs. More than one party from the employees` side may eventually conclude the TCA in order to enhance its scope of application. However, under the term 'initiator', I refer to the party that actively initiated the

Table 1: Initiators of TCAs from the employees' side

Initiator \ Year	1996	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Company Employee Representatives	-	-	-	-	1	1	-	-	-	1	1	-	1	1	2	1	-	1	1
EWCs	1	1	3	3	8	10	7	9	2	2	9	9	3	9	5	10	6	6	2
European Trade Union Federation	-	-	-	1	3	2	2	2	3	2	7	4	3	8	5	5	3	3	2
Global Union Federations	-	-	-	3	8	9	4	6	17	7	6	19	8	12	6	11	11	11	3
National Trade Union Organisations	-	-	-	2	7	7	2	3	5	5	4	10	5	9	6	10	4	8	2

process or was the first party to be consulted after the management`s initiative, based on personal research.

As it is evident from Table 1, EWCs play an important role in the negotiation, conclusion and monitoring of these types of agreements. However, this is contrary to their initial competence, which is the 'information and consultation' of employees in community-scale undertakings or groups of undertakings, and not the negotiation or conclusion of any types of agreements. For example, in the TCA of BNP Paribas on Gender Equality it is stated that: 'Follow-up on the application of this Agreement will be carried out on an annual basis as a part of a meeting of the Group's European Works Council. At this meeting, a specific and detailed review of the introduction of reporting applications will be produced and presented to the members of the Council'.[11] Similar provisions appear in many other agreements. As it has previously been mentioned, this is a role undertaken by the EWC which is outside the boundaries of its competences in accordance with the Directive.

An additional issue that needs to be addressed is the proactive character that TCAs tend to adopt. The proactive character is evident in the fact that the issues addressed in the TCAs concern the adaptability to change or a potential conflict that may appear in the future. This type of change can be a result of globalisation, restructuring or any other risks that exist in the environment of the multinational enterprise. Table 2 indicates the number of agreements per type of topic, and provides an answer to the second question of this analysis concerning the primary topics of TCAs.

Table 2: Topics addressed in TCAs

Topic	Appearance as primary topic
Career and skills development	21
Equal opportunities, diversity and anti-discrimination	16
Fundamental Rights, Trade Unions	135
Health and Safety, working conditions	24
Mobility	2
Protection of personal data and internet policy	5
Recruitment-hiring policy	10
Restructuring-impact on the workforce	25

[11] BNP Paribas, European Charter on Workplace Equality, signed at 16th September 2014, available at: www.ec.europa.eu/employment_social/emplportal/transnational_agreements/BNP-gender_equality-EN.pdf (visited 9 August 2015).

Social Dialogue, employee involvement and governance	32
Sustainability, governance and ethics	5
Transfer, subcontracting and outsourcing	5
Wages and benefit	3

Contrary to the above, TCAs can also have a reactive character, as in the case of a conflict in the globalised workplace of the multinational company. However, this tends to decrease, since unions will not choose this option, which lacks legal enforcement. If a trade union wishes to push for the signing of a document with the employer after an incident has occurred, this will take place in the form of a national collective agreement. This position is evident in the underlying reluctance of trade unions towards TCAs, since they would not, under any circumstances, wish that TCAs prevail or replace national collective agreements. On the other hand, if this incident has occurred in a workplace outside the boundaries of the EU, especially in countries where union presence is low, then the Global Unions or the European Trade Union Federation will decide for that option. This position is also expressed by ETUC that would wish for the signing of a European Collective Agreement rather than intermediate measures at European sectoral or enterprise level.

A similar attitude exists in the employers' side that wish for the TCAs to retain their CSR character or move towards a strategic advantage approach, meaning to reduce conflict in the workplace or increase employee engagement. Hadwiger[12] identifies eight reasons that multinationals conclude TCAs, namely in order to maintain a good relationship with workers' councils and trade unions, provide a credible signal of compliance with social and environmental standards, safeguard against negative publicity and risk management, legitimise management decisions and reduce transaction costs, better manage global production networks by standardisation, motivate the employees, attract skilled workers and develop workers' loyalty, level the playing field,[13] and deal with the shadow of state policies.

[12] F. Hadwiger, 'Why do Multinational Companies Sign Transnational Company Agreements', University of Hamburg, DFG-Graduirtenkolleg (GRK 1597/2): *The Economics of the Internationalisation of the Law* (2014) p. 14 at p. 28.

[13] Meaning to raise the standards in the whole sector in order to avoid unfair competition (*see* also references in *supra* n. 10).

3. A new approach focused on the signatories of TCAs and based on the creation of labour networks of common interests

Current research has focused on the identification of the legal character of TCAs due to the fact that these are agreements signed in the European (or global) workplace between representatives of the employees and the employers. The common element in these agreements is that they are the result of a previous existing collaborative environment with strong trade union presence.

Research focus needs to be addressed to the character of the agents that conclude these agreements rather to the agreements themselves or the process of their conclusion. It is important to understand that European Trade Union Federations or the EWCs cannot be identified as trade unions, or even social movements, based on the traditional terms. In the traditional Webb's approach, there is a conflict of interests between employees and employers, which creates the need for the employees to unionise. In the Marxist approach, trade unions are perceived as the means to change the economic system. However, these actors do not have a revolutionary character, and their operation requires the collaborative efforts of both the employees and the employers that can create joint bodies of representation, legally protected to address the vulnerable side of employees, in order to better adjust to any risks arising from the micro or macro environment of the multinational company.

The existence of these new networks (rather than associations or trade unions) is the result of European initiatives based on the European Social Model, and their scope is dual. On the one hand, they represent the interests of the workplace, and on the other hand, they contribute to the strengthening of the European integration process by creating identities and new ethics. These new ethics go beyond the Germanic protestant model, since they are initiated by European institutions and European Social Partners. Under this assumption, the European Commission would wish that the European Social Partners, under EU funding for capacity building, take the initiative for these agreements, since they possess the knowledge about the specific needs for the conclusion of a specific TCA.

While it is evident that the purpose of the EWCs, based on the Recast Directive,[14] is to inform and consult, with the participation of the

[14] *See* Art. 1 of the Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of

employer's side, European Trade Union Federations have yet to be identified concerning their role in the European structure. In that aspect, EWCs operate outside their institutionalised role since, complying with the Recast Directive, they do not possess the capability to negotiate for any sort of agreement with the employers. Employees' representatives disagreed with this approach because they would not like these bodies, in which employers also participate, to negotiate agreements with the employees.

These organisations seem to develop into labour networks of common interests that contain elements of the European Identity in the European Social Model. Access to these networks has the potential to create identities rather than legal results; these identities are those of cooperation and not of conflict. Under this perspective, TCAs should not be considered as legal documents, rather than as the result of a network-based European society that manages to create strategic advantages towards other foreign company models. The importance of these labour networks that include both the employers and the employees is the formation of a new social capital for both the multinationals and the EU. The term 'social capital' has been the object of research in the past in a variety of social phenomena, and more specifically by Putnam regarding the public life of contemporary societies,[15] and by Burt regarding relations within and beyond the firm.[16]

What is apparent in all Directives, concerning information and consultation of employees, employee participation and employee rights, is an effort to maintain a balance between the managerial prerogative, on the one hand, and a social market economy, on the other hand. The second can be characterised as an *ipso facto* result of the European Social Model, a model that protects employees, pensioners, and social policy, and can be the opposite of the American Model of individualism, or the Japanese model of managerialism.

This approach seems more efficient than the effort to legally equalise all labour relations systems in the EU. The latter would seem as futile, since there are differences both in the definition of terms used by each EU member (employee, collective bargaining, representativeness, information and consultation) and in the labour relations cultures (Mediterranean,

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undertakings for the purposes of informing and consulting employees, *OJ* [2009] L 122/28, 06.05.2009.

[15] R. D. Putnam, 'Bowling alone: America's declining social capital', 6 *Journal of Democracy* (1995) p. 65 at p.78.

[16] R. S. Burt, *Structural holes: The social structure of competition* (Harvard University Press 1992).

Nordic, Anglo-Saxon). Differences can also be traced in the social security systems between the member states. Until recently, such differences allowed for social dumping practices in the member states as well as 'whipsawing' strategies, where companies would use the conflicting interests of two or more different national trade unions in order to better negotiate working terms or wages.[17]

Conclusion

The notion of the Euroworker as one of the cornerstones of the European Integration, following those of the Euromanagers, Euro Civil Servants, Euro Students and Professors, or Euro Regions,[18] seems to lose pace due to the neo-liberal transformation of the European Union and the current economic crisis in the EU. The above term would refer to a person (blue-collar or white-collar) that works for an undertaking that has operations in more than one EU member states, and is covered by European Collective Bargaining Agreements or Transnational Company Agreements. It can, moreover, refer to his representatives in European Works Councils or European Trade Union Federations for information on the activities of the multinational company they work for, where rights are covered by EU Directives (such as health and safety in the workplace, working time etc.). On the other side, the employers of these multinational companies are operating in accordance with the principles of the EU concerning free trade and employee protection, and by taking into consideration all interests that are affected by the operation of the multinational company. Therefore, the Euroworker operates under a framework of cooperation with a responsible management and in cooperation with other networks such as consumers, producers in the supply chain of the multinational, or representatives of environmental groups, since all these networks are acknowledged in the multilevel governance of the EU.

This term, though it has lost its momentum after the end of the Delors Presidency, is more than necessary to re-emerge now in order to rebalance the equilibrium between the economic and the social aspect of the EU integration process. This balance has been distorted in the previous years,

[17] M. Hauptmeier, I. Greer, 'Whipsawing: Organizing Labor Competition in Multinational Auto Companies', ILERA 16th World Congress Proceedings (2012).
[18] *See* introduction in R. Blanpain and P. Windey, *European Works Councils* (Peeters 1994).

especially after the rulings in the *Laval* and *Viking* cases,[19] as well as after the incapacity of regional or European networks to coordinate actions against the austerity measures that had been imposed especially on the workers of the southern member states of the EU.[20] This coordination is hard to be achieved, since the majority of the workers in these states feel that they are not properly represented at the European level, especially when they feel distanced from the European system that imposes austerity measures. At the same time, austerity has also deteriorated the economic climate in the EU, since consumption is decreasing due to lower wages.

What is also evident now is that the EU political and economic environment is slowly transforming into an environment of networks of common interests where, especially for European labour relations, conflicts between employers and employees need to give place to cooperation for the 'anticipation of change in globalisation'.[21] This transformation can be the result of factors such as climate change, consumers' attitudes or price volatility. This is a list of risks that are difficult, if not impossible, to be legally predicted. This would also describe the post-industrialist community of the EU as it is described by Rifkin,[22] where access in 'European networks' can have the potential to create new identities by the collaborative relations of the workers and the management of the multinational companies that operate in the EU.

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[19] For the impact of the rulings on the *Laval* and *Viking* cases *see* J. Malmberg, 'The Impact of the ECJ Judgments of Viking, Laval, Ruffert and Luxembourg on the Practice of Collective Bargaining and the Effectiveness of Social Action' (DG INTERNAL POLICIES 2010), available at: www.europarl.europa.eu/document/activities/cont/201107/20110718ATT24274/20110718ATT24274EN.pdf (visited 9 August 2015).

[20] M. Vogiatzoglou, 'Workers' Transnational Networks in Times of Austerity; Italy and Greece', 21 *Transfer: European Review of Labour and Research* (2015) p. 215 at p. 228.

[21] This term appears in the majority of the concluded TCAs and may refer to any supply- and demand-side risks, as well as non-market risks that are correlated with the emphasis of the multinational company on cross-border activities. Management of all these risks means that the multinational company needs to possess all the proactive elements in order to better manage change. For an excellent analysis on the strategies of adaptation of the multinational company in the globalised environment, *see* P. Ghemawat, *Redefining Global Strategy: Crossing Borders in a World Where Differences Still Matter* (Harvard Business School Press 2007) p. 138.

[22] J. Rifkin, *The Age Of Access: The New Culture of Hypercapitalism, Where All of Life is a Paid-For Experience* (Putnam Publishing Group 2000).

Legal intervention by the European Commission, as far as TCAs are concerned, can be kept to a minimum, since that could only be achieved if at some point in the future the European Integration Process leads to the creation of a single state where wages, social security contributions and working conditions are the same for each member state. It is widely accepted that if the EU regulates a legal framework concerning the binding effects of TCAs, then the management side is not likely to enter into these negotiations. If the EU were to regulate a legal framework concerning the binding effects of TCAs, it is unlikely that the management side would enter into these negotiations since they would prefer to use TCAs for strategic aims, as is noted by Sobczak.[23]

Instead of a legal intervention, it would be more profitable to enhance all the intermediate actors in this process, such as the European Works Councils or the European Trade Union Federations. These actors need capacity building and financial support to increase their representativeness and to enhance the social capital of the multinationals that operate under a European context. However, this statement is only based on a hypothesis that these networked employees' representatives (union or non-union members), by having access to the European networks, based on collaboration and not on conflict, will eventually promote European integration. This new form of ethics that the Euroworker can potentially bear will be the cornerstone for a balanced and viable European Social Model that will be based on a set of different industrial relations systems in the EU, and will provide an answer to the question of how trade unions in hard times respond to almost impossible challenges.

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[23] A. Sobczak, 'Ensuring the effective implementation of transnational company agreements', 18 *Transfer: European Journal of Industrial Relations* (2012) p. 139 at p. 151.

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10. THE COMPATIBILITY OF THE SECONDARY LAW OF THE EUROPEAN UNION ON THE PROTECTION OF THE ENVIRONMENT WITH ITS OBLIGATIONS FROM ITS INTERNATIONAL AGREEMENTS

ALEXANDROS KATSANOS*

Introduction: The EU and international agreements

The European Economic Community possessed legal personality and concluded many international agreements, either on its own behalf or in cooperation with the member states.[1] Until the Treaty of Lisbon (2009), the European Union did not possess a legal personality, mainly due to the lack of such a specific provision in the Maastricht (1993) and the subsequent Treaties. After the Reform Treaty (Treaty of Lisbon), the European Union itself officially has a legal personality.[2] One of the fundamental consequences of the acquisition of legal personality is that the European Union substitutes the European Community in the international conventions already signed with third countries and international organisations, and furthermore becomes subject to the obligations deriving therefrom. The Treaty of Lisbon has also reconstructed the framework of the international agreements and has distinguished them into categories under specific preconditions and procedures to be followed.[3]

As a general rule, Article 216(2) TFEU provides that '*agreements concluded by the European Union with third countries and international organisations are binding upon the institutions of the Union and on its member states*'. The Court of Justice has consistently held that once an

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[1] ECJ 31 March 1971, Case 22/70 (ERTA Case), *Commission* v *Council*.

[2] Art. 47 TEU.

[3] *See*, for example, Art. 218 TEU.

agreement enters into force, its provisions form an integral part of EU law and binds the member states by virtue of their duties under EU law and not international law.[4] Therefore, international agreements are incorporated into the sources of EU law at a rank higher than the EU secondary law and are binding on the EU institutions to respect them during the fulfillment of their tasks.[5] According to the prevailing theory of monism,[6] the above incorporation of the international agreements in the legal order of the European Union takes place automatically without any further need of any legislative or regulatory act necessary for their ratification.[7]

Once the international agreements take effect, they are hierarchically superior to all acts of EU secondary law.[8] Therefore, the EU Court of Justice acknowledges that the aforementioned Article 216(2) TFEU may constitute the legal basis upon which a provision of the EU secondary law or an administrative act that is incompatible with the international (conventional) law may be invalidated. The principle of primacy of EU international agreements does not extend to the primary law (Treaties of the European Union) or to the general principles of law or fundamental rights under EU law.[9]

Finally, the same principle of primacy of the international agreements – to which the European Union itself is a contracting party – over the acts of its secondary law has the meaning that the secondary law must also, as far as possible, be interpreted in conformity with those agreements, even though such a 'treaty-friendly interpretation' is more a dualist than a monist approach. Certainly, such interpretation does not depart from the prevailing theory of monism, but mainly serves the goal of obtaining a

[4] P. Craig, G. de Búrca, *EU Law: Text, Cases and Materials*, 5th edition (Oxford University Press 2011) p. 338; ECJ 30 April 1974, Case 181/73, *R. & V. Haegeman* v *Belgian State*, para. 5.

[5] E. Sachpekidou, *European Law* (Sakkoulas Publishers 2013), p. 257 (in Greek); ECJ 26 October 1982, Case 104/81, *Hauptzollamt Mainz* v *Kupferberg & Cie,* para. 13.

[6] *See* C. Timmermans, 'The EU and Public International Law', 4 *European Foreign Affairs Review* (1999) p. 181.

[7] G. de Búrca, 'The ECJ and the International Legal Order After *Kadi*', 51 *Harvard International Law Journal* (2010) p. 105.

[8] ECJ 12 December 1972, Case 21-24/72, *International Fruit Company NV and others* v *Produktschap voor Groenten en Fruit*; *see* also F. Martines, 'Direct Effect of International Agreements of the European Union', 25 *European Journal of International Law* (2014) p. 129 at p. 131.

[9] ECJ 11 April 2013, Case C-335/11, *HK Danmark*.

high level of compatibility of EU secondary law with international law, while simultaneously preserving the autonomy of the EU legal system.[10]

1. Judicial criteria for the direct effect and the compatibility review of secondary law

The ECJ (now CJEU) traditionally allowed the examination of the compatibility of the secondary law with the provisions of an international agreement recognizing the 'direct effect' of the latter. Direct effect has initially been recognised by the case law of the Court of Justice of the European Communities regarding the compatibility of national provisions with EU law.[11] According to the doctrine of direct effect, a provision of EU law is capable of having direct effect if it is sufficiently clear, precise and unconditional.[12] If these conditions are met, it can be invoked by individuals before national courts, which can apply them directly, leaving aside the national rule.[13]

In the international context, the direct effect is somewhat more complicated, since the direct effect doctrine partly aims to preserve the autonomy of the EU internal legislation. It is the principle which, under specific conditions, allows a national or supranational court to apply an international rule of law as an independent legal basis for its judgment, even when that rule is not transposed, or when it is inadequately transposed to the national or supranational legal order.[14] According to the classical direct effect criterion, as implemented also by part of the EU case law, the validity of the acts of the European Union institutions could be adjudicated with reference to a provision of international law when that provision binds the EU and is capable of conferring rights on individuals

[10] ECJ 10 September 1996, Case C-61/94, *Commission* v *Germany*; ECJ 26 April 1972, Case 92/71 (Case Interfood), *Interfood GmbH* v *Hauptzollamt Hamburg*.
[11] ECJ 5 February 1963, Case 26/62, *NV Algemene Transport-en Expeditie Onderneming van Gend & Loos* v *Netherlands Inland Revenue Administration*.
[12] *Supra* n. 4, p. 183.
[13] *Supra* n. 4, p. 193. *See* also B. De Witte, 'Direct Effect, Supremacy and the Nature of the Legal Order', in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford University Press 1999) p. 187.
[14] G. Betlem and A. Nollkaemper, 'Giving Effect to Public International Law and European Community Law before Domestic Courts: A Comparative Analysis of the Practice of Consistent Interpretation', 14 *European Journal of International Law* (2003) p. 569.

that they can claim before the courts.[15] This can be seen as a rather restrictive approach for the review of the compliance of European law with international law, considering the non-binding character of a great number of international conventions.

On the other hand, at the international level, the specific nature and legal character of the provisions of an international agreement, as well as the agreement itself as a whole, should also be taken into consideration as a condition of implementing the direct effect principle. For example, the ECJ held in a number of cases concerning the GATT and WTO agreements that their provisions did not produce such a direct effect, based on the specific nature of the GATT and WTO agreements, which constitute mainly 'reciprocal and mutually advantageous arrangements'.[16] With regard to their structure and nature, those agreements were not acknowledged by the European Court as a legal basis upon which it could review the legality of the acts of the European Union institutions.[17] The Court, considering the mission and the scheme of the WTO agreements, found that those agreements had no intention or mechanism whatsoever of requiring from national courts not to apply a provision which is opposed to their rules, whereas the GATT provisions were characterised by their flexibility, taking also into consideration the scheme of their non-binding dispute settlement system.[18]

Departing from this approach, the ECJ case law allowed the compatibility of the administrative acts as well as of the secondary law of the European Union with the provisions of GATT and WTO to be reviewed only in exceptional cases,[19] which furthermore ought to be restrictively interpreted. The Court accepted such a review of legality of the secondary law or administrative acts only in the cases of *Fediol* v *Commission*[20] and *Nakajima* v *Council*,[21] namely when an act of the European Union refers expressly to specific provisions of an international

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[15] A. Dashwood et al., *Wyatt and Dashwood's European Union Law*, Sixth Edition (Hart Publishing 2011) p. 953.
[16] ECJ 5 October 1994, Case C-280/93, *Germany* v *Council,* paras. 103 to 112. *See* also analysis *supra* n. 4, p. 344-350.
[17] ECJ 23 November 1999, Case C-149/96, *Portugal* v *Council*.
[18] *See supra* n. 4, p. 345.
[19] J. Bourgeois, 'The European Court of Justice and the WTO: Problems and Challenges', in J.H.H. Weiler (ed.), *The EU, the WTO, and The NAFTA: Towards a Common Law of International Trade* (Oxford University Press 2000) p. 71; P. Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford University Press 2004) p. 316.
[20] ECJ 22 June 1989, Case 70/87, *Fediol* v *Commission*.
[21] ECJ 7 May 1991, Case 69/89, *Nakajima* v *Council*.

agreement (case *Fediol* v *Commission*), or when the act of EU law intends to implement a special or particular obligation under the international agreement (case *Nakajima* v *Council*).[22]

The Court also had the opportunity to underline the specific nature of the rules of the GATT and the WTO agreements in comparison with the provisions of other international agreements. Specifically, the Court compared the GATT and WTO agreements with agreements on the protection of the environment, such as i.e. the Convention for the Prevention of Pollution from Ships and the Convention on Biological Diversity. It made clear that the exclusion of the *ultra vires* review of the secondary law or an administrative act in the prism of those (GATT and WTO) agreements cannot be furthermore applied to a convention which, in contradiction to them, is not strictly based on 'reciprocal and mutually advantageous' arrangements, such as agreements on the environment which serve basic goals of the European Union as written in the founding treaties.[23]

As a condition for such an *ultra vires* review, the direct effect of the provisions of an international agreement requires an examination in successive stages. Such incompatibility can only be affirmed, first of all, when the European Union is bound itself by the international agreement, which is the case when the European Union is a contracting party or has substituted all its member states. Next, the compatibility of an act of EU law under the prism of an international agreement can only be examined where the 'nature and the broad logic' of the latter do not preclude this.[24] Moreover, where the nature and the broad logic of the international agreement permit the examination of the validity of EU law in the light of its provisions, it is also necessary for the provisions of that agreement to be unconditionally and sufficiently precise,[25] and to have a direct effect. Finally, for the condition of direct effect to be affirmed, those provisions must contain clear and precise obligations and rights that need no further subsequent measures for their implementation or effectiveness. It must be stated, though, that it is highly questionable by some academics,[26] as well

[22] *See supra* n. 21, paras. 28-29; *supra* n. 4, p. 345-346.
[23] ECJ 3 June 2008, Case C-308/2006*, Intertanko and others* v *Secretary of State for Transport.*
[24] *See* also J. Rideau, *Droit institutionnel de l'Union et des Communautés européennes* (Librairie Générale de Droit et de Jurisprudence 1996) p. 757.
[25] ECJ 10 January 2006, Case C-344/04, *IATA and ELFAA* v *Department of Transport*.
[26] K. Lenaerts and T. Corthauts, 'Of birds and hedges: the role of primacy in invoking norms of EU law', 31 *European Law Review* (2006) p. 287 at 298.

as lately by the EU Court of Justice, whether it is necessary for an international rule of law to grant rights directly to individuals that they can invoke before the courts in order for that rule to be considered as the basis for an incompatibility review of the secondary law.[27]

However, according to the EU case law, it is rather obvious that there is not only one single approach concerning the review of the legality of secondary law in the light of international conventional law. The related jurisprudence is anything but consolidated; on the contrary, it is rather characterised by a certain degree of diversity as well as inconsistency.[28] It should be pointed out that on this matter the European Union judicature shows some consistent 'generosity' as far as the association agreements are concerned. The very nature of association agreements allows individuals to invoke their provisions before the courts, since such international agreements are capable of directly affecting their situation. On the other hand, as it has already been pointed out, in the specific areas of the WTO and GATT agreements, which are characterised by their own special nature and broad logic, the provisions of those agreements do not constitute a legal basis upon which the Court may examine the legality of EU secondary law or the acts of the European institutions.

The abovementioned approach of the direct effect must take into consideration the increasing number of the agreements to which the European Union is a contracting party, which inevitably reflects a substantial escalation concerning the effects that those agreements produce in EU law. For example, a trade cooperation agreement could not affect the internal order the same way that a multilateral convention – which creates rules of general scope and even serves political objectives – would affect it, particularly in the area of environmental protection. It should also

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According to them, 'the invoked Articles need to be unconditional and sufficiently precise, but only to the extent that they must be apt to serve as a yardstick for review, not in the sense that they confer rights on individuals as required in cases involving direct effect'; cf. R. Pavoni, 'Controversial aspects of the interaction between international and EU law in environmental matters: Direct effects and Member States' unilateral measures', in E. Morgera (ed.), *The External Environmental Policy of the European Union: EU and International Law Perspectives* (Cambridge University Press 2012) p. 347.

[27] *Supra* n. 13. According to the Advocate General Gulmann, 'it is possible that an agreement may be invoked in the context of an application under Art. 173 of the Treaty in spite of the fact that it does not have direct effect. But the position may also be that the reasons leading to the finding that the agreement does not have direct effect are of such a nature as in addition to prevent the agreement from forming part of the legal basis for the Court's review of legality.'

[28] *See supra* n. 4, p. 344, 346 and 350.

be pointed out that a certain inconsistency within the case law has occurred, with most characteristic of all the judgments in two different cases, *Intertanko*[29] and *Poulsen and Diva Navigation*.[30] In the former, the Court's decision affirmed the absence of rules intended to apply directly and immediately to individuals,[31] whereas in the latter the Court reached the conclusion that individuals should be afforded the right to refer to the same Convention on the Law of the Sea, but only as the expression of customary international law.

It has to be taken into consideration, though, that the direct effect criterion, when it is applied only to international agreements that confer direct individual rights, can lead to the exclusion of a very large array of international conventions from constituting the basis for the legality review of EU law. In order to avoid that, in some cases the Court decided to broaden the interpretation of international conventions more as a source of obligations rather than as a source of direct individual rights, namely the stricter notion of the direct effect criterion. Such a distinction is ultimately a distinction between the possibility of relying directly on a provision of an agreement and the possibility of broadly using that agreement as an instrument in the light of which the validity of a provision of the secondary law can be examined.[32]

In the so-called *Biotechnology* case,[33] the Court decided that the lack of direct effect of a provision should not preclude a review of legality, provided that the characteristics of the international convention in question would not preclude this. According to the Court's ruling, the Rio Convention on Biological Diversity was, unlike the WTO agreement, not based on 'reciprocal and mutually advantageous arrangements', even though it did not contain exhaustive rules that could be seen as a source of law.[34] This could have a positive effect in the direction of broadening the criteria of a legality review. The Court clarified that the case law about the WTO agreements ought to be seen as a special case, and that the consequent denial of the Court to accept a legality review could be explained by the special regime of those agreements.

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[29] ECJ 3 June 2008, Case 308/06, *Intertanko and other*s v *Secretary of State for Transport*.
[30] ECJ 24 November 1992, Case C-286/90, *Anklagemyndigheden* v *Peter Michael Poulsen and Diva Navigation Corp*., paras. 9-10.
[31] *Supra* n. 29, paras. 42-45 and 64-45.
[32] *See supra* n. 15, p. 964.
[33] ECJ 9 October 2001, Case C-377/98, *Kingdom of the Netherlands* v *European Parliament and Council of the European Union.*
[34] *Ibid.* paras. 52-54.

Secondly, the possibility to use provisions of an international convention as a basis for the legality of EU acts regardless of their direct effect in a narrow sense, meaning granting direct individual rights, even when strictly speaking those provisions had no direct effect, is a step forward for the international law as a whole to have effect in the EU legal order.

However, in the *Intertanko* case, the Court decided to stick to a restrictive interpretation of an international agreement of a completely different nature than the GATT and WTO agreements, namely the United Nations Convention on the Law of the Sea (UNCLOS). It held that the Convention does not confer rights to individuals and therefore the 'nature and broad logic' of the Convention prevented the Court from examining the legality of EU acts based on its provisions. The Court based its decision on the structure of the international convention in order to deny the possibility of reviewing the compatibility of the EU secondary law and of acts based on its provisions. Moreover, by basing its conclusion on the reasoning that the nature and broad logic of the Convention excludes the legality review because the provisions of the UNCLOS did not confer rights to individuals, it also faced the direct effect provision with a restrictive eye, showing unwillingness for a rather liberal decision.[35]

2. Environment

One of the latest and most characteristic examples on environmental matters is the Aarhus Convention. The provisions of that convention are intended to ensure effective environmental protection and to supply individuals, including environmental organisations, with strong weapons for the protection of the environment. It therefore also requires national courts to interpret national law, as far as possible, in a way which is compatible with the objectives of Article 9(3) of the Convention. In addition to that, it is clear that the Court, as an EU institution itself, is also obliged to comply with the Aarhus Convention.

The Aarhus Convention is an important international convention in the field of the environment, known for its decisive rules on the matters of public participation aimed at the protection of the environment by secure access of the public to information and justice. The European Union became a contracting party of the Aarhus Convention in 2005, and

[35] *See supra* n. 15, p. 961. *See* also P. Pescatore, 'Drafting and analysing decisions on dispute settlement', in P. Pescatore, W.J. Davey & A.F. Lowenfeld (eds.), *Handbook of WTO/GATT Dispute Settlement* (Translations Publishers 1997) p. 11.

subsequently issued the Aarhus Regulation.[36] The Aarhus Regulation intends to transfer into the European internal legal order the provisions of the Aarhus Convention and to apply them to the EU institutions and bodies. According to Article 10(1) of the Aarhus Regulation, '*any non-governmental organisation which meets the criteria set out in Article 11 is entitled to make a request for internal review to the Community institution or body that has adopted an administrative act under environmental law or, in case of an alleged administrative omission, should have adopted such an act*', whereas according to Article 2(1) of the same EU Regulation, '*administrative act means any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects*'. Under this definition, any acts of general but not individual scope are excluded from the internal review as foreseen in the Article 10(1). This provision is similar to the obligations resulting from Article 9(3) of the Aarhus Convention that it intends to implement. According to Article 9(3) of the Aarhus Convention, '[…] *each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment*'.

By comparing those two legal texts, it is easy to detect an obvious divergence regarding the two contexts, as the Aarhus Convention provides access to justice against any 'act or omission' that runs counter to national environmental law, whereas on the other hand the Aarhus Regulation forbids only 'measures of individual scope' with this content, which has certainly a more restrictive field of application compared to the broader notion of any 'act or omission', as in the Aarhus Convention. This divergence was the cause of the legal disputes that arose between the EU institutions and two Dutch environmental organisations under the names of 'Vereniging Milieudefensie' and 'Stichting Stop Luchtverontreiniging Utrecht'. In 2012, the General Court annulled two decisions of the Commission that were based on a regulation that was regarded as incompatible with the Aarhus Convention.[37] However, the EU institutions

[36] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, *OJ* [2006] L 264/13, 25.09.2006.

[37] ECJ (Grand Chamber) 13 January 2015, Cases C-401/12 P, 402/12 and 403/12 P, *Council of the European Union, European Parliament and European*

appealed against those judgments. Consequently, in the relevant cases, the Chamber of the Court was confronted with the same question, and finally annulled the decisions of the General Court.[38] The General Court decided that the legality of the secondary law of the European Union could be questioned under the prism of the provisions of an international convention, only when that was justified by the very 'nature and broad logic' of that convention and, furthermore, when those provisions were '[…] unconditional and sufficiently precise in their content'. However the General Court, having considered the true meaning of Article 9(3) of the Aarhus Convention, had already expressed the opinion that this provision did not indeed confer direct legal rights on individuals, but on the contrary, Article 9(3) needed subsequent measures for its implementation in national law, whereas its mission and meaning was to specify the relevant criteria under which the contracting parties to the Convention ought to adopt those measures. The General Court, though, annulled the acts of the Commission, basing its decision on the abovementioned cases of *Fediol* and *Nakajima*, according to both of which the review of EU secondary law's compatibility with international conventions that have no direct effect is only to be restrictively accepted in exceptional cases.

The Grand Chamber then decided that the *Fediol case* was inapplicable as a basis for the Court's reasoning, due to the lack of direct reference of Article 10(1) of the Aarhus Regulation to specific provisions of the Aarhus Convention, as well as to the absence of direct individual rights. It also found the *Nakajima* case inapplicable because the Aarhus Regulation does not intend to implement a 'particular' obligation of the Aarhus Convention, since Article 9(3) of the Aarhus Convention sets the criteria under which the contracting parties had to implement its provisions. Consequently, the Grand Chamber of the Court found the General Court's decision about the incompatibility of the Aarhus Regulation with the provisions of Article 9(3) of the Aarhus Convention incorrect and subsequently annulled the General Courts' decisions.[39]

Conclusion

In conclusion, there is no doubt that the aforementioned Court decisions are reasonable in their explanation, but on the other hand one

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Commission v *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*.

[38] ECJ (General Court) 14 June 2012, T-396/09, *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht* v *Commission*.

[39] *Supra* n. 37. paras. 53-61.

might find them to be another step in the Court's reluctance to cede some of the EU legal system's autonomy in order to fully implement its international obligations. One of the goals of the European Union, as stated in its founding Treaties, is to observe and contribute to the development of international law.[40] From this point of view, the strict requirement of the direct effect in a very narrow sense, meaning the persistence to the criterion of direct applicability by individuals, can be a real obstacle in that way.

The view of the judicature that the Aarhus Convention does not indeed intend to directly grant the citizens environmental rights, but rather to oblige the contracting parties to ensure such a possibility in its national legal orders, seems to be correct. On the other hand, the European Union, as an international organisation with an exhaustive and rather complete legal system, will find itself before the dilemma of whether it will stick to formalities in order to preserve its autonomy, or it will find a more flexible way to integrate international law and contribute to its further evolution.[41]

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[40] Art. 3(5) TEU.

[41] P. Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law', 8 *European Law Review* (1983) p. 155.

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11. MULTILATERALISING REGIONALISM AND THE CASE OF THE EU

STEFANOS KATSOULIS*

Introduction

The dilemma between regionalism and multilateralism has troubled scholars and practitioners of international trade law for long.[1] This issue has been increasingly gaining importance, in view of the ongoing economic recession and the constant alterations in the field of international trade. Low growth rates of the developed liberal economies of the West, along with a profound saturation in their markets, on the one hand, and the emergence of new global trade partners, on the other, are only a few of the reasons that led to the establishment of regional trade agreements,[2] through which states do not simply aspire to promote their regional trade relations, but mainly seek to serve politico-economic objectives.

Researchers and scholars in international studies hold different views.[3] On the one hand, all those defending regionalism claim that it offers

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1 *See* e.g. S. Lester and B. Mercurio (eds.), *Bilateral and Regional Trade Agreements: Commentary and Analysis* (Cambridge University Press 2009); J. Schott, 'The Future of the multilateral trading system in a multi-polar world', *Deutsches Institut fur Entwicklungspolitik*, 8 Discussion Paper 2008; B. Richard and L. Patrick (eds.), *Multilateralising Regionalism: Challenges for the Global Trading System, World Trade Organization* (Cambridge University Press 2008); L. Bartels and F. Ortino (eds.), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press 2006); D. K. Das, *Regionalism in Global Trade* (Edward Elgar 2004).

2 *See* WTO, *World Trade Report 2011, The WTO and Preferential Trade Agreements: From Co-existence to Coherence* (WTO Publications 2011) p. 94.

3 *See* e.g. O. Cattaneo, 'The Political Economy of RTAs', in S. Lester and B. Mercurio (eds.), *supra* n. 1, p. 34-37; V. D. Do and W. Watson, 'Economic Analysis and Regional Trade Agreements', *in* L. Bartels and F. Ortino (eds.),

opportunities for economic development, which would not be ensured merely through participation in the multilateral trading system. On the other hand, supporters of multilateral trade emphasise that the very option of signing a regional trade agreement (henceforth RTA) is offered to states thanks to the existence of the multilateral trading system. The latter perspective, due to the constant expansion through the cumulative integration of states, serves as the main field of international trade activity. In fact, both regional and multilateral trade entail advantages and disadvantages, rendering obsolete the debate over the prevalence of one theory over the other.

Further, it can readily be concluded that both regional and multilateral methods of conducting international trade do not significantly differ from each other as to the substance of international trade activity. The participation of a state either in the multilateral trading system or in a regional trade agreement presupposes compliance with the liberal principles of the free market, aiming at the elimination of trade barriers in international trade. Lifting trade barriers and opening up national markets constitute a definite precondition in both cases, while their diversification depends on the degree of market liberalisation and the range of mutual trade concessions granted to the trading partners. In the multilateral trading system, liberalisation may be achieved via the negotiations between two member states, but the same privilege is granted to the rest of the members thanks to the most-favored nation principle (MFN). In a regional trade agreement, significant trade liberalisation for the substantial part of the trade transactions[4] may be ensured, but only for the trade relations of its contracting parties.

Besides, the discussion over which form of transnational trade preceded the other has proved futile.[5] It can be claimed that regional trade agreements did indeed preexist GATT if one takes for granted that GATT could be deemed the successful effort of multilateralisation of the bilateral reciprocal trade agreements that had been contracted at the time. But GATT was not adopted on the basis of this prospect, nor did the preexisting regional trade agreements have the same typical features as

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supra n. 1, p. 10; M. Schiff and L. A. Winters, *Regional Integration and Development* (The International Bank for Reconstruction and Development/The World Bank 2003) p. 209; K. Anderson and R. Blackhurst (eds.), *Regional Integration and the Global Trading System* (Harvester Wheatsheaf 1993).

[4] Para. 8 of Art. XXIV of GATT.

[5] J. Barton et al., *The Evolution of the Trade Regime: Politics, Law and Economics of the GATT and the WTO* (Princeton University Press 2008) p. 53.

their successors.[6] Contemporary regional trade agreements (RTAs) are built on the basis of certain provisions of the multilateral agreements, namely Article XXIV of GATT and Article V of GATS. It cannot be any different since these agreements – as is explicitly declared in paragraph 4 of Article XXIV of GATT – are drafted with a view to facilitate the trade between its contracting parties, which is expected to lead to the promotion of free trade in the long term.

Additionally, it would be incorrect to take the view that since GATT is the normative basis for the drafting of RTAs, the latter should be deemed inferior, nor that there is a matter of hierarchy between the multilateral and the regional normative context of trade activity. The role of RTAs in the progressive development of the multilateral trading system must not be underestimated. It is worth mentioning that, in many cases where the rounds of multilateral negotiations had been stalemated, the evolution of regional trade contributed towards the effective completion of the multilateral negotiations. Therefore, RTAs can be considered as co-existing in the current multilateral trading system,[7] rendering inaccurate any argument in favour of an alleged antagonism of the two ways of interstate trade activity.

The issue therefore must not be posed as a dilemma, a choice between the participation in the multilateral trading system, on the one hand, and the implementation of RTAs, on the other. A contemporary approach on the issue should encompass the utilisation of RTAs to the benefit of the multilateral trading system. The answer to the question of how this could be achieved is to be found within the normative context of the multilateral trading system, whose function is founded on the Agreement establishing the WTO and its annexed multilateral trade agreements.

What are the reasons that make the need for harmonisation of regionalism and multilateralism compelling? States choose to sign RTAs for a series of economic and political reasons,[8] with the purpose of defending their national interests. Usually, participation in RTAs with other states located in the same geographical region would achieve a more

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[6] *Ibid.* p. 54.

[7] WTO Director General Roberto Azevedo, Speech 'Regional Trade Agreements "cannot substitute" the multilateral trading system', *WTO News: Speeches of the Director General*, 25 September 2014, available at: www.wto.org/english/news_e/spra_e/spra33_e.htm (visited 15 October 2015).

[8] *See* C. Damko, 'The Political Economy of Regional Trade Agreements', in L. Bartels and F. Ortino (eds.), *supra* n. 1, p. 23-42; T. Cottier and M. Foltea, 'Constitutional Function of the WTO and Regional Trade Agreements', in L. Bartels and F. Ortino (eds.), *supra* n. 1, p. 44-47.

efficient promotion of their interests, considering that all those states belonging to a certain geographical area face common or similar challenges related to economic, political and security issues.

In the post-war era one can trace four phases of regionalism in international literature.[9] Today, the world is witnessing a new phenomenon:[10] the drafting of mutually beneficial trade agreements between powerful regional partners in the international trade arena, the so-called 'super-regional'' or 'megaregional'' trade agreements,[11] in the words of the incumbent Director General of the WTO, Roberto Azevedo. According to Mr. Azevedo, this recent development in interregional trade cooperation is the key for the synchronisation of regionalism and multilateralism.[12] This is because the formation of robust trade partners will effectively tip the balance in international trade. For this reason, in order to prevent the triumph of hegemonic tendencies in international trade, there is a need to ensure that those RTAs are consistent with the fundamental principles of the multilateral trading system, and especially that their function is aligned with the institutional framework and legal context of the WTO. In any case, however, the effort to multilateralise regionalism should focus on having positive results for the entirety of the members of the multilateral trading system, both those participating in the respective RTAs and those in a less favourable position. Therefore, through the multilateralisation of regionalism, one can expect to witness the amelioration of the developing states' position within the multilateral trading system. This is possible due to the fact that their interests are promoted within the framework of the WTO and that they are offered the prospect to create new RTAs, and also because the already existing ones are evolving in such a way that they can be competitive towards the RTAs of the economically and technologically advanced states.[13]

Since 2013 and the adoption by WTO member states of the Trade Facilitation Agreement,[14] intense efforts have been made to conclude the Doha Round of WTO negotiations. Although the Trade Facilitation Agreement has not been expected to bring significant changes in the existing institutional framework for the RTAs, it is certain that the RTAs will continue to spread, as the states will undoubtedly continue to pursue

[9] *See supra* n. 2, p. 51-54; Das, *supra* n. 1, p. 57.
[10] *See* Das, *supra* n. 1, p. 91-92.
[11] *See supra* n. 5.
[12] *Ibid*.
[13] *See supra* n. 2, p. 94; Barton et al., *supra* n. 5, p. 174-178.
[14] P. Naskou-Perraki et al., *Διεθνείς Οργανισμοί [International Organisations]* (Themis Publications 2014) p. 268-269.

expanded markets with as few protectionist barriers as possible for their trade activities.

1. The Multilateralisation of Regionalism

The issue raised, then, is how consistency can be achieved between multilateral and regional trade or, to put it another way, how to multilateralise regionalism. As mentioned above, a contemporary approach to the matter is required to utilise the RTAs for the benefit of the multilateral trading system. The regulatory framework of the WTO for the RTAs is appropriate to attain this goal, despite the criticism concerning the need for revision of the planned scheme in the RTA. Crucial for this proposed approach are the provisions of Article XXIV of GATT and Articles XI-XII of the Agreement Establishing the WTO.

According to Article XXIV(2) of GATT, '*...a customs territory shall be understood to mean any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories*", while as explicitly stated in Article XII(1) of the Agreement, '*any state or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement...*". Therefore, under the conditions set out in Article XII of the WTO Agreement, a separate customs territory may apply for membership at the WTO.[15] The most commonly cited case of separate customs territory is that of the sovereign state. Other examples of custom territories are the customs union, which is formed in the context of a trade bloc of states, as well as the autonomous or dependent territory that enjoys autonomy in exercising external trade and customs policy. Thereupon, the importance of the concept of the 'separate custom territory' for the WTO is obvious, as well as its correlation with Article XXIV of GATT. Undoubtedly, any customs union consistent with the requirements of paragraphs 5(a) and 8(a) of Article XXIV of GATT should be treated as a separate customs territory, able to become a full member in WTO. Thus, any customs union established within the framework of Article XXIV of GATT may be considered as a potential full WTO member. In this way, customs unions may be fully integrated into the multilateral regulatory framework of the WTO, becoming leading players in the multilateral processes.

[15] *See* M. Matsushita et al., *The World Trade Organization: Law, Practice and Policy* (Oxford University Press 2002) p. 11-12; *supra* n. 14, p. 259.

Consequently, a customs union should not only be obliged to satisfy the requirements of Article XXIV of GATT concerning customs unions, but above all it should have to comply with the multilateral obligations deriving from WTO membership, indicating the acceptance and implementation of the provisions of the Agreement Establishing the WTO and its annexed multilateral trade agreements. A customs union is then transformed from a simple preferential trade agreement into a crucial partner in the multilateral trading system, lowering the risk of regional isolation and competition in international trade. This could be mentioned as the so-called 'multilateralisation of regionalism', as customs unions are required to fully comply with the multilateral trade regime of the WTO and to respect its fundamental principles. However, despite the existence of the appropriate legal basis for the realisation of the multilateralisation of regionalism, a number of identifiable issues should be addressed.

First, this is not a situation that will occur in the near future. Involvement in a RTA is a product of the political will of the sovereign states that decide to engage in such a process. Further, promoting a customs union to full WTO membership is closely connected to the desired level of economic integration that is being envisaged by the contracting parties.[16] If the contracting parties merely seek to promote intra-regional trade, the Free Trade Agreement (FTA) is the most appropriate means of achieving their goal. NAFTA is such an example, where the contracting parties – the United States, Canada and Mexico – aspire to remove barriers to their intra-regional trade and not to adopt a common commercial policy towards third countries, a prerequisite for creating a customs union. It is notable that the establishment of a customs union requires high-level consultations, and particularly the intention of the contracting parties to concede part of their sovereign rights regarding the conduct of foreign trade policy. Maintaining the exclusive privilege of making external trade policy, together with the much more complex and lengthy procedures required to create a customs union, steer states towards the selection of FTAs as a preferred means of conducting their commercial policy. The advantage, however, of the single payment of customs duties and the unhindered movement of products from third countries into the territory of the customs union, as well as the political will for regional economic integration in order to address many of the contemporary challenges worldwide, may lead towards the customs union case. Such a development will benefit the contracting parties of the customs unions, as

[16] *Supra* n. 5, p. 174-178.

their negotiating power will be boosted within the multilateral procedures of the WTO.

The most important thing, however, is that there should be guarantees that the eventual inclusion of other customs unions in the WTO will not have adverse effects, thus leading to the regionalisation of multilateralism. Therefore, any potential overshadowing of the multilateral processes in the WTO due to the inclusion of activities of powerful regional trading partners should be prevented. The aim is not to replace the multilateral processes with an informal directorate of strong regional partners, but quite the opposite. That is, a stricter and more effective control of the operation of RTAs through their actual integration into the WTO multilateral trading system. Two main institutional tools of the WTO should be used to achieve this objective: the Transparency Mechanism for RTAs and the Dispute Settlement Mechanism of the WTO.

The Transparency Mechanism for RTAs was created by the General Council in December 2006,[17] and is the most important development for RTAs in the Doha Round. It provides for the early announcement of the creation of any RTA and its notification to the WTO. In particular, the Committee on Regional Trade Agreements[18] is entrusted with the task of monitoring and evaluating the RTAs falling under Article XXIV of GATT and Article V of GATS. Furthermore, the Committee on Trade and Development examines RTAs between developing countries, as indicated in the Enabling Clause.[19] The Transparency Mechanism has a provisional character, while it is expected to be reviewed and possibly replaced by a new permanent mechanism with the completion of the Doha Round, as a result of multilateral negotiations. The responsibility to notify in order to achieve transparency within the procedures of the Mechanism is of paramount importance for the prevention of any violations of the WTO multilateral procedures for RTAs. Through the Transparency Mechanism, WTO members that are not participating in RTAs may be informed about the trade arrangements of the existing and upcoming RTAs and, in this

[17] WTO, 'Transparency Mechanism for Regional Trade Agreements', WT/L/671, 18 December 2006. *See* also Lester and Mercurio (eds.), *supra* n. 1, p.112.

[18] The CRTA was established in February 1996. WTO, Committee on Regional Trade Agreements, WT/L/127, 7 February 1996.

[19] 'Differential and more favourable treatment, reciprocity and fuller participation of developing countries', Decision L/4903, 28 November 1979. *See* also P. C. Mavroidis et al., *The Law of the World Trade Organization (WTO): Documents, Cases and Analysis* (Thomson Reuters 2010) p. 158; P. Van den Bossche, *The Law and Policy of the World Trade Organization: Texts, Cases and Materials*, 2nd Edition (Cambridge University Press 2008) p. 707-708.

way, may be able to ensure their rights under the multilateral WTO trading rules.[20]

However, the most significant institutional tool that could be used in favor of the multilateralisation of regionalism is the WTO Dispute Settlement Mechanism.[21] In particular, since 1994, with the adoption of the Memorandum of Understanding of Interpretation of Article XXIV of the General Agreement on Tariffs and Trade, any cases relating to the implementation and the operation of RTAs under Article XXIV of GATT may be submitted to the WTO Dispute Settlement Mechanism.[22] According to paragraph 12 of the Memorandum of Understanding, 'The provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding, may be invoked with respect to any matters arising from the application of those provisions of Article XXIV relating to customs unions, free-trade areas or interim agreements leading to the formation of a customs union or free-trade area.' Up to now, only one case concerning interpretative issues related to the application of Article XXIV of GATT has been directly considered by the WTO adjudicating bodies.[23] However, there have been some cases so far[24] where incidental control related to the application of Article XXIV of GATT has been conducted.[25] Despite the fact that the decisions of the WTO adjudicating bodies in the aforementioned cases do not, in principle, create a precedent for other WTO disputes, they still constitute a positive precedent for the future submission of disputes arising from the application of Article XXIV of GATT to the WTO Dispute Settlement Bodies. It should be noted that, so far at least, WTO members seem to be reluctant to resolve their disputes under the WTO Dispute Settlement

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[20] Schott, *supra* n. 1, p. 14-15.

[21] *See* W. J. Davey, 'Dispute Settlement in the WTO and RTAs: A Comment', in L. Bartels and F. Ortino (eds.), *supra* n. 1, p. 343-350; P. Gklavinis, *Διεθνές Οικονομικό Δίκαιο. Γενικές Αρχές, Διεθνές Εμπόριο και Άμεσες Ξένες Επενδύσεις [International Economic Law: General Principles, International Trade and Foreign Direct Investments]* (Sakkoulas Publications 2009) p. 221-235.

[22] J. Trachtman, 'International Trade: Regionalism', in A. T. Guzman and A. O. Sykes (eds.), *Research Handbook in International Economic Law* (Edward Elgar 2007) p. 169; Matsushita et al., *supra* n. 15, p. 369-371; Gklavinis, *supra* n. 21, p. 297.

[23] *See* WTO, Appellate Body Report, 22 October 1999, WT/DS34/AB/R, 'Turkey - Restrictions on Imports of Textile and Clothing Products'. The case is well known with its short title 'Turkey-Textiles'.

[24] J. Pauwelyn, 'The Puzzle of WTO Safeguards and Regional Trade Agreements', 7 *Journal of International Economic Law* (2004) p. 109 at p. 109-110.

[25] Matsushita et al., *supra* n. 15, p. 365.

Mechanism when the disputes are related to RTAs. This lack of political will is connected to the inability of the Committee on Regional Trade Agreement to consider the RTAs being brought before it.[26] Therefore, it is a matter of the political will of the WTO members to consider the acceptance of the RTAs, regardless of whether they fully comply with the criteria set by Article XXIV, just as it is a matter of political will to exempt from the WTO Dispute Settlement Bodies those disputes concerning the application of the Article XXIV of GATT.

Today, in the current phase of interregional cooperation and the emergence of so-called 'super-regional' trade agreements, using the WTO Dispute Settlement Mechanism for matters arising from the application of Article XXIV of GATT is imperative. WTO members should be concerned about the issue during the Doha Round negotiations and should proceed with the clarification of all the interpretative problems concerning the application of Article XXIV of GATT, as well as further upgrade the role of the WTO Dispute Settlement Mechanism in RTAs issues.

2. The EU example

The EU holds an outstanding position among RTAs worldwide.[27] It has its own international legal personality, a common currency and a single market. It is a RTA, both under Article XXIV/GATT and Article V/GATS. The EU is the only customs union that enjoys full WTO membership.[28] As a customs union, the EU constitutes a single customs territory and therefore, fulfils the requirements of Articles XI-XII of the Agreement Establishing the WTO, according to which states and separate customs territories that enjoy full autonomy while conducting their external commercial relations may become full WTO members.[29]

In spite of the fact that the EU faces serious internal problems, due to the difficulties in handling the debt crisis of many Eurozone member states, it remains true that the EU is among the largest trade partners worldwide. The EU is the most successful RTA and, given the 'institutional mantle' provided by its WTO full membership, serves as a model for the emergence of new forms of regional cooperation and integration, especially for Latin America and Africa. It is exactly this

[26] Das, *supra* n. 1, p. 103.
[27] Schott, *supra* n. 1, p. 9.
[28] Art. XI of the Agreement Establishing the WTO.
[29] In specific, the EU membership falls primarily under Art. XI of the Agreement Establishing the WTO, given the respective mention of the participation of the European Communities as one of the founding members of the WTO.

model that is suggested here, in order to achieve the multilateralisation of regionalism. More precisely, the customs union of the EU has been the object of years of negotiations that took place within the working group that had been constituted with this aim by the GATT contracting parties. Despite significant disagreements, the approval of the EU customs union was the result of mutual political will.

The EU is being monitored by the WTO Trade Policy Review Mechanism, as it is obliged to hold a periodic review and evaluation of its commercial policy, as do all other members of the WTO. In this way, it can be verified whether the trade policy of the EU is consistent with its multilateral obligations under WTO legal framework, promoting transparency in international trade. The EU is the only RTA subject to the transparency obligation of the Trade Policy Review Mechanism, as it is the only customs union with a full WTO membership. Therefore, it can be concluded that a customs union accepted as a full WTO member, according to Article XII of the Agreement Establishing the WTO, will be subjected not only to the control of the Transparency Mechanism for RTAs, but also to the transparency control under the Trade Policy Review Mechanism. The latter constitutes an essential institutional tool of the WTO in order to ensure transparency in the multilateral trading system. It is, therefore, a situation of substantial multilateralisation of regionalism. In addition, the EU has appeared several times before the WTO adjudicating bodies, both as a complainant and as a respondent. It is also worth mentioning that the WTO adjudicating bodies have only once so far dealt with the issue of the direct interpretation of the application of Article XXIV of GATT, in the case which is known as 'Turkey-Textiles' concerning the formation of the EU-Turkey customs union.[30]

Being a full WTO member, the EU proceeds with the formation of other RTAs with third countries, not just in the wider European region, but in other continents as well.[31] Of these agreements, the customs union with Turkey, as well as the agreement with EFTA establishing the European Economic Area, should be mentioned as being of high importance. Currently, the CETA[32] trade agreement is under negotiation with Canada, as is the TTIP[33] trade agreement with the United States, while their completion is expected to reshape the world trading map. In particular, the TTIP is expected to provide for the liberalisation of one third of the world

[30] *See supra* n. 20.
[31] Trade agreements with: Mexico; South Africa; Iraq; Cameroon; Madagascar; Albania; Montenegro; Israel; Egypt; Morocco; Tunisia.
[32] Comprehensive Economic and Trade Agreement (CETA).
[33] Transatlantic Trade and Investment Partnership (TTIP).

trade, which is expected to create millions of new job positions and rapid economic development for its contracting parties.[34] Indeed, countries with customs agreements with the EU, such as Turkey, could face the prospect of opening their markets to American goods without a separate agreement with the United States. Yet, a number of issues arising during the TTIP negotiations, namely the settlement of investment disputes, the lifting of the ban on imports of GMO crops and hormone-treated beef, the recognition of geographic trademarks on food products, and the facilitation of access to the American public procurement market, have caused significant reactions among member states of the EU. The progress of the negotiations in the near future is expected to determine the future of the agreement itself, as well as the future of the world trade in general. In this context, the important role of the EU as a RTA functioning within the framework of the multilateral trading system is obvious.

Conclusion

Taking into consideration the challenges that the states have to face in the current globalised international scene, the idea of multilateralising regionalism is considered to be the solution towards the intensification of competition in the international trade, which could lead to a new era of regional trade introversion and isolation, damaging the multilateral trading system and its members. It is, in fact, a new form of multilateral trade governance based on regional cooperation, within the WTO framework and according to multilateral trade agreements. The institutional framework for progressive development in this direction is already in existence. The provisions of the Agreement Establishing the WTO, in combination with Article XXIV of GATT, the Trade Policy Review Mechanism and the Dispute Settlement Mechanism, comprise the institutional base for the transformation of regional trade cooperation within the regulatory framework of the multilateral trading system. The sole condition required is the existence and expression of political will by the member states themselves, in order to proceed with the required mutual concessions. Whether they will follow this option or not will become clear in the near future.

[34] EU Website, *EU-US trade talks*, available at: ec.europa.eu/trade/policy/in-focus/ttip/ (visited 15 October 2015).

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12. KEYNOTE SPEECH: EURASIANISM AND THE EURASIAN ECONOMIC UNION: HISTORY AND CURRENT SITUATION

IULIIA SUSHKOVA*

Introduction

Signed in Astana on 29 May 2014, the Treaty on the Eurasian Economic Union was one of the most notable events of that year. The founders of the Eurasian Economic Union and the proponents of post-Soviet integration have deemed the document a historical step, which marks the creation of a powerful regional bloc capable of competing with the already existing successful integration associations.

In the current public political discourse, along with the recent establishment of the Eurasian Economic Union, there are fundamental concepts of integration. The first concept refers to a 'Great Eurasian Union' as a group of member states oriented towards the integration mainly with the countries of the former USSR, but also aiming at broader cooperation with the other countries of Europe and Asia. The second concept promotes an enduring idea of the development of a United Europe – a 'Greater Europe' from Lisbon to Vladivostok. Regardless of the complicated processes in modern geopolitics, the abovementioned concepts aim at strengthening and deepening the cooperation within the Eurasian area, in which the role of Russia is significant. In the 21st century, Neo-eurasianism is becoming one of the most important concepts globally.

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1. Eurasianism: A theoretical approach

The geography and history of Russia reveal that, in fact, it is located in two spheres: one-third is situated in the eastern part of Europe, and two-thirds in the northern part of Asia. This unique position has been the cause of disputes among Russian thinkers for almost two centuries regarding the strategy and perspectives of the country's development, considering its multiple important dimensions (geographical, historical, ideological, social, economic, legal, cultural etc.). The question, then, is: In which direction should Russia head: Towards Europe or Asia?

'If Russia is to be saved, it will only be as the Eurasian Motherland, and only through Eurasianism', the Russian contemporary thinker and historian Lev Nikolayevich Gumelev noted in the early 1990s.[1] In the early 1820s, in Prague, the economist-geographer P.N. Savitsky and the philosopher N.S. Trubetskoy became the founders of the ideological movement called 'Eurasianism'. Among other recognised ideologists of Eurasianism were N.N. Alekseev, G.V. Vernadsky, L. Karsavin, K.N. Leontiev, V.P. Nikitin, B.N. Shiryaev, and V.N. Ivanov.[2] Eurasianists regarded Russia as a special world, developing according to its own unique way, neither part of Europe nor Asia, different from them, but at the same time equal to them. Within a few centuries, the territory of Russia spread in terms of natural expansion into Asia. Russia has by now a unique experience in managing a multiethnic and multiconfessional society, organizing appropriate conditions adapted equally well to the European and Asian ethnic groups.

Eurasianism developed as an ideological movement of Russian social thought, as the result of the interaction between other contradictory movements, the 'Slavophiles' and the 'Westerners'. Traditional Eurasianism has been interpreted as a contraposition of Russia towards Europe and Asia, especially to the 'Western world'. It must be said, however, that the Eurasians did not intend to turn away from Europe. On the contrary, they believed that in order 'to get closer to Europe, there is a need to become politically and economically independent from it'. Eurasianists argued that Russia could and should be independent. 'Russia represents a unique geographic environment. In its simple, broad outlines,

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[1] L.N. Gumilev, *Ритмы Евразии. Эпохи и цивилизации* [*Rhythms of Eurasia: Epochs and Civilization*] (Progress 1993) p. 31.

[2] S.P. Glinkina and I.I. Orlik, *Евразийская идея на постсоветском пространстве* [*The Eurasian Idea in the Post-Soviet Area*], 2 *Novaya i Noveishaya Istoriya* (2012) p. 3 at p. 3-4.

it is sharply distinct from the fractural structure of Europe'.[3] According to N.S. Trubetskoy, the Eurasian world is a 'closed and completed geographic, economic and ethnic unit', which is different from either Europe or Asia. He believed that nature itself shows the peoples of Eurasia 'the need to unite and create their own national culture in collaboration with each other'. Trubetskoy wrote, 'The road to the true face for Russia – Eurasia – is written by its past. And yet, this road leads not to the past, but to the future. A totally new culture has to be established, our own culture, not similar to the European civilisation'.[4] Eurasianists thought that historically-formed statehoods such as the Empire of Genghis Khan, the Moscow State, the Russian Empire, and the USSR could be considered as consecutive forms of Eurasian integration models.

The modern understanding of Eurasianism generates complex approaches to emphasise the important role of Russia in current geopolitical models of cooperation among European and Asian countries. At the same time, there is a rather strong opinion that, in reality, a united Eurasia does not exist; in fact, Europe and Asia function separately and the 'bridge' through Russia is blocked. Global communication channels pass through the Suez Canal, enabling the creation of a connection between Asia, the USA and the EU and leading Russia to failure. In these conditions, it is very important to be critical and objective in relation to the potential of Russian geopolitics in Eurasia, which is determined by the size of the territory and the market, resources and infrastructure, Russian foreign investments, and approaches to the choice of governing. This potential is, without a doubt, strong, but the territory is sparsely populated, and there are obvious differences in the level of regional development of the country.[5] Today, fundamental changes in world politics, centering on the conflict in Ukraine, are causing Russia to turn towards Asia, and the Eurasian context becomes a distinct possibility.

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[3] P.N. Savitsky, *Континент Евразии. Россия и Европа. Хрестоматия по русской геополитике* [*Continent of Eurasia. Russia and Europe: Chrestomathy on Russian Politics*] (Nauka 2007) p. 406-411.

[4] N. S. Trubetskoy, *Наследие Чингисхана* [*Heritage of Genghis Khan*] (Agraf 2009) p. 282-286.

[5] I. D. Ivanov, *Геополитика России в Евразии* [*Geopolitics of Russia in Asia*], 81 *Vestnik of the Russian Academy of Sciences* (2011) p. 1071 at p. 1071-1072.

2. Eurasian Union: history of its establishment

The idea of the establishment of a Eurasian Union of States was first proposed by the President of the Republic of Kazakhstan, N.A. Nazarbayev, on 29 March 1994 during his speech at the Lomonosov Moscow State University. Together with the further improvement of the Community of the Independent States, he proposed a large-scale integration project for post-Soviet countries on a mutually beneficial basis for the development of a coherent economic policy and the adoption of a joint strategic development program (in the political, military, legal, environmental, cultural and educational fields). Gradually, an understanding has been reached that the success of integration depends on the recognition of the priority of national interests and sovereignty. Integration was perceived by N.A. Nazarbayev as an instrument of economic growth and of the implementation of new opportunities to overcome the complex political difficulties of the 1990s, which were caused by the breakdown of the USSR.[6] The leaders of Russia and Belarus, V.V. Putin and A.G. Lukashenko, have actively supported the Eurasian project of N.A. Nazarbayev, which, through joint efforts, has been successfully and consistently implemented.

The convergence of the Eurasian states began in 1995 with the signature of the Agreement on the Customs Union of Belarus, Kazakhstan and Russia. Over the next 20 years, the three states have become the basis of the integration, advancing to the creation of the Common Economic Space and the Eurasian Economic Union. More recently, Kyrgyzstan and Tajikistan have become members of these institutions. In 2000, the five neighbouring states created a new integration structure – the Eurasian Economic Community, aimed at closer cooperation through harmonisation of the regulatory framework and approval processes of economic restructuring. At the same time, there has been intensified co-operation on the formation of the legal basis of the Common Economic Space. In 2003, this process also involved Ukraine, but shortly thereafter Ukraine receded. In August 2006, the work on integration concentrated on the framework of Belarus, Kazakhstan and Russia, while Kyrgyzstan and Tajikistan expressed the intention to follow them, depending on the state of readiness of their economies. Belarus, Kazakhstan and Russia have progressed to a considerable extent in this way. Legal and institutional frameworks of integration have been formed, determining the priorities and specific areas of economic development.[7]

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[6] Discussion of the scientific report made by I.D. Ivanov, *supra* n. 5, p. 1074.
[7] *See* www.eaeunion.org/#about (visited 10 June 2015).

The second stage of the integration process began in October 2007, when the 'Troika' of leaders signed the Agreement on the establishment of a Common Customs Space and the formation of the Customs Union. According to this Agreement, the Commission of the Customary Union was established as the only permanent regulatory institution of the Customs Union. The Customs Union of Belarus, Kazakhstan and Russia began its work on 1 January, 2010 and established a unified customs tariff and a common nomenclature of foreign economic activities, the Customs Code of the Customs Union and the Commission of the Customs Union. When all customs checks points at internal borders were closed and the Common Customs Space was formed on July 1, 2011, the Customs Union started operating in full mode. It provided for the free movement of goods, the implementation of the unified mechanism of customs and foreign trade regulation (tariff and non-tariff), the legal framework in the field of technical regulation, the application of sanitary, veterinary and phytosanitary measures, other procedures for import and export, and the completion of single-form documents.

From 1 January 2012, the third stage began with the formation of the Common Economic Space. Representing a higher level of integration, it provided not only for free movement of goods and a common trade regime towards third countries, but also free movement of services, capital and labour, common rules and principles of competition, and the regulation of natural monopolies. It also created a single market of 170 million consumers and introduced a series of actions in the key areas of economic regulation (macroeconomics, competition, industrial and agricultural subsidies, transport, energy). The Eurasian Economic Community Court was established to resolve conflicts related to discrimination, violation of competition rules and equal conditions for trade among the applicants of the member states. The Eurasian Economic Commission became a permanent regulatory institution, to which national governments have delegated certain powers.

With regard to the Eurasian Economic Union project, President of Russia V.V. Putin stated in September 2012 that, 'We intend to establish a powerful supranational association capable of becoming one of the poles of the modern world and serving as an efficient bridge between Europe and the dynamic Asia-Pacific region. In particular, this means that on the basis of the Customs Union and the Common Economic Space, it is necessary to come to a closer coordination of economic and monetary policy, to create a fully-fledged Economic Union'.[8]

[8] *See* Statement of the President of Russia V.V. Putin, *Izvestia*, 3 October 2012.

A new stage of development started on 1 January 2015, when the newly-established Eurasian Economic Union started to operate according to its foundational Treaty, which was signed by the Presidents of Belarus, Kazakhstan and Russia in Astana on 29 May 2014. In 2015, Armenia and Kyrgyzstan joined the Eurasian Economic Union. The number of states interested in participating in the Eurasian integration process is growing. The 'Eurasian dream' appeared in 1994 and became a reality in 2010. The member states of the Eurasian Economic Union are:

- Armenia (since 2 January 2015, with a population of 3,010,600 people),
- Belarus (since 1 January 2015, with a population of 9,481,000 people),
- Kazakhstan (since 1 January 2015, with a population of 17,417,447 people),
- The Kyrgyz Republic (since 29 May 2015, with a population of 5,874,100 people), and
- The Russian Federation (since 1 January 2015, with a population of 146,270,033 people).

The Eurasian Economic Union is oriented towards intensive modernisation, cooperation and competitiveness of national economies, as well as stable development in the interest of raising the living standards of the population of member states. Obviously, Asian countries of the post-Soviet area have a greater cultural affinity with Russia than with the other neighbours, namely China. The Eurasian Economic Union attracts membership due to the possibility of obtaining a variety of economic benefits and more effective access to foreign markets through Russia. For example, Kazakhstan still exports 84% of its oil production to Europe and to the world market, transporting oil through Russian territory, and only 16% through a newly-built pipeline to China. For Russia, the Eurasian integration project is a large-scale enterprise, which will take several decades and will cost billions of dollars to be completed.[9]

[9] V.L. Inozemtsev, *Евразийский Экономический Союз: потерянные в пространстве* [*Eurasian Economic Union: Lost in the Space*], 6 *Polis, Political Studies* (2014) p. 71 at p. 77.

3. The Eurasian Economic Union: legal nature, structure, competences

The Eurasian Economic Union is an international organisation of regional economic integration with international legal status and established by the Treaty on the Eurasian Economic Union. Its legal system consists of the following acts: the Treaty on the Eurasian Economic Union; international treaties within the Union (the treaties concluded by member states on the functioning and development of the Union); international treaties regarding cooperation with a third party (international treaties concluded with third states, their integration associations and international organisations); decisions and directions of the Supreme Eurasian Economic Council, the Eurasian Intergovernmental Council and the Eurasian Economic Commission adopted within the framework of their powers under the Treaty and international agreements within the Union.[10] The organisation aims to follow the fundamental principles of international law, to consider specific characteristics of the political system of member states, and to ensure mutually beneficial cooperation, equality and respect for national interests, in compliance with the principles of market economy and fair competition.

The Eurasian Economic Union provides for the freedom of movement of goods, services, capital and workforce, and for unified, harmonised and coordinated policies in the economy. 'Common policy' is implemented by the member states in certain policy areas, based on the use of the unified legal regulation, including the decisions of the institutions in the framework of their powers. The unification of legislation is directed toward its approximation and aimed at establishing identical mechanisms of legal regulation in some areas. 'Harmonised policy' is implemented by the member states in certain fields and is related to the harmonisation of legal regulation on the basis of institutional decision-making. 'Harmonisation of legislation' aims at establishing similar normative legal regulations in some areas. 'Coordinated policy' involves the cooperation of member states on the basis of common approaches adopted in the framework of the Union's institutions.[11]

The agreement includes commitments in different areas of economic integration, among which are common policies on trade, technical regulation,

[10] The Treaty establishing the Eurasian Economic Union; available at: www.eurasiacommission.org/ru/nae/news/Pages/01-01-2015-1.aspx (visited 30 April 2015).
[11] *Ibid*.

harmonised macroeconomic and monetary policies, coordinated policies in the field of transport, energy, agriculture, cooperation in the fields of industry, labor migration, and consumer protection. The agreement sets the basic principles for competition rules. A separate chapter contains provisions for the gradual integration of energy markets and coordination of activities in the fields of electricity, gas, oil and oil products. The Treaty also envisages the possibility of joint action by the member states for the development of export of goods to the markets of third countries. In addition, member states can apply to protect their rights in the Court of the Eurasian Economic Union.

The Treaty on the Eurasian Economic Union could be regarded as a compromise proposal with a number of measures which have not yet fully been implemented. In particular, the Commission and the Court have not been granted broad powers to monitor compliance with Eurasian Union law. Controversial issues can be the subject of discussion at the level of the Council of the Heads of States. In addition, topical issues to create a single financial regulator, policy energy trade, as well as the problem of the existence of restrictions in trade between members of the Union, have not been resolved, and have been postponed until 2025 or indefinitely.

The Eurasian Economic Union has created a common market, acting on the basis of the World Trade Organisation (WTO) rules. The GDP of this market exceeds 4.5 trillion dollars. Common markets will be established in pharmaceutical products (by 2016), electricity (by 2019), and oil, gas and petroleum products (by 2025). A supranational body for the regulation of the financial market of the Eurasian Economic Union will start functioning in 2025 in Alma-Ata. One important issue is to decide which powers and functions of the supranational authority will be delegated for the regulation of the financial market. Among the overall macroeconomic effects of integration are: the decline in commodity prices, the promotion of competition, an increase of GDP by at least 25 % and, mainly, the welfare of the peoples and the development of new technologies and products.

The bodies of the Eurasian Economic Union are the Supreme Eurasian Economic Council, the Eurasian Intergovernmental Council, the Eurasian Economic Commission, and the Court of the Eurasian Economic Union.

The Supreme Eurasian Economic Council is the highest institution of the Union, consisting of the heads of the member states of the Union. Its function is to determine the strategy, the direction and the prospects of the Union's development. Decisions and orders in this institution are made by consensus, and are enforceable in all member states. Its meetings are chaired by its Chairman, and are held at least once a year. On the initiative

of any of the member states or of the President of the High Council, additional meetings could be convened to discuss urgent issues. The Chairman could invite members of the Commission Board to participate in the meetings.

Another institution of the Eurasian Economic Union is the Eurasian Intergovernmental Council, which consists of the heads of governments of the member states. It ensures the implementation and monitoring of the execution of the Treaty on the Eurasian Economic Union, international treaties within the Union, and decisions of the Supreme Council. Moreover, the Council considers the recommendations of the Board of the Commission, the issues on which there is no consensus, gives instructions to the Commission, and exercises other powers as well. Decisions and orders are made by consensus, and are subject to enforcement by the member states. Sessions are held when necessary, but at least twice a year.

The Eurasian Economic Commission, located in Moscow, is a permanent supranational regulatory body of the Union, and includes in its structure the Council and the Board. It adopts decisions binding the member states, included in the system of Eurasian Economic Union law. The Council's decisions, executive orders and recommendations are made by consensus. The Board's acts are adopted by qualified majority (2/3 of votes of the total number of the Board members) or by consensus (on sensitive issues). The Commission has the power to promote the elimination of restrictive measures in trade with third parties and the use of response measures. In order to increase the exports of goods by the member states to third country markets, the Eurasian Economic Union is entitled to develop insurance and export credit, and to use international leasing. In addition, it will promote the concept of the 'product of the Eurasian Economic Union', and will introduce a unified labeling of the Eurasian Economic Union for demonstration, advertisement and branding activities abroad. The following are significant competitive areas of interaction: energy, monetary, industrial, agricultural policy, financial markets, and the circulation of medicines and medical devices.

The development of a common information system will allow the implementation of 'single window' technology to simplify the interaction between state bodies and businesses in the Eurasian Economic Union. It includes the formation of directories and classifiers for the unification of the documents. The Commission carries out confirmation of the interaction of the authorised bodies in the implementation of the temporary sanitary, veterinary-sanitary, and phytosanitary measures, the application of common sanitary, epidemiological and hygienic requirements and procedures, and the list of the sanitary-epidemiological supervision

products monitored by the state. It has powers in the sphere of protection of consumer rights and intellectual property. A supranational component will be developed in the system of protection of the freedom in the provision of services. The parties and the Commission determine areas for possible gradual liberalisation by introducing projects for the approval by the Supreme Eurasian Economic Council.

The Court of the Eurasian Economic Union, located in Minsk, is a permanent judicial body of the Eurasian Economic Union. Its status, structure, powers and procedure of functioning and formation are determined by the Statute of the Court of the Eurasian Economic Union. Its purpose is to ensure the uniform application of normative acts and adopted decisions by the member states and the institutions, and to resolve disputes following an appropriate request. After examining disputes on demand of a member state or an economic entity, the Court issues decisions binding on the parties to the dispute or on the Commission. The Court consists of two judges from each member state, appointed by the Supreme Eurasian Economic Council for a term of nine years. It hears cases in the Grand Chamber of the Court, the Panel of the Court and the Appeals Chamber of the Court.

Members of the Eurasian Economic Union are not entitled to apply protective policies to each other in trade, e.g. non-tariff measures, special safeguards, anti-dumping and countervailing mechanisms. The possibility of an exception is provided in cases where protective measures are necessary to ensure defense and security, protection of life and health and protection of nature, but such measures should not constitute the means of unjustifiable discrimination or a disguised restriction on trade. Previously, the rules of the Customs Union allowed its members to use mutual protective measures, although in practice they have not actually been applied. The right to invoke sanitary, veterinary-sanitary, and phytosanitary measures for members of the Eurasian Economic Union has been reserved.

Since the beginning of 2015, the citizens of Russia, Belarus and Kazakhstan do not have to obtain a work permit for employment in any of the countries of the EAEU. Internal trade and migration in the Union will contribute to the mutual recognition of diplomas, except for the diplomas of lawyers, teachers, pharmacists and doctors. Citizens of member countries of the EAEU working in any one of them under a contract of more than six months will pay income tax as a resident rather than as a foreign national. The integration is expected to increase competition in the internal markets of the member states of the Union. In particular, construction companies of member states of the EAEU will be able to

work inside the territory of the Union without the formation of new legal entities, but before the beginning of 2015 this practice only applied between Russia and Belarus. There will be uniform approaches to the taxation system for the citizens of the member states, so in case of long-term employment contracts, income taxes on the basis of employment in the Russian Federation will be carried out on terms no less favourable than for Russian citizens.

The Eurasian Economic Union, enjoying a unique geographical location and considerable economic potential, can exercise international powers within its jurisdiction by carrying out cooperation with foreign states, international organisations and integration associations. This sphere is regulated by the decisions of the Supreme Eurasian Economic Council, following the implementation of the relevant domestic procedures by the member states. Nowadays, it has positive prospects of trade and economic cooperation with partners, such as the European Union, the European Free Trade Association, the Common Market of South America, the Association of Southeast Asian Nations, the Council of the Arab States of the Persian Gulf, the Pacific Alliance, the Southern African Customs Union, and so on. The European Union is the largest trading partner of the member states of the Eurasian Economic Union. The signature and agreement of economic memoranda could provide new effective opportunities for the promotion of the business interests of the Eurasian Economic Union in foreign markets. It is important to represent interests not only of the Union, but also of its individual member states, providing possibilities for national businesses to participate in deliberations at all stages, from the selection of an external partner until the stage of filling in the agenda of international events. For these reasons, mechanisms of business meetings and advisory committees will be established.

The most significant part of the development of economic cooperation is the creation of free trade zones with partners, promoted by the membership of Russia in the World Trade Organisation. This form of integration has turned into a long-term perspective, with the aim of setting more liberal rules in trade with major partners on the basis of those already existing in WTO liberalisation. Currently, discussions are underway with New Zealand, Vietnam, Israel, India, Egypt, etc. The Eurasian Economic Union may offer to its partners to enter a market with a population of over 170 million people, with access to affordable energy resources, skilled workforce, and transportation infrastructure. The experience of different countries shows that business relations and cooperation significantly contribute to the growth of national production and the greater integration of economies into the world trade. A comprehensive approach will allow

parties to benefit from the establishment of the free trade regime, to create new conditions for attracting investment in the countries, and in general to upgrade the level of cooperation.

The Eurasian Economic Union is open for accession by any state that shares its goals and principles. In order for the country to obtain the status of candidate for accession to the Eurasian Union, an application should be submitted to the President of the Supreme Eurasian Economic Council. The decision to grant the state the status of candidate country for accession to the Union is adopted by the Supreme Eurasian Economic Council by consensus. Then, a special working group explores the readiness of the country to become a member and to implement the necessary commitments. It prepares an action program, which the candidate country needs to follow. On the basis of the working group's conclusion that the candidate for accession state has fully complied with the obligations arising from the right of the Union, the Supreme Council takes the decision to sign with it an international Treaty of accession to the Union. The international Treaty is subject to ratification.

The 'observer state' status in the Eurasian Union means that its authorised representatives may be present, upon invitation, at the meetings of the Union institutions. It may also receive from the Union institutions documents that are not confidential. The 'observer state' status does not give the right to participate in decision-making in the Union institutions. The observer state is obliged to refrain from any action that could harm the interests of the Union and of the member states, or the object and purpose of the Treaty on the Eurasian Economic Union. Any party has the right to contact the Chairman of the Supreme Eurasian Economic Council with the request to be granted the 'observer state' status in the Union. The decision on granting the 'observer state' status in the Union, or the refusal to grant such status, is adopted by the Supreme Eurasian Economic Council with regard to the interests of the development of integration and to the achievement of the objectives of the Treaty.

The Eurasian integration is developing steadily. The leaders of Russia, Belarus and Kazakhstan appreciate the process of European integration. Summing up the results of the Customs Union and the Common Economic Space over time, the President of Russia V.V. Putin stated that the Eurasian integration project has achieved concrete results. The President of Kazakhstan N.A. Nazarbayev emphasised that the integration of the three countries is moving forward confidently. The President of Belarus A.G. Lukashenko said that 'it would be a shame for us and three of our states, if the Union does not follow the planned time schedule'. Positions of the leaders of the Eurasian countries reflect the depth and dynamics of

integration. Achievements in the construction of the Eurasian Economic Union are an indisputable fact, but the Union still faces a lot of controversies. In particular, at the meeting of the Supreme Eurasian Economic Council, experts discussed that over the past three years, the share of Kazakhstan's imports from Russia and Belarus increased from 32% to 40% of the total, but it is not accompanied by an equal growth of Kazakhstan's exports to these countries. Withdrawal from the common market is not enforced by the relevant regional structures. A.G. Lukashenko recalled the earlier decision, under which the Directors of the departments of the Eurasian Economic Commission and their deputies were from different states, but this provision has not yet been implemented either.[12]

4. The European Union as the source of inspiration and experience for the Eurasian Union

Defining the essence of the Eurasian Union, the Kazakh President N.A. Nazarbayev stressed that 'the Eurasian project is short-sighted to see only collective defence against external economic, military, political, informational, technological, environmental and other threats'. Some believe that by the word 'threat' he meant the West in general and the European Union in particular.[13] At the same time, N.A. Nazarbayev noted the need for development of more opportunities for interaction, for example, with the European Union.

From the point of view of comparing the European Union and the Eurasian Union, the following data might be helpful: the area covered by the European Union is one-fifth of the area covered by the Eurasian Union, the gas reserves of the European Union are no more than 4% of those in the Eurasian Union, and the oil reserves in the European Union are generally not comparable to the huge inventory that the Eurasian Union has. A population of about 170 million people lives in the territory of the countries of the Eurasian Union and accounts for over 80% of the economic potential of the former USSR. However, the Eurasian Union is no more than about a third of the European Union in terms of population, and it has 5.6 times the GDP and almost 3.5 times the volume of trade and

[12] A. N. Mikhailenko, Евразийский Экономический Союз: суть проблемы [*Eurasian Economic Union: Essence of the Issue*], 4 *Observer* (2014) p. 40 at p. 40-42.

[13] M. G. Nosov, Россия между Европой и Азией [*Russia between Europe and Asia*], 3 *Modern Europe* (2013) p. 22 at p. 35.

GDP per capita of Russia, which has the highest rate among the members of the Eurasian Union. Prior to the period of sanctions against Russia by the European Union, the latter was Russia's biggest trading partner and a major source of investment and technological innovation for the economy. For Belarus, the European Union is its second main trading partner after Russia, while for Kazakhstan the first. The interregional economic partnership, and perhaps economic integration, which would be most profitable for both the members of the Eurasian Union and the members of the European Union, could not be implemented in practice.

The most important problem of the Eurasian Economic Union is how to balance the national and supranational interests of the participating countries and the eventual contradictions which might emerge from these. The only supranational body of the Customs Union and the Common Economic Space is the Eurasian Economic Commission. The Chairman of the Eurasian Economic Commission Board and its members are appointed by the Supreme Eurasian Economic Council at the level of heads of state on the basis of consensus. Therefore, the Eurasian Commissioners are closely tied to their states.

How does this relationship work? Usually the Eurasian Commissioners openly attend meetings of their government, or some more secretive forms are used. Such a relationship is inherent in the Eurasian Economic Commission institutionally. Therefore, supranationality is the form, not the content. Comparing this position with the European Union's structure, the following remarks could be made: In the European Union there are three supranational institutions: the European Parliament, the European Commission and the European Court. The supranationality of the European Commissioners is based on the fact that their appointment by the European Council is approved by the decision of the European Parliament. Members of the European Parliament are directly elected by voters in all 28 member states of the European Union, and they do not depend on the authorities of their states. The Commissioners are not bound to their states for their appointment to this position. Moreover, if they suddenly decided to show a preference for the states of which they are citizens, this would threaten their position as European managers and politicians. At the European Union Summit on 19-20 December 2013, the European Commissioner for Energy, Günther Ottinger, warned the German Chancellor Angela Merkel that their country is the largest in the European Union, but still one of 28, and she should be willing to compromise.[14]

[14] *See* A.N. Mikhailenko, *supra* n. 12.

In his speech at the meeting of the Supreme Eurasian Economic Council on 24 October 2013, N.A. Nazarbayev drew attention to the shortcomings in the functioning of the Eurasian Economic Commission. The President of Kazakhstan noted that the Russian Commissioners participate in meetings of the Russian Government, and enjoy government support. Meanwhile, according to the EU Treaties, the Commission is a supranational body, and the Commissioners are not subject to national governments. The same logic was followed at the meeting of the Supreme Eurasian Economic Council on 24 December 2013. N.A. Nazarbayev recalled that the Minsk agreement was reached and 'that there was no distrust between us, to carry out effective work of our Commission, to resolve the issue of equal representation of our citizens in its departments'. Of the twenty-three departments of the Eurasian Economic Commission, seven should be headed by citizens of Kazakhstan and Belarus, and nine by citizens of Russia. Thus, the trust between the countries during the integration process should, according to the Kazakh leader, be based on equal representation in the supranational institution. However, this practice has not been followed yet.[15]

In addition, there is a need for a clearer and more substantive delineation of the competences of the Eurasian Economic Union and of its member states. Policy combinations of 'national-supranational interests' can have different purposes. A large country can try to influence all members of an integration association in its own way, in other words it can attempt to bend them to the national interests of its own. In recent years, Germany and other more economically developed European countries have been accused of following similar behaviors, which allegedly imposed policies of austerity on crisis-ridden neighbouring partner countries.

The most important aspect of the experience of the European Union is the establishment of supranational institutions. The experience in the formation of the European Union can be seen in the establishment of the management system of the Eurasian Economic Union and Customs Union. Scholars have perceived European terminology in the names of the supreme management bodies of the Eurasian Union, and organisation principles have a great deal in common. For example, in the Eurasian Economic Union, there is a more cautious approach towards the establishment of supranational bodies and towards giving them the necessary scope of authority. The Eurasian Interparliamentary Assembly,

[15] Press conference at the end of the meeting of the Supreme Eurasian Economic Council on 24 October, 2013, *see* www.kremlin.ru/transcripts/19485, visited 23 April 2015.

which will replace the Interparliamentary Assembly of the Eurasian Economic Community, should develop the basic legislation in the main fields of legal relations, and in the future, become a full-fledged Eurasian Parliament, resembling the European Parliament, endowed with legislative and oversight powers, and formed following direct democratic elections.

The development of the early stages of the common market and the customs union are common for both the European and the Eurasian integration. A unified customs area implies the prohibition of any customs duties in trade relations between the member states and the formation of the common customs tariff in relation to third countries. The common market extends these principles, and eliminates other obstacles to the competition and cooperation of the economies of the countries of the Union by ensuring the so-called four freedoms: free movement of goods, services, labour force, and capital.

The European sanctions led Russia to deepen cooperation with Asian countries. Russia began its formation as a European country, still facing the challenges emanating from Asia. It was the story of the European Powers; in this connection, the mission of Russia in the world can be much more accurately designated as being the Europeans in Asia. The levels of economic growth of the member states of the Eurasian Union, on the one hand, and of the member states of the European Union, on the other hand, are at different historical stages of development. Only in Russia and Belarus is there a fairly well-developed industrial sector, and the same applies for the banking sector in Russia and Kazakhstan. However, the banks of Kyrgyzstan are extremely weak, and in Tajikistan there is no strong industrial sector and no banking resources to create one. They will long depend on their agricultural production and raw materials, and it is common knowledge that an agrarian economy is the least suitable for integration.[16]

Conclusion

Since 1 January 2015, Russia, Belarus and Kazakhstan have reached a new level of economic integration. This day saw the start of the Eurasian Economic Union, which was the successor of the Customs Union inaugurated by the three countries in 2010. The gradual development of

[16] I.A. Kholov, Евразийский Союз, проблем и перспективы развития [*Eurasian Union, the problems and prospects of development*], 5 *Law and policy* (2012) p. 909 at p. 910.

integration within the Eurasian Economic Union led to the creation of the Customs Union and the Common Economic Space, and is planned to move towards closer cooperation within the Eurasian Economic Union. All this testifies to the dynamics of the integration process, the success of which is largely due to the existing European Union experience.

The successful functioning of the European Union can influence the emergence of a new integrated unit (community). The founders of new communities are in a better position, because they can use the positive experience of the European Union taking into account past mistakes and shortcomings. The Eurasian Economic Union is not an exception and has different starting opportunities and challenges, although the general direction and objectives of these economic associations are the same. It took the Europeans 40 years to go from the European Coal and Steel Community to the full mode of the European Union. The formation of the Eurasian Economic Union, based on the common economic space, is much more dynamic because it takes into account the experience of the European Union and of other regional associations. And this is an obvious advantage, allowing to avoid mistakes and to prevent failure.

Today, a number of European countries have started to oppose the Jean Monnet method, according to which integration develops by gradually increasing the role of the supranational authorities, since they have been strengthening the intergovernmental element in the European Union's functioning. Nowadays there are initiatives to implement new mechanisms in the European Union financial system. The European Union experience is interesting for Russia, since Russia is the largest country in the Eurasian Union and aims to play a leading role in it.

What is the combination of the Russian and Eurasian interests? It is not the first time that this issue has occurred on the agenda of Russia's foreign policy. Is Russia acting more as Eurasian than a purely Russian country by investing huge resources in the Eurasian construction? Russia has always felt itself to be a Eurasian country. The Russians have never forgotten that the main part of the Russian territory lies in Asia, though they have not used these benefits. Today, the supranational (Eurasian) component is much weaker than the national interests of participating countries. In practical terms, there are a number of areas of Eurasianism, which must necessarily be developed: trade and economic direction, freedom of movement of goods within the Customs Union, and development of social-cultural competitiveness in the scientific, educational, cultural and humanitarian spheres.

PART 4:

THE ECONOMIC AND FINANCIAL CRISIS

13. THE POLITICAL ECONOMY OF 'COMMON GOOD'

ILIAS KONSTANTINIDIS*

Introduction

This chapter concerns the actual and potential role of European citizenship and the evolution of EU values. As the Treaty on European Union mentions in its preamble, the member states are 'resolved to establish a citizenship common to nationals of their countries'.[1] This declaration posits a hard aim, as it creates a need for the cultivation of a parallel, supranational identity, based on the concept of 'citizenship', which functions as supplementary to the existing national identities.

It has to be clear that in this chapter, 'citizenship' is examined as a concept of political philosophy and not as a legal status, usually in connection with nationality. Its subject generally refers to civic republican political philosophy and to the related perception and practice for the attainment of a 'civic economy'. It concerns an interdisciplinary synthesis, which combines political philosophy with economic theory, mainly taken from macroeconomic theoretical analysis. Its main hypothesis is that concepts like 'citizenship', and more generally political philosophy, influence politics and economy in communities. It is a theoretical work, which connects the evolution of this particular philosophical thought with a related economic vision and practice that started in the 1990s. It was named 'civic economy', aiming at new efforts for efficient partnerships between the public and the private sector, in favour of the 'common good'.[2]

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[1] Preamble TEU.

[2] M. Palazzi, P. Hesseling, R. Young and P. Kloppenborg, 'Beyond Market and State: The "civic" economy' (Progressio Foundation Publication 1 1990).

1. Scholars on civic republican philosophy

The following points are taken from professors of political philosophy and political science, who have done research on this current of thought.

Will Kymlicka includes the civic republican philosophy in a chapter entitled 'Citizenship Theory' in his book *Contemporary Political Philosophy* (2002).[3] Michael Sandel analyzes 'the political economy of citizenship' in his book *Democracy's Discontent: America in Search of a Public Philosophy* (1996).[4] Richard Dagger refers to a potential 'civic economy' in his article 'Neo-republicanism and the civic economy'.[5] He is wondering if republican theory can offer 'a coherent and attractive vision of economic life'. An assumption implied in this question is that every philosophical system occupied with politics is obliged to cultivate a well-tuned approach, in accordance with how the international economic system and the economics of a modern nation state function in reality.

Dagger thinks that a 'civic economy' should:

a) Take work very seriously as a value of life, as well as workplace conditions.
b) Aim at efficient production and distribution of goods and services.
c) Emphasize on the concepts of 'publicity' and 'community' in politics.
d) Support inheritance and progressive luxury consumption taxes.
e) Strive for a 'civic minimum' of support to as many citizens as possible.[6]

Iseult Honohan explains in her book *Civic Republicanism* (2002)[7] that the main points of this philosophical current are:

- A new notion of liberty, defined by Professor Philip Pettit as 'freedom as non-domination'.[8] In particular, 'freedom as non-

[3] W. Kymlicka, *Contemporary Political Philosophy* (Oxford University Press 2002).
[4] M. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (The Belknap Press of Harvard University Press 1996).
[5] R. Dagger, 'Neo-republicanism and the civic economy', 5 *Philosophy, Politics and Economics* (2006) p. 152.
[6] *Ibid.* p. 161-166.
[7] I. Honohan, *Civic Republicanism* (Routledge 2002) p. 1-4.
[8] P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1997) p. 163.

domination' exists as a third notion of liberty between 'freedom as non-interference' and 'freedom as self-mastery'. Philosophically speaking, it is related to perspectives for the minimisation of arbitrary interference powers, which are exerted either from people to people or from institutions to people. Protection from such conditions is based on the 'Rule of Law'. On the aforementioned basis, it is considered that it is compatible with perspectives for individuals to cultivate and develop their free choices without violating other people's liberties.

- New perspectives of governance.
- Rights and obligations connected with citizenship.

She supports the idea that certain global, contemporary evolutions push for a new trend of republican philosophy. These evolutions are:

1. Economic globalisation.
2. Environmental risks.
3. The crisis of the traditional form of the nation state.

These are circumstances that press for alternative thinking in politics.

2. Individual freedom and community

Liberal and libertarian political philosophy emphasize on the concept of 'individual freedom'. This notion of liberty is called the 'negative' notion, or 'freedom as non-interference'. Liberalism emphasizes on personal independence and devalues the concept of 'common good'. Liberal democracy is strongly criticised by thinkers who see the need to promote concepts like 'community' or 'citizenship' and the connection of politics with morality.

On the contrary, communitarian political philosophy emphasizes on the concepts of 'community' and 'collectivity'. Its notion of liberty is called the 'positive' notion, or 'freedom as self-mastery'. According to civic republicans, communitarians tend to be authoritative and oppressive in their effort to construct a coherent community. A contemporary concept of community has to seriously keep in mind the cultural or every other kind of diversity among citizens, which is a fundamental characteristic of contemporary Western societies.

Republican political philosophy offers an alternative proposal for a 'political community', different from that of liberalism or communitarianism.[9] The notion of freedom as 'non-domination' means individual freedom is secured, or even restricted, by the 'Rule of Law', so as arbitrary interference from people to people or from institutions to people to be efficiently repelled.

At first glance, 'individual freedom' and 'community' are concepts not fully compatible with each other, but they are both important. Civic republican philosophy tries to harmonise these two concepts. The point for contemporary citizens is both to enjoy a high level of individual freedom, secured for as many citizens as possible, and at the same time to keep community protected and developed. Such 'civic condition' is not considered easy to succeed. So according to these, the interest is orientated to the public part of life. The general belief is that care and action for public affairs and 'common good' allow people to have a better quality of private life because they are relevant to less domination and more knowledge, so that people enjoy prospects to make effective choices and solve problems.

3. Deliberative, not representative neither direct, democracy

'Deliberative democracy' is the form of democracy that 'civic republican citizenship' supports. Article 11 of the Treaty on European Union refers to potential co-operations between institutions and citizen interest groups: "1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action. 2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society." It also describes an initiative, which encourages meaningful and active participation in the EU procedures from the side of civil society. Through this initiative, EU citizens have the chance to promote a proposal to the European Commission by gathering one million signatures so as to start a process of producing a legal act in accordance with EU Treaties: "4. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within

[9] 'Positive and Negative Freedom', *Stanford Encyclopedia of Philosophy*, Feb 27, 2003, www.plato.stanford.edu/entries/liberty-positive-negative, visited 14 September 2015; *see* also I. Honohan, *supra* n. 7.

the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties. The procedures and conditions required for such a citizens' initiative shall be determined in accordance with the first paragraph of Article 24 of the Treaty on the Functioning of the European Union."[10] So this form of democracy differs from 'representative or indirect democracy', as it seeks a more active role from citizens, civil society organisations, and generally interest groups.

The other important and more difficult point that has to be explained is how this kind of 'deliberative democracy' also differs from 'direct democracy', which is generally thought to be ineffective when we have to deal with multidimensional socioeconomic and political environments, such as the EU, and more generally of the Western World. The difference between 'deliberative' and 'direct democracy' is vital and can be explained with the help of an American legal scholar's theory, Cass Sunstein. The substantial and meaningful function of a 'deliberative democracy' secures that decisions or requests promoted by the 'civil society' are products of knowledge and interaction among those who are interested in common affairs, and not products of simple, momentary or passionate expressions or views. He refers to a 'republic', which is not compatible with a kind of 'direct democracy' that immediately responds to whatever citizens may desire. The 'republic' is a democracy with institutions designed to secure discussion and interaction among parts of 'civil society' and government, based on adequate knowledge. According to Sunstein, a political system in which 'deliberative democracy' functions with the help of new technologies and the internet has to be considered as a feasible and realistically effective form of direct democracy. It also provides choices to citizens so as to promote their views to government even daily.[11]

4. Citizenship, deliberative democracy and free expression

Sunstein's book *Republic.com* (2001) provides with arguments that connect citizenship with 'deliberative democracy'. He emphasizes on the role of the widespread information with the help of new technologies and the need for common experiences for people living in the same community. In particular, the author supports a 'system of free expression' with the following characteristics.

[10] Art. 11 TEU.
[11] C. Sunstein, *Republic.com* (Princeton University Press 2001) p. 39, 197.

Citizens are exposed spontaneously, through new technologies and media, to materials they do not choose, even if they find it outrageous. That kind of information variety functions as security against social fragmentation and extremism. Social fragmentation and extremism are cultivated when like-minded people generally interact only with their own. With the help of governments, but without using enforcement or compulsion, citizens should obtain knowledge for subjects they otherwise would not have chosen. The absence of enforcement or compulsion is a vital point, because only tyrannies force people to watch or read, but in a true democracy governments have to find ways to inform citizens with materials that otherwise people do not choose on their own.

His second argument comes from the fact that societies in the contemporary Western world are highly heterogeneous. That produces a need for common experiences for citizens living in the same community, whatever their social, religious or other kind of diversity. Without common experiences, social tensions are more frequent, and more difficult to resolve. Common experiences provide with a kind of 'social glue', important so as to turn private individuals into fellow citizens. Absence of common experiences means a higher level of 'social fragmentation'. Promoting common values or experiences is not an easy goal. Such policies have to stay far from oppression, manipulation and exclusion.

Points like the aforementioned are vital to build the so-called 'social capital'.[12] Such a system of free expression is thought to be compatible with a real 'republic', which promotes a form of 'deliberative democracy' with the help of new technologies and new forms of communication.

5. Domination, socioeconomic independence and the difficulty of an appropriate state intervention

What is wrong with 'domination'? Domination from people to people or from institutions to people results in widening the economic inequality among them. For political philosophy professor Philip Pettit, basic state policies should try to promote the socioeconomic independence of citizens. This means that the state has to provide with opportunities that can lead people to obtain capabilities. An eminent economist, Amartya Sen, refers to the success of people according to the opportunities they have been given in order to function in the basic social framework a local community creates ('capability to function' or 'capacitation'). According to Sen, goods are connected with utilities and capabilities and can also

[12] *Ibid.*

result in happiness for individuals. Through the possession of goods, people are given the chance to obtain 'capacitation' in order to serve useful functions. The 'capacitation' obtained produces utility, or can even lead an individual to happiness. There is a sequential relationship between goods, functions related to the utility of goods, the cultivation of capabilities so as to use goods efficiently, and happiness. Especially the third, 'capability to function' or 'capacitation', is considered a basic condition, according to Sen's theory, for a decent personal living.[13]

Socioeconomic independence means economic prosperity, and economic prosperity is compatible with the absence of domination. These goals demand a kind of state interference in the function of the economy in order to facilitate growth and distribute sources fairly. States help local economies to grow by facilitating:

- Investments in industry branches, according to local comparative advantages and the needs of the international demand for particular products and services.
- The rising of productivity.
- Participation of local initiatives in international commercial networks.

Such policies of promoting local economy via legitimate ways lessen domination and increase independence and freedom.[14] In economies where free, competitive markets function, a kind of state interference is generally considered necessary. Capitalistic economies function in reality as *mixed* capitalistic economies based on the co-operation between the public and the private sector.

Three reasons for the existence of mixed economic systems are:

a) Completely free competition tends to create monopolies or oligopolies, therefore accumulation of economic power to less people. When monopolies or oligopolies are not products of economies of scale, they hurt consumers with their price policies and distort fair competition.
b) It is difficult for the private sector to produce some goods or services, as those have to do with safety or basic common utility goods.

[13] A. Sen, 'Poor, Relatively Speaking', 35 *Oxford Economic Papers* (1983) p. 153 at p. 160.
[14] P. Pettit, *supra* n. 8.

c) An important role for the public sector is the supervision of price levels and the implication of an efficient source distribution system. The first part of this statement means that state services ought to be 'on alert' in case entrepreneurs raise prices in a way that causes harmful inflation or speculation against consumers. Secondly, state services ought to succeed in a distribution system, which functions so as to restrict at least the extreme economic inequalities among citizens, but at the same time without hurting the entrepreneurship with extreme taxation measures.

Policies according to mixed economic systems exist so as to prevent economic powers of free antagonism from creating undesirable inequality consequences against the economically vulnerable part of society.[15] The ways of state interference in the economy can be divided in two categories, *direct control* and *economic policies*. *Direct control* consists of legal and institutional regulations covering transactions, such as in price levels, incomes, quantities, quality controls, taxation, terms for employers and employees. *Economic policies* consist of fiscal and monetary policies, such as fluctuations in the level of taxation, the level of public investments, or special credit policies, fluctuations of the interest rates or money circulation, through central bank policies.[16]

It is generally recognised that state interference exists and is necessary, but the crux of the matter is how exactly and at what point this should happen, keeping at the same time in mind the special characteristics and needs of every local, but not closed, economy. It is also widely known that state interference can lead to economic destruction when choices are not in accordance to what the needs of a local and the international economy are.

6. Consumption v. Consumerism

Professors of political philosophy Jürgen Habermas and Iseult Honohan wrote about the encapsulation of people in their privacy and their trend to be mainly consumers rather than citizens. If this could be considered as accurate, new efforts are necessary to restore the interest in the concept of 'community'. Sunstein defines the phenomenon as the 'consumption treadmill'. According to this phenomenon, consumers tend to spend more

[15] E. Pournarakis and G. Chantzikonstantinou, *Principles of Economics, Macroeconomic and Microeconomic Theory* (Sofia 2011) p. 63-64, 98, 104 (in Greek).
[16] *Ibid.* p. 42, 109-10, 306.

and more in qualities or quantities of goods, without actually improving their life. Sunstein's 'system' of free expression based on knowledge and common experiences functions against consumerism.[17]

According to the eminent American legal scholar of the modern era Louis D. Brandeis (1856-1941), who offered to the American political theory an Aristotelian view of the 'ideal citizen', inactive citizens put freedom in danger. That does not mean that citizens have to be occupied most of their times with politics. It means that each one has obligations and rights as a citizen, apart from being simply a consumer.[18] The difference between consumption and consumerism can show how citizenship is related to economic results. Consumption, employment, savings, investment, productivity, taxation, commerce, and fiscal policy are main economic variables that interact with each other. It can be said that constructive policies and results of these depend on citizenship.

While private consumption is the most prominent variable for a contemporary economy, estimated by professors of macroeconomics to about 2/3 of the Gross Domestic Product in most economies,[19] consumerism or overconsumption is a deviation from the constructive form of consumption. It has to be considered as a problem capable of destroying a local economy. Consumerism or overconsumption is connected with a weakened or an absent sense of citizenship. It is connected with waste of resources, fake needs, and finally, social norms based on what and how we consume. All these mean community weakening. Kenneth Galbraith (1908-2006), an eminent professor of economics, also emphasized on the fact that consumerist societies waste productive resources in order to produce unimportant goods, which could otherwise be used for producing useful goods or facilities. The media (through advertisement) have responsibility for that kind of economic behavior.[20]

Concerning the interacted economic variables, consumption is often connected to lending, and overconsumption to over-lending. Over-lending increases deficits in public or private budgets. Deficits cause problems when they do not correspond to productive investment and exports. When they are continual, debts increase and economy goes out of control.

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[17] Sunstein, *supra* n. 11, p. 195.
[18] *Ibid.* p. 47.
[19] A. Abel, B. Bernanke and D. Croushore, *Macroeconomics*, translation in Greek G. Landouris (Κριτική 2010) p. 58, 341-5; D. Chantzinikolaou, *Introduction to macroeconomics*: *With data from the Greek economy* (Kioroglou Lamprini 2011) p. 17, 100 (in Greek).
[20] Pournarakis and Chantzikonstantinou, *supra* n. 15, p. 105.

As a result, there are economies that have the following characteristics:

- Current account deficits, because of the high level of imports.
- Public deficits that enlarge the volume and the cost of public debt, when deficits are not diminished by selling or granting public property for exploitation.
- Low levels of savings, which cause problems in the credit system, deter investments and do not let GDP grow.

Under these circumstances, local economies have to deal with economic stagnation, or even depression, inserted in a 'vicious economic circle' difficult to cure.[21] When public debt is not based on productive investments, it transfers costs, hurts sustainability, and is expected to decrease the living standards of the following generations. In these circumstances, comes a time in the future when local economies are called to abruptly minimize their private consumption.

Consequently, dealing with consumption, lending, public or private surpluses and economic growth, or on the other hand consumerism, over-lending, non-constructive public or private debts and depression, can be considered as a matter of citizenship, and particularly as a matter of how citizens and government executives work for their community prospects of sustainability.

7. Reference to the Eurozone crisis

In the annex of this chapter one can see tables with data about macroeconomic variables from 2008 to 2014 or 2013 taken from Eurostat, concerning the southern countries of the Eurozone and Ireland. Through these, the route of debt crisis and of depression in the Eurozone is easily understood.

Table 1.1 shows that the General Government Gross Debt as percentage of the GDP of all these countries increases every year, apart from the year 2014 in Ireland. Percentages in 2014 are all high, above 100%, apart from Spain, where the percentage is 97,7 %, which is also considered as high. Table 1.2 shows that all governments in the years of crisis, namely since 2009, have produced budget deficits during all the years. Table 1.3 shows a general problem with high levels of imports that these countries had or have, except for Ireland, which resulted in the years 2012-2013 with impressive rates of Current Account Surpluses. It also

[21] *Ibid.* p. 390.

shows that in 2013, all countries finally succeeded a Current Account Surplus, apart from Cyprus. That may give the impression that efforts for production, productivity stimulation and more effective import-export policies have started to give results, leading economies to real growth. Table 1.4 shows the fluctuation of the real GDP per capita. It becomes clear that during all the years of the crisis we have to do with stagnation or even depression, apart from the year 2010 in Italy and the year 2011 in Ireland. In the years 2012 and 2013, there is a decrease in GDP everywhere; on the other hand, one has to recognise that these amounts of incomes cannot be said to concern really poor countries. Table 1.5 shows that unemployment rates also vary from high to very high, and have continually worsened until 2013, with the exception of Ireland.

The levels of GDP per capita show that possibilities for high levels of consumption exist in all these countries. One does not have to do with generally poor countries. On the other hand, it seems that they all have serious investment and production problems, except for Ireland since 2012. That is why one can see the phenomena of:

- Continual increase and high levels in their Government Debt as percentage of the GDP,
- Continual increase and also high levels of Government Deficits,
- Difficulty in succeeding adequate current account surpluses, apart from Ireland since 2012,
- Decrease in the real GDP,
- High unemployment rates.

It seems that Government Deficits these countries create do not correspond to productive development, apart from Ireland. In this country, the Current Account Surpluses in 2013-2014 coincided with a serious decrease in General Government Debt as a percentage of GDP, from 123,2% in 2013 to 109,7% in 2014.

These conditions pose a question whether this kind of depression seriously has to do with production problems, namely wrong investments, wrong import-export policies, over-consumption, and over-lending. And that is because when all these parameters function in the appropriate destination, GDP grows and public debt decreases, something that we only see in the example of Ireland from the year 2014.

Conclusion

- A contemporary multidimensional environment, with the broader meaning of the concept 'environment', is compatible with multidimensional, interdisciplinary knowledge.
- Reality is a matter of interaction among economy, politics, social conditions and culture.
- Contemporary political philosophy seeks for a balance in order to combine the sense of individual freedom with the promotion of the common good.
- 'Deliberative democracy' shows how the public and the private sector can produce decisions effectively, based on adequate knowledge.
- Co-operation between public and private sector depends on the aforementioned balance of both promoting community and individual freedom initiatives.
- 'State interference' is a vital condition for securing the 'common good', but this interference can be proved either constructive or destructive, according to how it influences the economic cycle.
- A lack in citizenship theory cultivation can turn consumption to consumerism.
- Consumerism hurts sustainability, because it causes resource spoiling or excessive unproductive debts.

Annex

Table 1.1

General Government Gross Debt as percentage of the GDP							
	2008*	2009	2010	2011	2012	2013	2014
Italy	102,3	112,5	115,3	116,4	123,1	128,5	132,1
Spain	39,4	52,7	60,1	69,2	84,4	92,1	97,7
Ireland	42,6	62,3	87,4	111,2	121,7	123,2	109,7
Greece	-	-	-	171,3	156,9	175,0	177,1
Cyprus	45,3	54,1	56,5	66,0	79.5	102,2	107,5

Source: Eurostat
www.ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=teina225&plugin=1
*First column in all tables in comparison with the year 2007.

Table 1.2

General Government Deficit / Surplus							
	2008	2009	2010	2011	2012	2013	2014
Italy	-2,7	-5,3	-4,2	-3,5	-3,0	-2,9	-3,0
Spain	-4,4	-11,0	-9,4	-9,4	-10,3	-6,8	-5,8
Ireland	-7,0	-13,9	-32,5	-12,7	-8,1	-5,8	-4,1
Greece	-	-	-	-10,2	-8,7	-12,3	-3,5
Cyprus	0,9	-5,5	-4,8	-5,8	-5,8	-4,9	-8,8

Source: Eurostat
www.ec.europa.eu/eurostat/tgm/table.do?tab=table&plugin=1&language=en&pcode=teina200

Table 1.3

Current Account Deficit / Surplus						
	2008	2009	2010	2011	2012	2013
Italy	-2,9	-1,9	-3,4	-3,0	0,1	0,2
Spain	-9,6	-4,8	-4,5	-3,7	-1,2	0,8
Ireland	-5,6	-2,3	1,1	1,2	4,4	6,6
Greece	-14,9	-11,2	-10,1	-9,9	-2,4	0,7
Cyprus	-15,6	-10,7	-9,8	-3,4	-6,9	-1,9

Source: Eurostat
www.ec.europa.eu/eurostat/tgm/table.do?tab=table&language=en&pcode=tec00043

Table 1.4

Real GDP per capita in euros						
	2008	2009	2010	2011	2012	2013
Italy	24700	23200	23500	23500	22800	22400
Spain	21700	20700	20600	20600	20200	20100
Ireland	39300	36400	35900	36500	36400	36200
Greece	18800	18200	17400	16200	15100	-
Cyprus	19600	18700	18500	18100	17400	16400

Source: Eurostat
www.appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do;jsessionid=i_IQ5IpUAeU74QyqsoBt5xvr3WOos5Za0-BBWHMB65I2CchghdRx!1693801765

Table 1.5

Unemployment rate							
	2008	2009	2010	2011	2012	2013	2014
Italy	6,7	7,7	8,4	8,4	10,7	12,1	12,7
Spain	11,3	17,9	19,9	21,4	24,8	26,1	24,5
Ireland	6,4	12,0	12,9	14,7	14,7	13,1	11,3
Greece	7,8	9,6	12,7	17,9	24,5	27,5	26,5
Cyprus	3.7	5,4	6,3	7,9	11,9	15,9	16,1

Source: Eurostat
www.ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tsdec450&plugin=1

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'Positive and Negative Freedom', *Stanford Encyclopedia of Philosophy*, Feb 27, 2003, www.plato.stanford.edu/entries/liberty-positive-negative

14. INPUT OR OUTPUT? EVALUATION OF THE EU DEMOCRATIC DEFICIT APPROACHES AFTER THE EUROZONE CRISIS

ALEXANDROS KYRIAKIDIS*

Introduction

The financial crisis of the late-2000s has undoubtedly affected countries around the globe in a number of different ways. It began in the United States of America as a sub-prime mortgage meltdown, and was later transferred in the European Union (EU) through the banking sector and the resulting credit crunch. Within the EU, it took the form mainly of a banking and sovereign debt crisis. It affected many EU member states, among them many Eurozone member states as well. Such an effect put tremendous pressure upon the common currency (the Euro), and led to what became known as the Eurozone Crisis (hereinafter the Crisis). This triggered a number of measures and responses at the supranational and national levels, to address the Crisis' causes and effects.

The one side of the EU response to the Crisis was the *ad hoc* cooperation with the International Monetary Fund (hereby the Fund), in providing policy-conditional financial assistance to EU and Eurozone member states who were faced with financial difficulties and balance of payments problems. The other side of the EU response was a complete overhaul of the EU and Eurozone *modus operandi*, particularly in terms of financial governance through a plethora of fundamental policies and measures introduced at the supranational level. This aspect of the EU response has received substantial academic attention. However, relevant scholarship seems segmented and fragmented, and focuses largely on a political economy, economic, legal or other relevant theoretical

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framework. Focus on the EU Democratic Deficit and the impact of the above supranational measures on it is largely lacking. There are some analyses which examine the effect of EU and Eurozone economic governance in relation to democratic standards, but they are somewhat generic and outdated.[1] Some scholarship does draw broad connections with the input-output aspects of the EU democratic deficit, without however making explicit reference or in-depth analyses.[2]

The aim of this chapter, therefore, is to attempt an evaluation of the different approaches of EU Democratic Deficit scholarship in terms of the impact of the EU supranational measures during the Crisis. This issue is of substantial importance. The EU Democratic Deficit largely frames the democratic issues existing within the EU construct, based on its form and shape. Any measure which alters such form and shape considerably, as is the case with the measures during the Crisis, will undoubtedly affect the theoretical framework. Therefore, an evaluation of such framework becomes necessary, in part to update and in part to validate its contributions to the democratic debate within the EU. In addition, the relevant scholarship is divided along theoretical lines. Based on the pre-conditions of each aspect, through investigation of the Crisis measures, it is possible to determine which of such aspects is now more relevant to the EU. Finally, existing scholarship[3] could benefit from further delineation of

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[1] For example: K. Featherstone, 'Jean Monnet and the "Democratic Deficit" in the European Union', 32 *Journal of Common Market Studies* (1994) p. 149; S. Gill, 'European Governance and New Constitutionalism: Economic and Monetary Union and Alternatives to Disciplinary Neoliberalism in Europe' 3 *New Political Economy* (1998) p. 5; B. Crum, 'Saving the Euro at the Cost of Democracy,' 51 *Journal of Common Market Studies* (2013) p. 614; B. Rittberger, 'Integration Without Representation? The European Parliament and the Reform of Economic Governance in the EU', 52 *Journal of Common Market Studies* (2014) p. 1174; Y. Mény, 'Managing the EU Crises: Another Way of Integration by Stealth?', 37 *West European Politics* (2014) p. 1336.

[2] For example, G. Majone, 'Rethinking European Integration After the Debt Crisis', UCL, The European Institute Working Paper No. 3/2012, available at: www.ucl.ac.uk/european-institute/analysis-publications/publications/WP3.pdf, visited 10 October 2014; F. W. Scharpf, 'Legitimacy in the Multilevel European Polity', 1 *European Political Science Review* (2009) p. 173; V. A. Schmidt, 'Re-Envisioning the European Union: Identity, Democracy, Economy' 47 *Journal of Common Market Studies* (2009) p. 17.

[3] For example, D. Schwarzer, 'The Euro Area Crises, Shifting Power Relations and Institutional Change in the European Union', 3 *Global Policy* (2012) p. 28; T. Beukers, 'The Eurozone Crisis and the Legitimacy of Differentiated Integration', EUI Working Paper Max Weber Programme 2013/36, available at:

the measures, which themselves have so far escaped extensive and accurate analysis.

The question is then raised: What is the impact of the measures assumed at the EU supranational level during the Crisis on the different approaches of EU Democratic Deficit scholarship? To answer this question, a brief literature review of the relevant scholarship is presented, whereby the different approaches of the EU Democratic Deficit are examined, along with their assumptions and pre-conditions. The analysis then follows, whereby the measures assumed at the EU supranational level during the Crisis are presented and evaluated against the above assumptions and preconditions of the different approaches to the EU Democratic Deficit. Finally, the results of the analysis, along with the impact of the measures upon the relevant scholarship, are presented.

1. Literature review

Existing literature on the EU democratic deficit is extensive, with the debate becoming prominent in the 1970s through to the 1990s, peaking in the 1980s on account of the Single European Act.[4] There are primarily two different approaches referenced in the relevant scholarship: Input and Output. The fundamental distinction between the two originates from the work of Fritz Scharpf.

1.1. Output

The output-based approach to the EU democratic deficit stems from the main argument that more democratisation of the EU would lead to less efficiency. Supporters of this model do not necessarily deny the existing reduced citizen input in the decision-making processes of the EU, but argue that, whether by design or effect, said input can and should be sacrificed to achieve the desired output, which increased input might often have damaged.[5] This approach sees the EU merely as a facilitating

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cadmus.eui.eu/bitstream/handle/1814/29057/MWP_2013_36_Beukers.pdf?sequence=1, visited 10 October 2014; S. Sandbeck & E. Schneider, 'From the Sovereign Debt Crisis to Authoritarian Statism: Contradictions of the European State Project', 19 *New Political Economy* (2014) p. 847.

[4] V. A. Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output and "Throughput"', 61 *Political Studies* (2013) p. 2; S. Hix, *What's Wrong with the European Union and How to Fix It* (Polity Press 2008) p. 67.

[5] V.A. Schmidt, *supra* n. 4, p. 5; R. Bellamy, 'Democracy Without Democracy? Can the EU's Democratic "Outputs" be Separated from the Democratic "Inputs"

organisation aimed at increasing financial gains by aiding cooperation between EU member states.[6] It is also argued that the EU's technical character justifies the lack of input, since the public was never expected to, and is not interested in deciding on technical issues, i.e. those issues are not electorally salient.[7] In either case, technocratic expertise in technical policies is seen as superior to the knowledge, or willingness, of citizens to participate, and can also be more impartial and less prone to biases or pressures by powerful national minorities.[8]

Moreover, it is argued that the EU, as a regulatory agent, lacks powers on policies which require democratic input (taxes, social welfare, etc.).[9] EU member states' governments are unwilling to surrender their decision-making authority in important policy realms such as welfare and education, and EU member states' citizens share such a view since social policy, which includes a great amount of value judgements, is considered a fundamental function of the state, i.e. the national level. Even in those areas where the EU enjoys clear competence, policies are characterised by intense intergovernmental fragmentation, and its action is severely restricted by institutional checks and balances.[10] Furthermore, the criteria employed to evaluate the EU democratically are simply too optimistic, and are not fitting either for the EU or for a state.[11] Finally, it is argued that indirect representation via the EU member states' respective governments is both valid and sufficient in terms of accountability. The national executives are held indirectly accountable for all actions through the national electoral process.[12]

Provided by Competitive Parties and Majority Rule?', 17 *Journal of European Public Policy* (2010) p. 2 at p. 3; A. Moravcsik, 'The Myth of Europe's "Democratic Deficit"', 43 *Intereconomics* (2008) p. 331 at p. 340.

[6] A. Warleigh, *Democracy and the European Union: Theory, Practice and Reform* (SAGE 2003) p. 16; K. Featherstone, *supra* n. 1, p. 159-163.

[7] Schmidt, *supra* n. 4, p. 10; G. Majone, 'Transaction-Cost Efficiency and the Democratic Deficit', 17 *Journal of European Public Policy* (2010) p. 150 at p. 157; R. Bellamy, 'Still in Deficit: Rights, Regulations, and Democracy in the EU', 12 *European Law Journal* (2006) p. 725 at p. 735-738.

[8] A. Moravcsik, 'In Defense of the "Democratic Deficit": Reassessing Legitimacy in the European Union', 40 *Journal of Common Market Studies* (2002) p. 603 at p. 614.

[9] Moravcsik, *supra* n. 8, pp. 607-608; Moravcsik, *supra* n. 5, p. 333; G. Majone, *Regulating Europe* (Routledge 2003) p. 5.

[10] Moravcsik, *supra* n. 8, pp. 608-611; Moravcsik, *supra* n. 5, p. 335.

[11] Moravcsik, *supra* n. 8, p. 605.

[12] Moravcsik, *supra* n. 8, p. 607; Scharpf, *supra* n. 2, p. 182.

1.2. Input

At the other end of this theoretical debate lies the approach that emphasizes the input of citizens.[13] Here, it is emphasized that 'democratic legitimacy does not stem from the aggregation of the preferences of all, but from the deliberation of all'.[14] Furthermore, the EU might have begun as a mere facilitator, but has now evolved into almost all areas over which a state has authority. EU policy creates many winners and losers, moving away from a purely Pareto-optimal system.[15] Hence, democratic control is needed to ensure proper operation of the system. In any case, the distinction between redistributive and regulatory policies is not at all clear, and it is argued that there is no apparent reason for suggesting that technocratic/independent actors will produce better policies than majoritarian institutions.[16]

Moreover, deliberation platforms and party competition are of the utmost importance in adequately representing the policy debates within a society and providing ample information for a voter to choose between candidates.[17] Of course, some institutions should remain insulated from the influence of citizens; however, these have to be identified and, most importantly, have to present evidence of pursuing the general interest.[18] Such restrictions are necessary since, as it has been argued, technocrats 'have an unfortunate tendency to overlook issues that are legitimate worries for ordinary folk', and are prone to pressures from particular lobbies or actors.[19]

The input-based approach also focuses on the lack of opposition input. In other words, 'if citizens cannot identify alternative leaders or policy agendas, it is difficult for them to determine whether leaders could have done better or to identify who is responsible for policies.'[20] The restricted

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[13] Scharpf, *supra* n. 2, p. 188.
[14] E. O. Eriksen & J. E. Fossum, 'Post-National Integration', in E. O. Eriksen & J. E. Fossum (eds.), *Democracy in the European Union: Integration Through Deliberation?* (Routledge 2000) p. 1 at p. 18.
[15] A. Follesdall & S. Hix, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik', 44 *Journal of Common Market Studies* (2006) p. 533 at p. 543 & 551-552; C. Lord, 'Still in Democratic Deficit', 43 *Intereconomics* (2008) p. 316 at p. 317.
[16] Bellamy, *supra* n. 7, p. 737.
[17] Follesdall & Hix, *supra* n. 15, p. 549-551.
[18] *Ibid.* p. 542-543.
[19] *Ibid.* p. 546.
[20] *Ibid.* p. 548.

role of the European Parliament is also highlighted, both when examined in isolation and when compared to other EU institutions.[21]

1.3. Interim conclusion on theory

In the above sections, the different approaches to the EU Democratic Deficit were outlined. As the aim of the chapter is to determine how the Crisis measures impacted these approaches, an interim conclusion should outline the core principles of each approach. From the overview of the relevant literature above, it can be concluded that each specific theoretical aspect of the EU democratic deficit is concerned with different, distinctive features.

Firstly, the output approach emphasizes that the effect of the supranational level on the domestic policy realm, especially in terms of democratic procedures, is rather limited. The EU competences are limited, as are its means; its nature is not redistributive. Most importantly, decisions taken at the supranational level are subject to accountability controls. Legitimacy concerns, should those arise, are addressed at the national level. In fact, any attempt to increase legitimacy and accountability at the EU level, thus severely restricting delegation, might produce adverse effects on EU policies.

Secondly, the input approach suggests that delegation of policies from the national to the supranational realm, many of which are core national policies and highly electorally salient, has dramatically increased. Not only that, but it is argued that such delegation results in a severe decrease of both legitimacy and accountability. Accountability is lost between the great variety and number of different levels and actors, while legitimacy is challenged on account of the questionable representativeness of decision-making bodies.

Given the above, the main elements examined across the different perspectives need to be summarised, in order to provide for a set of questions that could yield the effect of the Crisis measures on the different approaches of EU Democratic Deficit scholarship. In the first place, the question of whether the new measures impact core national policy areas, with redistributive effects, was raised. Should that be the case, the Input rather than the Output approach would be more appropriate in describing the reforms in the EU operating framework post-Crisis, since the Output approach presents the EU as merely a regulatory agent lacking any policy

[21] G. Majone, 'Europe's "Democratic Deficit": The Question of Standards', 4 *European Law Journal* (1998) p. 5 at p. 7-8.

capacity in core national policy, especially any of a redistributive nature. Secondly, the delegation to supranational institutions itself, regardless of the type of policies over which authority is delegated, was analysed. Increased delegation would, again, designate the Input rather than the Output approach as the more fitting. In the Output approach, the member states are presented as always attempting to delegate as little authority to supranational institutions as possible (Least Common Denominator), especially when that concerns sensitive national policies such as the budget.

Thirdly, the provisions of the new measures for representative institutions were investigated. Issues here are somewhat more complicated across the different approaches of the EU Democratic Deficit. The Output approach provides that further inclusion of participatory processes, even those included in the policy-making of representative institutions, is not necessary and could even be counter-productive. The Input approach provides that further inclusion of representative bodies is essential, given the newly-acquired extensive policy-making capabilities of the EU. Hence, increase in participation of representative institutions in the decision-making process would designate the Input approach as the one more adequately describing the post-Crisis EU. In contrast, any decrease of the policy-making capacity of representative institutions, whether of supranational or national nature, or the maintenance of such capacity at the same levels vis-à-vis an increase in the policy ability of other institutions (again whether supranational, such as the Commission, or national, such as the state executives), would be indicative of the Output approach.

2. Analysis

The EU has proceeded with a number of supranational measures throughout the Crisis that have fundamentally altered its *modus operandi*. Throughout these measures it is evident that delegation has increased, both across EU instruments (horizontal delegation) and from the national to the supranational level (vertical delegation). This is met by a corresponding augmentation in the decision-making capacity of supranational institutions, especially those of a technocratic nature, such as the European Commission (henceforth Commission) and the European Central Bank (henceforth ECB). The complexity, number and legislation of EU institutions have also greatly increased, making it more difficult for citizens to exercise accountability controls. In order to establish the impact of the above measures on the different aspects of EU Democratic Deficit

literature, the aforementioned four core areas of the relevant scholarship need to be evaluated vis-à-vis these new measures.

2.1. Core National Policy Areas – Redistributive Effect

Firstly, the conditionality of the financial assistance mechanisms (European Financial Stability Mechanism – henceforth the Mechanism –, European Financial Stability Facility *Société Anonyme* – henceforth the Corporation – and European Stability Mechanism – henceforth ESM) admittedly contains provisions for policies which are intrusive in core national policy areas and are agreed at the supranational level. These policies are of a fundamentally redistributive character (taxation, budgetary provisions, etc.). Of the three, the Mechanism is, relatively, the most relaxed one, as the economic conditionality is referenced in a more general manner, there is no provision for strict implementation of measures, and the reviews conducted by the Commission and the ECB are every six months.[22] However, its implementation, as for example in the cases of Ireland in December 2010[23] and Greece in July 2015[24] (the latter as a bridge financing vehicle), as well as its amendment in August 2015[25] to include further guarantees for non-Eurozone member states (when assistance is given to a Eurozone member state) has yielded mixed results. While the framework does provide more leeway than the other two financial assistance instruments, its implementation has included similarly strict conditionality (although of a limited breadth, given also the limited amount of financing) and guarantees on the part of the borrowing member state.

In regards to the other two financing instruments, the Corporation, a Luxembourg-based company, and the ESM, an international Treaty between the then-18 Eurozone member states, both introduce a much stricter level of conditionality, especially considering the latter mechanism's attachment to

[22] Recitals & Art. 1 Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European Financial Stabilisation Mechanism, *OJ* [2010] L 118/1, 12.5.2010.
[23] Council Implementing Decision (EU) 2011/77 of 7 December 2010 on Granting Union Financial Assistance to Ireland.
[24] Council Implementing Decision (EU) 2015/1181 of 17 July 2015 on Granting Short-Term Union Financial Assistance to Greece.
[25] Council Regulation (EU) No 2015/1360 of 4 August 2015 amending Regulation (EU) No 407/2010 establishing a European Financial Stabilisation Mechanism, *OJ* [2015] L 210/1, 7.8.2015.

the Fund.[26] In congruence with these observations, the Fund's involvement, the Memorandum of Understanding (henceforth the Memorandum) and the Troika (the Commission, ECB, the Fund) are also solidified with regard to financial assistance in Eurozone member states through the Two-Pack Regulation 472/2013. Even when the financial assistance programme has ended, influence in core national policy remains under the Post-Programme Surveillance (PPS) regime, whereby the ECB and the Commission are assigned to conduct review missions 'as long as a minimum of 75% of the financial assistance' has not been repaid.[27]

Conditionality also assumes a primary role within the Mechanism's framework and through the ESM Treaty. The latter stipulates that the Memoranda can include anything 'from a macro-economic adjustment programme to continuous respect of pre-established eligibility conditions.'[28] The vagueness of the ESM Treaty's phrasing at this point could potentially translate into the inclusion in the adjustment programme of a variety of measures even outside economic policy. This expands the breadth of the policy areas covered under relevant economic adjustment programmes, which are still overseen by the Commission and the ECB, along with the Fund. Hence, the EU instruments obtain further influence into core, redistributive, national policy areas. Detailed conditionality and structural adjustment are also introduced within EU via the Treaty on Stability, Coordination and Growth, in its connection with the Excessive Deficit Procedure (henceforth the Procedure) of TFEU Article 125. The Treaty's Article 5 mandates that an EU member state under the Procedure has to 'put in place a budgetary and economic…programme, including detailed description of the structural reforms,' needed to correct the deficit. This adds another layer of specificity to TFEU Article 126, without the Treaty itself provisioning for such specificity.[29]

Through the above international Treaty, broader budget-intrusive measures are also introduced, such as the one to 'encourage and, if necessary, compel a member state to reduce a deficit' which is over the

[26] Recitals 6-12, Art. 13 & 48 Treaty Establishing the European Stability Mechanism (henceforth ESM Treaty).
[27] Art. 14 Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the Euro area experiencing or threatened with serious difficulties with respect to their financial stability, *OJ* [2013] L 140/1, 27.5.2013 (henceforth Regulation 472/2013).
[28] Art. 12 ESM Treaty.
[29] Art. 5 Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.

3% GDP threshold.[30] This stipulation does not specify by what means and how exactly a Eurozone member state is to be 'compelled' to reduce its deficit. Within the EU framework it is forbidden for member states' governments to run excessive deficits, but a process of forcing reduction is not included. Budgetary influence by the supranational level is also demonstrated in the Fiscal Compact (Title III of the above international Treaty). The Fiscal Compact provides for even more budgetary consolidation, regardless of any other indicators of the economy. In the case of a deviation, an automatic mechanism, which should be established through 'provisions of binding force and permanent character, preferably constitutional...', and in accordance with common principles proposed by the Commission, should stipulate measures towards reduction.[31] Hence, through this international Treaty, it is mandated for member states to introduce constitutional or similar permanent arrangements, binding in nature, which are to affect the national level in one of the most sensitive and important functions of a country: its budget. In addition, such process is to be based on common foundations, again set by a supranational, technocratic actor: the Commission. This provision reduces the national level authority vis-à-vis the supranational level, and especially in comparison to the Commission.

Similar budget-intrusive stipulations exist throughout the rest of the legislation investigated. Directive 2011/85/EU of the Six-Pack essentially mandates that the 3-year budgetary framework, which is overseen by the EU, constitutes the basis for the national budgets of the EU member states, and hence assumes primacy over the national annual budget.[32] This constitutes a significant influence over national redistributive policies. However, perhaps the most important budget-related provision in the Crisis measures is included in Two-Pack Regulation 473/2013. This constitutes a landmark measure within the Eurozone, and the EU more generally. It is the first time that it has been clearly stipulated that the Commission, a supranational, technocratic, non-elected actor has direct access and ability to affect the budget of member states. This is especially the case if the Commission opinion on the budget is that it harbours discrepancies. Then the Commission 'should request a revised draft

[30] Recital 17 Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.
[31] Art. 3 Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.
[32] Chapter V Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States, *OJ* [2011] L 306/41, 23.11.2011.

budgetary plan' that needs to be drafted by the Eurozone member state concerned as soon as possible.[33]

Furthermore, through the above Regulation, the Commission is not the only supranational actor which acquires ability to directly influence the budget through this Regulation. After the Commission issues its opinion, the opinion along with the budget are then both transmitted to the Eurogroup for evaluation. It is clear that the national budget has, at least in a substantial portion, moved away from the domestic policy realm. The above results in a direct increase of the ability of actors at the supranational level to influence policies that, firstly, have large and direct redistributive effects on EU citizens and, secondly, were previously considered core national sovereign policies. This, given the current existing situation of the EU and the reduced role of the European Parliament (even after the Lisbon Treaty modifications) that persists in the new measures, impacts the democratic deficit negatively.

2.2. Delegation – Authority of Supranational Institutions

The second principal issue in relation to the impact of the measures during the Crisis on the EU democratic deficit is the delegation they entail. The roles assigned to the Commission and the ECB across the Treaty on Stability, Coordination and Growth, the ESM, and the EU-based legislation include a considerable increase in their decision-making authority. For example, in Article 7 of the Treaty on Stability, Coordination and Growth, it is stipulated that the Eurozone member states *a priori* 'commit to supporting proposals or recommendations submitted by the European Commission', when arguing that a Eurozone member state is in excessive deficit, unless a qualified majority of them, without the one concerned, is opposed.[34] Moreover, it is provided that all Commission Recommendations or Proposals in relation to the Procedure are to be immediately enforceable and accepted, unless a qualified majority of Eurozone member states opposes them, i.e. Reverse Qualified Majority Voting. Similar voting procedures are instituted in relation to Commission decisions across the supranational measures, such as the Two-Pack Regulation 472/2013, which provides for the same reverse

[33] Recital 20 Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, *OJ* [2013] L 140/11, 27.5.2013.

[34] Art. 7 Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.

voting on the Commission's proposal of additional measures under PPS.[35] The above provide the Commission with significantly increased decision-making capacity and policy implementation authority through the new, reverse voting system, since a blocking majority is much harder to obtain than a passing majority. Of course, the primary authority still remains with the Eurogroup, which remains an intergovernmental institution with a democratically ambiguous procedure, being an unofficial group which convenes behind closed doors.

The Two-Pack itself contains other stipulations relevant to the increased decision-making capacity of the Commission, and much more. Regulation 473/2013, and primarily the procedure of the Commission and the Eurogroup reviewing national budgets, provides these supranational actors with greatly increased decision-making capacity, especially considering the fact that the member state concerned needs to change the budget and conform to the Commission's opinion on it (as described in the previous section). The same applies to the Eurogroup. Regulation 472/2013 also presents an increase in delegation of both the Commission and the ECB. Their powers are considerably increased as part of the Troika, both in terms of decision-making authority as well as the binding character of their decisions. For example, the Commission can decide if and when a Eurozone member state is to be placed under surveillance, while the ECB enjoys influence on economic policy through the Memorandum process.[36] In addition, in PPS, even though a financial adjustment programme has ended, the Commission can still propose additional measures, thus retaining the increased decision-making capacity for a substantial duration.[37]

Relevant increases in the power of the Commission and of the ECB are found in other measures as well, such as in the Mechanism. In addition, across the Six-Pack, reference is made to increased Commission authority, particularly in the areas of setting fines and conducting enhanced, in-depth surveillance in EU member states, such as in Regulation 1173/2011, which also indirectly increases the power of the Council (its decisions acquire more direct and stricter implications).[38] Another clear example of increase in the authority of supranational institutions across the measures during the Crisis is the new European Supervisory Authorities. Their upgrade from

[35] Art. 14 Regulation 472/2013.
[36] Art. 2 Regulation 472/2013.
[37] Art. 14 Regulation 472/2013.
[38] Chapters V & VI Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, *OJ* [2011] L 306/1, 23.11.2011.

3rd level Committees to Authorities provides for an increase in their decision-making capacity, and they have now obtained the capability of initiating and enforcing mandatory policy and supervision within the national realm of EU member states. Formerly, as Committees, their role was mainly restricted to advisory functions for the Commission.[39] Similarly, in the Banking Union, delegation is increased vertically, by providing the ECB with *inter alia* direct control over the national banking sector of EU member states.

There has also been an increase in delegation within the ESM Treaty. Part of the concern is the utilisation of EU institutions in the ESM, given its international character. For example, the Commission and ECB acquire more authority, as they are in charge of deciding if there is an urgent need to call for an emergency voting procedure with lower voting thresholds.[40] Such powers add a substantial amount of gate-keeper authority, i.e. a significant intermediary role, to the mandate of those institutions. In addition, the Commission and the ECB are now authorised to negotiate the economic adjustment programme of the beneficiary Eurozone member state, along with the Fund, as well as monitor its progress.[41] Considering the above, the increase in the decision-making capacity of EU institutions through the ESM Treaty is substantial. However, the European Court of Justice (hereinafter the Court) argued in the *Pringle* case that there are no new competences acquired by the EU via the revision of Article 136 TFEU.[42]

Throughout the material investigated the two supranational institutions of the EU which have by far the most augmented decision-making capacity and influence are the Commission and the ECB. In terms of the Commission, its role throughout the Crisis seems to have an increased and direct effect on all policy areas within EU member states, primarily in sensitive ones such as the budget or taxation. The Commission did not enjoy such a broad effect on national policy. In addition, the Commission assumes quite a conflict-oriented role. It has the role of both the negotiator/drafter as well as the role of the overseer with regard to structural adjustment programmes. This may also point to a distortion of the Treaty-outlined mission of the Commission, i.e. to propose new EU

[39] European Commission Staff Working Document, 'The application of the Lamfalussy process to EU securities markets legislation: A preliminary assessment of the Commission services', SEC(2004) 1459, Brussels, 15.11.2004.
[40] Article 4 ESM Treaty.
[41] Articles 5 & 13 ESM Treaty.
[42] ECJ 27 November 2012, Case C-370/12, *Thomas Pringle* v *Government of Ireland, Ireland, The Attorney General*.

laws to the EP and Council, to manage the EU budget, to enforce EU law, to represent the EU internationally and, more generally, to represent the interests of the EU as a whole.[43] The potential conflict of interest and the unorthodox role assumed by the Commission were outlined by the European Parliament in its Report (paragraph 53) on the Troika.[44]

In terms of the ECB, its legally established purpose is to be a monetary policy instrument aimed mainly at maintaining price stability.[45] However, through the Memoranda, the ECB has assumed a primary role in shaping a variety of policies, including economic policy. This seems to exceed its mandate. An indicative example is the then ECB President's August 2011 letter to the then Italian Prime Minister, in which fiscal policy measures (retirement provisions, extensive privatisations, wage reform, etc.) were outlined to be implemented by the Italian government.[46] The above issues are, in part, highlighted again by the aforementioned European Parliament's Report (paragraphs 54 and 55).[47]

The above issues regarding the increase in the decision-making authority of EU institutions also apply to the Court. The Court is set up as being responsible for the ESM Treaty, which is an international agreement outside the EU framework. This ensures some EU-related judicial oversight. At the same time, however, it increases the competence of the Court itself. It is the case that the Court has the authority to adjudicate disputes within the subject matter of the Treaties (if a special agreement is signed between the EU member states concerned).[48] However, it is not allowed to consider charges based on violations relating to the Excessive Deficit Procedure, as stipulated in Article 126(10) TFEU. Such a

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[43] European Commission, 'About the European Commission', available at: ec.europa.eu/about/index_en.htm, visited 20 October 2013; Art. 17 TFEU.

[44] Karas and Hoang Ngoc report on the enquiry on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries, Text adopted as European Parliament resolution of 13 March 2014 on the enquiry on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries, P7_TA(2014)0239.

[45] Art. 127 TFEU & Protocol No 4.

[46] Corriere della sera, 'Trichet e Draghi: Un'azione pressante per ristabilire la fiducia degli investitori', available at: www.corriere.it/economia/11_settembre_29/trichet_draghi_inglese_304a5f1e-ea59-11e0-ae06-4da866778017.shtml, visited 10 October 2013; G. Dinmore & R. Atkins, 'ECB Letter Shows Pressure on Berlusconi', available at: www.ft.com/cms/s/0/3576e9c2-eaad-11e0-aeca-00144feab49a.html#axzz3LnTDZ42i, visited 10 October 2013.

[47] *Supra* n. 44.

[48] Art. 273 TFEU.

restriction is bypassed through the ESM Treaty, since it allows the Court to adjudicate on issues relevant to Articles 121 and 136 TFEU, in the latter of which the process of Article 126 is included. Therefore, while the Court may not adjudicate on matters of Article 126 according to the TFEU, it now may do so through the ESM Treaty. Here, there is clear augmentation of the authority of the Court.

2.3. Representative institutions

So far, it has been demonstrated that, during the Crisis, the supranational level has acquired increased influence over redistributive policies that constitute core national issues. It has also been established that the supranational measures during the Crisis have resulted in an increase of the decision-making capacity of supranational actors, particularly those of a technocratic nature. What needs to be established in accordance with the different aspects of the EU Democratic Deficit literature is the effect of the Crisis measures on the representative institutions within the EU.

Within the Mechanism's framework there is a lack of any kind of reference to the European Parliament. Moreover, while the European Parliament has *de jure* oversight capacity over EU institutions (such as the Commission or ECB), this capacity is limited and cannot constitute adequate justification for not introducing similar provisions in EFSM.[49] The Six-Pack also suffers from democratic deficiencies regarding parliamentary oversight, especially considering the size and purpose of the legislation. Across this legislative bundle, the European Parliament is given some increased abilities to scrutinize activities, but this is mainly restricted to the right to call key political actors for a hearing. Moreover, the need for more timely and increased parliamentary involvement, both of the European Parliament and national Parliaments, is mentioned, but is rather generic and lacks a detailed context. The European Parliament's reference across the board is thus extant but miniscule, especially compared to the increasing role assumed by the Commission.

Similar conclusions can be drawn regarding the Two-Pack. Regulation 472/2013 suffers from an apparent decrease in the authority of national Parliaments which, though mentioned, need merely to 'be kept informed in accordance with national rules and practice'.[50] The only real parliamentary authority is again restricted to the ability of national Parliaments to invite representatives of the Commission 'to participate in an exchange of views

[49] *Supra* n. 22.
[50] Recital 10 Regulation 472/2013.

on the progress of the programme.' The same applies to PPS, both for national Parliaments and the European Parliament.[51] Regulation 473/2013 is equally deficient in terms of representative authority.

The lack of an increase in the participation of representative institutions in the decision-making process is important, when consideration is given both to the increase in the authority of executive-based or technocratic-based supranational actors, as well as to the direct effect of the policies included in the Crisis measures on EU citizens. The Crisis measures include increased delegation to the supranational level in relation to a wide variety of national policies previously considered to be core, from the public (e.g. budget) to the private (e.g. banking institutions) sectors. This coincides with an increase in the authority of the supranational institutions, particularly the supranational technocratic authorities. For example, the Commission has gained increased authority not only over the member states, but also over some intergovernmental official instruments of the EU, such as the Council of Ministers. The same can be said for unofficial intergovernmental instruments, which still retain authority more than the Commission and other supranational institutions, such as the Eurogroup. This results in further depoliticisation of decisions, with the electorate being increasingly unable to influence decisions that directly affect them.

Conclusion

What can be concluded, then, in terms of the impact of the measures assumed at the EU supranational level and the different approaches of the EU Democratic Deficit literature? In summarizing the relevant literature, two main approaches were outlined: Output and Input. The first approach of Output seems to originate from the intergovernmental end of the EU integration theories. From this approach, it is argued that the EU is merely a facilitating organisation, with limited authority over national policy, especially over core policy areas with redistributive effects (such as the state budget). The aim of the EU is to produce Pareto-optimal outcomes; as long as those are produced, it is not appropriate to raise issues of participatory processes. In fact, such processes might even damage the output produced. From this perspective, and in order for the EU to successfully maintain its facilitating character, there needs to be a restriction on the input citizens and representatives institutions have. Such a limitation is justified, given the above lack of influence over key national policy areas with redistributive effects. Such a limitation is also necessary,

[51] Art. 14 Regulation 472/2013.

given the nature of the involvement of the EU in policy, i.e. issues with a largely technical character, in which the citizenry would not be expected to decide upon nor be interested in doing so. In either case, the national level of democracy provides sufficient and valid democratic control over EU policies, as that level remains the primary decision-maker in the EU framework.

The second approach, i.e. Input, seems to originate from the supranational end of the EU integration theories' framework. This approach emphasizes the changes of the EU throughout time, arguing that its original facilitating role has long been enhanced substantially to include areas of core national policies with redistributive effects. Hence, the EU has moved away from a Pareto-optimal system. In this approach, it is also emphasized that the institutions of the EU have not experienced a similar progression. While EU policies have both expanded and deepened within the national realm, the majority of the decision-making institutions within the EU which decide such policies have remained somewhat technocratic and isolated from the citizenry. While this was acceptable in the previous, more regulatory forms of the EU, its expansion into new and core national policy areas makes the modification of its decision-making structure necessary in order to accommodate more participatory processes, commensurate with the expansion mentioned above. Of course, some institutions and decision-making processes should still remain isolated.

The evaluation of the measures regarding the different approaches of the EU Democratic Deficit should take the following principles into consideration. In the first place, there needs to be an evaluation of whether the measures investigated concern or affect, directly or indirectly, core national policy areas, such as the state's budget, taxation, etc., especially with a redistributive effect. In cases where there is such an effect, then the Input approach is more consistent with the EU post-Crisis, whereas if there is no such effect, the Output approach is more accurate. Secondly, the amount of delegation in the new measures needs to be established. Increased delegation to the supranational level fits better with the Input approach, whereas reduced delegation and/or restraint of its increase are more consistent with the Output approach. Thirdly, the representative provisions of the measures should be analyzed. Increased participation from supranational or national representative bodies would be more relevant to the Input approach. By contrast, reduction of such participation, or its maintenance at the same levels vis-à-vis increase in authority of other institutions of a different nature (e.g. executive) would be related to the Output approach.

The aim of this investigation has been to assess the impact of the supranational Eurozone Crisis measures on the aforementioned different approaches of the EU Democratic Deficit. What, then, is to be concluded? The first issue was the ability of supranational actors to affect core national policy areas, especially those which have a redistributive effect. In this respect, the measures allowed for a substantial increase in the ability of supranational actors to affect core national policy. Through the measures, supranational institutions, including some of a technocratic-supranational (e.g. Commission) nature and some of an intergovernmental (e.g. Eurogroup) nature, acquired an ability to affect sensitive policy areas, such as the national budget. The ability to affect the budget specifically is provisioned regardless of the state of the economy (crisis or not), such as through the Two-Pack and Six-Pack. In addition, when a member state is under financial strain, financial assistance from the EU is now provided under strenuous policy conditionality, giving the EU the ability to directly affect a number of policy areas in specific ways (e.g. pharmaceuticals – amount of brand versus generics, amount of budget allocated to education, etc.). This was demonstrated during this Crisis, especially in the cases of Greece, Ireland and Cyprus. The Memoranda, previously a solely Fund-utilized tool, has now been permanently introduced within the EU framework, also through the ESM international Treaty. Furthermore, influence of supranational institutions on sensitive national policies is reinforced through the connection of the Treaty on Stability, Coordination and Governance to the Excessive Deficit Procedure, i.e. when a member state is in excessive deficit. In addition, the Treaty on Stability, Coordination and Governance introduces a new obligation for member states (except those which did not sign it) to introduce permanent provisions for a debt brake into their constitution, a commitment not previously undertaken within the EU framework, and one which directly affects core national policies. From the above, therefore, the conclusion may be drawn that supranational actors have gained substantially increased influence over core national policy areas. Hence, the Input approach is more accurate on this point.

The second issue which was addressed was the delegation from the national to the supranational level of decision-making authority, regardless of the aforementioned influence on key national policy areas with redistributive effects. This was clearly the case across the Crisis measures, both those of a supranational and intergovernmental character. The introduction of reverse voting procedures into the EU Excessive Deficit Procedure regarding the rejection of a Commission proposal is an important example of how the supranational institutions have acquired

enhanced decision-making capabilities. What is more, this was done via the Treaty on Stability, Coordination and Governance, i.e. an International Treaty, and not via EU-based legislation. This indicates the circumvention of the existing EU operating framework, and an increase in the authority of EU institutions via other international instruments; this is a paradox. Reverse Qualified Majority Voting was introduced in a number of other measures which include a Commission proposal, such as the PPS in the Two-Pack. The Two-Pack itself, in addition, presents one of the most substantial increases in the authority of supranational institutions, with the Commission and the Eurogroup now being able to review and, if necessary, amend the budgets of Eurozone member states.

Furthermore, throughout the provisions relevant to actions during financial crises in general, as well as during this one, the Commission and the ECB have acquired a considerably increased decision-making capacity over national policy through the Memorandums. This involves potential conflict of interest for both, and also a *de facto* expansion of the ECBs authority to economic policy from its *de jure* monetary policy mandate. Similar increases have occurred for other supranational instruments, such as the Council, since its decisions have acquired more immediate and stricter implications. This applies to institutions such as the Court as well, since via the ESM Treaty, it can now, albeit indirectly, adjudicate over issues relating to the Excessive Deficit Procedure, though the TFEU precludes charges relating to such issues from being brought before the Court. Hence, in this second category, the Input aspect again seems a better fit for the EU operating framework post-Crisis. The Output approach includes arguments relating to member states being unwilling to transfer any more authority to EU supranational institutions, and to delegation remaining at steady levels. However, during the Crisis there has been a tremendous increase in the delegation of decision-making capacity from the national to the supranational level, even for areas that are not considered to be sensitive national policy with redistributive effects. In other words, the supranational institutions have become progressively stronger vis-à-vis member states. Of course, this varies in certain degrees, according to the relevant power position of the member state concerned. Some member states, and especially their representative institutions, have indeed retained some authority to influence supranational policy outcomes, such as the German *Bundestag* or the *Bundesverfassungsgericht* (German Federal Constitutional Court).[52] However, overall and even

[52] For example on its decision regarding the Greek bailout on 7 September 2011 (BvR 07 September 2011, Case 987/10).

taking account of the differences between member states, the ability of their democratic domestic actors to influence supranational decisions has severely decreased. This is concurrent with the arguments of the Input approach, which then are used to justify the need for greater participation from representative institutions.

Finally, the third element that has been analysed is the participation of representative institutions, i.e. the participatory aspect of indirect democracy. Here, while an attempt has been made throughout the measures to include some provisions for representative institutions, either the national Parliaments or the European Parliament, such provisions are miniscule, especially compared to the size and importance of legislation, as well as to the increase in decision-making authority of other supranational technocratic or executive-like institutions. Most provisions are restricted to mere informative or interview-based abilities of the various representative institutions, falling short of providing any type of real oversight authority or policy. Here the material analysed points to the Output approach as providing a more accurate depiction of this particular element. However, in this case the Input approach has to be chosen since, in combination with the other two elements mentioned above and the Output approach of reduced participatory influence over decisions, Input theorists criticize such reduced influence and call for greater representative decision-making.

Overall, the Input approach seems to have gained considerable ground, confirming the need for better Input as well as more adequately depicting the form of the EU post-Crisis. It is the case, as was demonstrated above, that the EU has evolved into a multi-faceted organisation, now able to affect key national policy areas, which have redistributive effects, as well as having the capacity to limit the ability of Member States to conduct policy in such areas. This is on account of the considerable increase in the EU institutions' decision-making authority, as well as of the substantial delegation of policy-making from the national to the supranational level.

The Output approach, focusing on the regulatory aspects of EU politics, seems either somewhat outdated, or, at the very least, restricted to policies of such type. Furthermore, the Output argument that the national level is the key decision-making level of the EU remains somewhat valid, especially considering that in a union of states such as the EU, *a priori* and *de facto* the national realm of policy naturally counts the most. However, the influence of EU actors in policies and abilities of such level have substantially increased, and confidence in the Output approach to the democratic safeguards of that level, given the above increase in influence

and in the number of supranational actors involved in the process, seems misplaced at best.

In conclusion, throughout this chapter the impact of the supranational measures adopted during the Eurozone Crisis on the Input/Output aspects of the EU Democratic Deficit scholarship was evaluated. The overview of these two main aspects of the relevant scholarship has revealed the need for an analysis of three elements throughout the measures: the ability of supranational actors to influence core national policy areas with redistributive effects; the overall general delegation of decision-making authority from the national to the supranational level and the increase in the policy-making capacity and influence of supranational actors; and the provisions in these new measures regarding policy-making influence of representative institutions. The supranational measures introduced during the Crisis were investigated in relation to the above three elements.

From the analysis presented above, it is clear that the Input approach presents a much more accurate picture of the EU post-Crisis reforms than the Output approach. What this means for the EU is that now, more than ever before, there is a need for increased input, whether it be by citizens or representative institutions, in order to adhere to the fundamental principles of representative democracy, as this has been formed in the Western liberal tradition. Without such increased input, there is the danger of seriously increasing the arguably perpetual democratic deficit of the EU to the point where it becomes alarming.

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15. THE ADMINISTRATIVE SYSTEMS OF THE EUROPEAN UNION IN THE CONTEXT OF THE GLOBAL ECONOMIC CRISIS

OCTAVIAN CHESARU*

Introduction

In order to assess the effects of the crisis on the administrative systems in the European Union and its member states, as well as the change processes of public administration as a reaction to new global challenges, this chapter follows three research hyphotheses:

- The new public management theory is still relevant in configuring the administrative systems of the European Union
- The economic crisis has generated a number of challenges for the European Union and its member states, representing a fundamental justification of the public administration reform processes
- The European Union aims at countering the crisis by promoting programmes and strategies that have become the main root of change in the member states.

With the purpose of achieving the main research objective, the chapter is structured in four sections and an empirical study, each providing the research framework for assessing the research hypotheses.

1. Theories of Administrative Systems

In an effort to formulate a theoretical framework for the arguments on the timeliness of the new public management theory within the administrative systems of the European Union, this section investigates the

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main features and criticism of the most important theories of administrative systems.

The bureaucratic theory (of the Weberian systems) highlights the uniqueness of the command and decision-making centre, even if such practices may lead to cumbersome, inflexible and opaque practices. The scientific management theory improves the internal processes of a system in order to increase its productivity. However, it proves to be incrementalist and it profoundly neglects its human resources. The classical theory brings together visions of the management processes of the administrative systems, coagulating an innovative set of functions of management processes (planning, organising, directing, coordinating, evaluating and managing), but makes vertical communication difficult (as do the Weberian systems) and neglects employee rights (similar to the scientific management theory). The human relations theory provides a response to the criticism of the other systems, analysing the socio-psychological aspects of labour. However, there is a lack of scientific cohesion concerning the economic processes of the system. New Public Management revolutionises the main ideologies of pre-existing theories, promoting a configuration of administrative systems which bestows efficiency, effectiveness, flexibility and speed.

The administrative system of the European Union presents numerous similarities between the theory of the new public management and its principles of operation and organisation.[1] However, Pollitt and Bouckaert consider that the European Union is close to a neo-Weberian state model.[2] Drechsler analyses the visions brought by Pollitt and Bouckaert to the emancipation of a neo-Weberian state, considering it to be highly unlikely because public administration is not and cannot be built on Weberian principles, given the establishment of participatory democracy mechanisms, whose features are specific to the new public management.[3] The idea of a total separation between the theory of the new public management system and the Weberian one is also supported by Percebois, who points out that

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[1] A. Matei and L. Matei, *The European Administration: Models, Processes and Empirical Assessment* (LAP Lamber Academic Publishing 2012) p. 110-112.

[2] C. Pollitt and G. Bouckaert, *Public Management Reform: A Comparative Analysis – New Public Management, Governance, and the Neo-Weberian State* (Oxford University Press 2011) p. 10.

[3] W. J. M. Drechsler, 'Public Administration in Times of Crisis', in R. Kattel, W. Mikulowski and B. G. Peters (eds.), *Public Administration in Times of Crisis: Selected Papers from the 18th NISPAcee Annual Conference, May 12-14 2010 Warsaw, Poland* (Network of Institutes and Schools of Public administration in Central Eastern Europe, 2011) p. 15 at p. 17.

all the differences between the two doctrines derive from different sets of values, having divergent views regarding the notions of efficiency and equity in public administration.[4]

Given the opinion of scholars and the features of the EU regulatory framework, administrative culture and decisional process, one may conclude that the new public management theory is still relevant in configuring the administrative systems of the European Union.

2. Perspectives on the Global Economic Crisis and Its Effects as Felt by the Administrative Systems in the European Union

The global economic crisis represents the most important challenge faced by our societies in the era of the globalisation of administrative systems, generating a series of new pressures on the authorities at EU or member state levels. Europeanisation, the reflection of the globalisation process within the European area,[5] has provided the framework for the spread of economic turmoil in all member states, generating a series of inputs of the administrative systems in the European Union, such as: amplifying social tensions, projecting a negative impact on developing countries, augmenting the state debt levels, the emergence of risks in the business environment, the persistence of corruption and tax evasion phenomena,[6] the questioning of the legitimacy of social and austerity measures adopted by authorities,[7] an alarming increase in unemployment rates and per capita debt levels, and so on.

The first responses were soon to appear from the European Union supranational mechanism, through adopting some intergovernmental agreements (such as the Euro Plus Pact,[8] the Treaty Establishing the

[4] L. Percebois, *Benefits without Drawbacks? Adverse or Complex Effects of Public Management Reforms* (48 Presupuesto y Gasto Público 2007) p. 150.

[5] L. Matei & D. C. Iancu, *Europenizarea administraţiei publice, volumul I – Procese fundamentale ale europenizării administraţiei publice* (Editura Economică 2009) p. 134-135.

[6] I. Vaidere report on the impact of the financial and economic crisis on human rights, Text adopted as European Parliament resolution of 18 April 2013 on the impact of the financial and economic crisis on human rights, P7_TA(2013)0179.

[7] S. Laulom, E. Mazuyer, C. Teissier, C.E. Triomphe and P. Vielle, 'How has the crisis affected social legislation in Europe?' (ETUI Policy Brief No 2/2012) p. 3.

[8] 'The Euro Plus Pact: Stronger Economic Policy Coordination for Competitiveness and Convergence', Annex I to European Council Conclusions, 24-25 March 2011.

European Stability Mechanism,[9] Better Governance for the Single Market,[10] the European Economic Recovery Plan,[11] etc.), through launching large-scale economic recovery programs (such as the Europe 2020 Strategy),[12] or through reconfiguring agendas according to economic objectives.

Furthermore, the EU reveals its orientation towards better regulations, regulatory fitness and reduction of administrative burdens, though these represent concepts which had been developed by the European Commission many years prior to 2008. It is estimated that in the context of the economic crisis, the concern of the public sector for the reduction of administrative burdens is a consequence of the implementation of the new public management within the administrative system of the Union.[13]

Thus, the economic crisis has generated a series of profound changes in both objectives and vision at the European Union and member state levels. To coagulate this vision into a unified policy, the European Commission launched the Europe 2020 Strategy in 2010, marking the Union's desire for intelligent, sustainable and inclusive growth as the paramount solution to the problems created by the economic crisis.[14]

In order to achieve such goals, numerous programs and initiatives have been put forth (Innovation Union, Youth on the Move, A Digital Agenda for Europe, An Industrial Policy for the Globalisation Era, an Agenda for New Skills and Jobs, a European Platform Against Poverty and Social

[9] Treaty Establishing the European Stability Mechanism (ESM Treaty), Brussels, 01.02.2012.

[10] European Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Better Governance for the Single Market', COM(2012) 259 final, Brussels, 08.06.2012.

[11] European Commission, Communication to the European Council 'A European Economic Recovery Plan', COM(2008) 800 final, Brussels, 26.11.2008.

[12] European Commission, Communication Europe 2020: A strategy for smart, sustainable and inclusive growth, COM(2010) 2020 final, Brussels, 03.03.2010.

[13] L. Matei & A. Matei, 'Reducing the Administrative Expenditures as Source for Increasing the Efficiency of Local Governance Under Conditions of the Financial Crisis', in K. Dong, M. Holzer and M. Zhang (eds.), *Century-long Efforts at Improving Government Performance and Fighting the Fiscal Crisis: Proceedings of the 4th and 5th Sino-US International Conferences on Public Administration, 5th Sino-US International Conference on Public Administration, 14-17 June 2010, Xiamen University, Xiamen, Fujian, China* (The American Society for Public Administration & School of Public Affairs and Administration, Rutgers University-Newark 2012) p. 528.

[14] European Commission, *supra* n. 12.

Exclusion),[15] through which the European Commission illustrated the reforms and long-term development strategies that were to be followed by member states in order to overcome the economic crisis.

3. Contemporary Trends in the Analysis and Impact Assessment of the Economic Crisis

Recent years have generated two congruent tendencies, namely the trend of authorities to involve scholars in the processes of crisis resolution, and the interest of researchers in studying the economic crisis. From an administrative sciences perspective, scholars are concerned with identifying the premises and causes of the emergence and evolution of the economic crisis, with analysing its effects on the political environment, on the institutional structure, or on the legal backgrounds of the states, as well as with identifying the types of successful reforms adopted at supranational and national levels with the purpose of countering the effects of the crisis. Scholars blame the globalisation of the economy, the interconnection of markets by means of technological developments, the abrogation of legislation (such as the Glass-Steagall Act), short-term vision, the oligopolistic nature of credit rating agencies, the development of hybrid economic instruments, the failure to regulate the banking sector in depth, high-level corruption, and arbitrary state intervention in the economy.[16]

Moreover, there have been signs of incrementalism of authorities with respect to necessary reforms during the economic crisis, and an observable tendency of governments to avoid any deviation from previously established paths, even though they have proved inefficient during the economic crisis,[17] and with numerous reforms being adopted belatedly, after a period of denying their necessity,[18] while waiting for other states to

[15] All these initiatives form part of the Europe 2020 Strategy for smart, sustainable and inclusive growth; *see supra* n. 12.

[16] S. K. Rao, 'The Global Economic Crisis: Challenges and Opportunities for Public Administration', 39 *ASCI Journal of Management* (2010) p. 33; W. J. M. Drechsler, *supra* n. 3; A. M. Khademian, 'A Public Administration Moment: Forging an Agenda for Financial Regulatory Reform', 69 *Public Administration Review* (2009) p. 595.

[17] B. G. Peters, J. Pierre and T. Randma-Liiv, 'Economic Crisis, Public Administration and Governance: Do New Problems Require New Solutions?', 11 *Public Organization Review* (2011) p. 13.

[18] W. Kickert, T. Randma-Liiv and R. Savi, 'Cutback Decision-Making in Europe: A Comparative Analysis' (7th ECPR General Conference Bordeaux, 2013).

undertake them first in order to respond to the new trend in public administration.[19]

Additionally, scholars report that, as a consequence of the economic crisis, there is a tendency for the authorities to hesitate between centralisation and decentralisation processes of competences of national administrations, the governments being compelled to make consensus-based crucial decisions at very short notice, and because of this, the efficiency of the new public management is thought to be achievable only through centralised administrative structures.[20] The impact of the crisis and the reform procedure of the EU member states is also evaluated, with a series of challenges for the states and the Commission being identified, such as the decisions to narrow down the public service through outsourcing and restructuring processes,[21] or to adopt severe austerity measures.

In conclusion, given the analyses identified in the literature, as well as the official documents issued by the European Commission, one can compile a series of features of the austerity measures at the EU level, which have been adopted gradually (supporting the aforementioned statement that states initially preferred to deny the magnitude of the crisis), following the centralisation of decisions concerning them. Nevertheless, all measures are considered substantial, reforming the system thoroughly.

4. Processes of Change Undertaken in Public Administration

Systems of public administration undergo reform processes with the purpose of providing responses to internal and external challenges, and adapting their internal processes and rules of functioning to the new context. Change is perceived as the act of *substituting, modifying or transforming* a process or phenomenon, targeting a growth in the performance of the organisation,[22] in order to meet challenges such as demographic, socio-cultural, or legal movements,[23] changes in the global economy, the emergence of new public management, development of new

[19] W. J. M. Drechsler, *supra* n. 3.
[20] W. Kickert, T. Randma-Liiv and R. Savi, *supra* n. 18.
[21] M. Onofrei and D. Lupu, 'The Dimension of Public Administration in Central and Eastern European Countries in the Current Financial Crisis', 6 *Transylvanian Review of Administrative Sciences* (2010) p. 109.
[22] E. Burduş, G. Căprărescu and A. Androniceanu, *Managementul schimbării organizaţionale* (Editura Economică 2008) p. 14.
[23] L. Matei, *Management public* (Editura Economică 2006) p. 118-120.

management techniques applied in the public sector, or political changes.[24] Change, a necessary tool in the design and coordination of public administration,[25] is regarded as a source of success or failure, but also as the most important source of opportunities and innovations, which is why change should be seen as the opportunity to learn new lessons.[26]

Several types of change can be found in the literature, i.e. change in the first degree (superficial change), change in the second degree (individual or sectoral change), in-depth change (radical transformation), closed change (predictable process), or open change (innovative process), each type of change being implemented according to objectives and capabilities.[27] Moreover, recurrent ideological reasons/sources of change are listed: they represent *a trend* (numerous reforms materialise because of the inertia of policymakers who adopt reform ideas and models from other leaders or policymakers); they are a consequence of the adopted ideology (the public sector is compelled to undertake a series of predictable legislative and institutional changes, with the purpose of maintaining the functionality of the system); they promote the political environment (corruption in public administration creates the possibility of recalibration of competences and prerogatives both horizontally and vertically, only to favour and empower local or central decision-makers); and lastly, they respond to the desire to solve the problems of society.[28]

To provide an answer to the preexisting economic pressures, the European Commission launched the REFIT (Regulatory Fitness and Performance Programme), whose role is to assist member states on reforms that must be undertaken for clearer and more effective regulation, and for an institutional architecture that is congruent with contemporary practices. The programme has been promoted by inertia, at the request of the European Council which decided, in 2007, that all member states are to reduce administrative costs by 25% by 2012.

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[24] S. P. Osborne and K. Brown, *Managing Change and Innovation in Public Service Organizations* (Routledge 2005) p. 5-6.

[25] A. Matei, *Analiza sistemelor administraţiei publice* (Editura Economică 2003) p. 129.

[26] E. Sztojanov, 'Seizing Opportunities in Times of Change: Entrepreneurial Prospects in Central and Eastern Europe', in *Change Management in a Dynamic Environment: The 5th International Conference of Management and Industrial Engineering* (Editura Niculescu 2011) p. 16.

[27] E. McMillan, *Complexity, Management and the Dynamics of Change: Challenges for Practice* (Routledge 2008) p. 77-79.

[28] W. J. M. Drechsler, *supra* n. 3.

In conclusion, the nature of reforms in public administration is realised by observing the coordination of various change processes aimed at addressing the political, economic, social and technological challenges the systems must deal with. The European Union supports economic recovery by reconfiguring its objectives and by supporting innovative programmes such as REFIT.

5. Case Study: Reform Trends in Public Administration Undertaken in the European Union During the Economic Crisis

Empirical research identifies the trends of modernisation of public administration that are regarded as benchmark examples, examines the level of implementation of the Europe 2020 Strategy by the member states, and assesses relevant examples showing the determination of the Romanian authorities to implement reforms in three general directions: achieving the objectives of the Europe 2020 Strategy; sustaining the implementation of new public management processes; and reducing administrative burdens.

The literature identifies a range of new reference paradigms, such as agencification, reorganising competences, or rendering authorities more accountable.[29] Agencification, or the process specific to the new public management, through which new public organisations are constituted with specific roles and tasks, represents a clear trend in the administrative system of the European Union, with numerous examples to prove this hypothesis, both at the level of the European Union and at the level of the member states. Along with the large number of decentralised or executive agencies of the European Union, a number of new agencies with economic objectives has been set up in recent years. At the concatenation between agencification and simplification lie the processes for setting up new agencies/institutions with a role in supporting the desiderata of simplification and burden reduction for the private sector – for instance, the Agency for Administrative Simplification (Belgium), the Council of Inspection, the Group for Legislative Reforms (Netherlands), the Department for Better Regulation, the National Legislative Control Council (Germany), and so on.

The trend (specific to new public management) to depoliticise and professionalise the civil service in the member states of the European

[29] E. Chiti, 'In the Aftermath of the Crisis: The EU Administrative System between Impediments and Momentum' (EUI Working Paper 2015).

Union has also been felt thoughout the economic crisis, numerous states implementing reforms aimed at overcoming possible obstacles in drawing and implementing public policies by achieving a better professional training of civil servants. One can identify several new reference models for the depoliticisation and professionalisation processes, such as the Brunetta Reform (Italy), which provided a cutback in the response times of the authorities in relation to applications from citizens and an increase in the efficiency of economic processes at government level.[30] A second example is constituted by the reform in Germany through which training departments in each ministry were established,[31] and a third one is illustrated by the Latvian civil servants training programme in using e-government platforms. The list of examples could be extended. To meet the challenges of the economic crisis, the simplification processes have been accentuated in the European Union, member states aspiring to the reduction of bureaucracy by implementing programmes or measures to alleviate the burden felt by the private sector.

The case study identifies a number of new reference models for the administrative burdens reduction processes, such as Law 180/2011 (Italy), which brought a substantial reduction in bureaucratic obligations for citizens and economic agents, and the program called *Burocrazia: diamoci a taglio!* (Italy), establishing a group of 3000 scholars and private sector experts who collaborated on tracing the most important reforms to be undertaken with the purpose of cutting back the administrative burden. Another such example is the *Simplifions Ensemble* programme (France), through which an official consultation website was launched for the civil society and the private sector on the main simplification methods for the bureaucratic burdens. Two other programmes were *Kafka* (Belgium), seeking consultation of the civil society and the private sector with the purpose of eliminating anomalies and irrational procedures within the public sector, and *Simplex* (Portugal), by which entrepreneurs are being consulted on the issue. Numerous other examples could be cited.

Alternatively, many political acts, together with the relevant literature, approach the sustained development of information technology in the public sector as a means to modernise public administration, helping to strengthen the economic balance.[32] The keywords in these documents are

[30] M. Bigoni and E. Deidda Gagliardo, 'Brunetta's Reform Swan Song? An Assessment of Its Success in Local Governments through the Analysis of Its Tools', 9 *European Scientific Journal* (2013) p. 403.
[31] OECD, *Better Regulation in Europe: Germany 2010* (OECD Publishing 2010).
[32] G. Zaman and Z. Goschin, 'Elasticity of Substitution for Production Functions in Romania and other Countries', 2 *Theoretical and Applied Economics* (2007) p. 3.

dematerialisation (reduction in the number of written acts and in archived and physically handled documents), as well as greater attention in dealing with debureaucratisation and transparency augmentation processes in public administration, along with consultation of stakeholders through new technological means.

It is estimated that administrative burdens can be reduced by implementing unique IT regulations that will eliminate cross-border barriers in trade and will create more flexible/fitter trade rules.[33] We can identify a number of new reference models for dematerialisation processes, such as the *E-Gov Programme 2012* (Italy), which represented Italy's action plan for the development of e-governance, the Estonian programme on the introduction of electronic voting, considered a world premiere,[34] and *BundOnline 2005* and *eGovernment 2.0* programmes (Germany), through which over 400 public services were dematerialised.

To sum up, the processes of agencification, simplification, dematerialisation or professionalisation are reform processes specific to the new public management theory, which have been accelerated in the last decade, modernising public administrations of the member states.

Stimulated by the European Commission through the Europe 2020 Strategy with objectives referring to smart, sustainable and inclusive growth, EU member states have made a series of legislative and institutional changes.[35] By examining the degree of implementation of the Strategy by the member states, as well as by tracking their reform processes concerning public finances, the banking sector, social security and education system, internal economic market or public administration, we notice the recurrence of reforms targetting the budget deficit reduction, which can be judged as a closed (predictable) change in the context of the economic crisis. The trend of undergoing austerity measures and reforms in health systems, state pension, and tax collection, represents an in-depth change, regarded as innovative and exemplary (an open change) in a few cases (such as Sweden). Conjointly, one can infer that medium-term objectives set by the Commission are difficult to achieve by the state, around half of them not being able to reach this desideratum.

With reference to the measures of the banking sector reform, the European Union has, during the economic crisis, provided a number of

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[33] L. Matei & A. Matei, *supra* n. 13.

[34] K. Reinsalu, 'Elections in Information Society – the Estonian Case: Local Elections and Elections for the European Parliament in 2009', in *The 18th NISPAcee Annual Conference, 'Public Administration in Times of Crisis', Warsaw, Poland, May 12–14, 2010* (2010) p. 221.

[35] L. Matei & A. Matei, *supra* n. 13.

supranational instruments and mechanisms, which have lifted much of this responsibility off the states and onto the supranational level. Nevertheless, some second-degree changes are observable, by which banks have been recapitalised and monitoring mechanisms have been enhanced (open changes). Social security and the education system register a series of closed changes at a national level, noting the recurrent implementation of mechanisms and instruments in the labour market that aim at employing the unemployed, the implementation of professional training projects, and reforms of the educational system (closed, second-degree changes). The market in the member states is subject to reforms that can be considered consequences of the ideology adopted (new public management), the recurring processes of deregulation and liberalisation of the energy sector (closed second-degree changes). Furthermore, there is a recurrent trend regarding the increase of competitiveness in certain sectors among member states (second-degree change). Public administrations in member states are appreciated for implementing significant reforms regarding the public service, public procurement systems, transparency of decisions, streamlining of procurement and reduction of administrative burdens, all of which illustrate second-degree changes specific to the ideology adopted.

The challenges for the future, reported by the European Commission, point to a number of particular issues brought about by the economic crisis, thus long-term objectives of the strategy representing a rather delicate matter. As regards public finances, despite the progress recorded, it is stressed that the high level of public debt and, in some cases, of tax evasion, generates substantial economic pressure. The Commission has also recommended, on several occasions, the initiation or improvement of reform processes in health care, state pensions, tax collection, and so on. Moreover, there remains a high rate of unemployment, especially among young people, and a limited connection between the educational system and the demands of the labour market. Although significant progress is noted, the Commission has also recommended the further pursuit of public administration reforms in the member states, recurring topics targetting better transparency in public procurement, better absorption of European funds, the fight against corruption and the reduction of administrative burdens.

All in all, there has been a tendency among the EU member states to adopt mostly closed (predictable) second-degree (sectoral) changes to achieve the Europe 2020 Strategy desiderata, in the inertia of the new public management theory or through the dissemination of change processes among member states. Challenges for the future call for the

adoption, within the next five years, of a number of reforms that provide open and in-depth changes.

Conclusion

The theoretical and empirical analyses in the paper generate the prerequisites to delineate a panoramic perspective on the impact of the economic crisis on the administrative systems in the European Union. Thus, to achieve a comprehensive analysis of the impact of the crisis on the administrative systems in the European Union, one should inspect the inputs, the internal change processes, and the outputs of the administrative systems.

One can regard as inputs (new challenges or effects generated by the crisis) the lower living standards, the lack of stability of the private sector, the high debt levels of the states, the high unemployment rates, the debasement of the gross domestic product, the heightening of social tensions and the exacerbation of corruption and tax evasion levels. In order to manage these inputs, the administrative systems are reshaping their institutional architecture (fluctuating between centralisation and decentralisation of powers), imposing austerity measures (wage cuts, reforms in the state pension system, the healthcare system, the social assistance system, and the tax system), downsizing the public sector (through restructuring, outsourcing or privatisation), improving the applicability of educational programmes in the labour market, implementing structural reforms, enhancing e-government processes, promoting the depoliticisation and professionalisation of the civil service, as well as implementing strategies to scale down the administrative burdens. The results (outputs) of these measures refer to the improvements of several processes that are specific to the new public management theory: economic competitiveness, enhancement of stability in the private sector, budgetary expenditure reduction, tax evasion and corruption reduction, budget deficit reduction, debt reduction, social tensions reduction, and economic sustainability expansion.

In light of the aforementioned scrutiny, objectives for future research can be submitted in order to further evaluate: the annual evolution of the processes of reform implementation that are specific to the Europe 2020 Strategy, analysis of the fairness of austerity measures, a study on the possibility to develop a new theory of configuration of the administrative systems, or on the long-term effects of the centralisation process of key decisions.

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16. STRUGGLING TO SUPERVISE - AND DOING SO WITH ALL ITS AUTHORITY: ESMA AND THE MARKET

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Introduction

In the wake of one financial crisis and at the threshold of another – and bearing in mind the repeatable nature of such phenomena – the question which naturally arises is whether the European agencies, which have been created to supervise and stabilise financial zones, are doing a good job. How effective are they against the forces of the market? One agency, in particular, is supposed to be at the very hub of market efficiency and stability – the European Securities and Markets Authority (ESMA). Given that the financial markets are becoming more and more globalised and that individual member states have fewer and fewer effective means of controlling them, the issue of the power of the agency is becoming crucial. Bearing in mind the fact that the European Union is at one and the same time a place for investments and a home of investors, the issues of protection and supervision are a top priority. The European structure of supervision, however, is new and has yet to be fully developed, which raises the question of its effectiveness, especially in view of the fact that recently more and more problems have been piling up.

The aim of this chapter is to take a general look at the way ESMA has been set up and at the problems which it is experiencing in the current factual and political situation. As a comprehensive legal scholarship offering a description of the agency already exists, the choice of ESMA characteristics and the problems encountered will be purely subjective and non-exhaustive in order to throw light on certain financial and economic issues.

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The chapter will be structured as follows: the first section will describe the origins of ESMA, the second section will analyse its growing powers, while the third section will deal with the relevant problems of the financial markets.

1. The nascent structure

ESMA is one of the new agencies of the European Union operating in the financial markets. It has been pointed out that agencies are often created as a response to crises.[1] This was also the case when ESMA was set up. Indeed, ESMA was part of a response to a full-blown crisis. Before the crisis, the EU policy towards the financial markets had been driven by attempts to create a single European financial market, and 'the policies that were meant to build an EU-wide regulatory framework in practice turned out to be a process of continuous deregulation, both at the EU and at the national level.'[2] When the crisis arrived, there was a high level of economic integration among EU member states, but the European economic architecture presented various loopholes.[3]

The crisis has shown just how dangerous these loopholes can be, and has pushed the European Union towards regulating the financial sphere. Moreover, it has demonstrated that supervision has not kept pace with the integration and evolution of the global market, and has created a need for the existing regulatory and supervisory systems to be rebuilt in order to tackle systemic risks better so as to safeguard financial stability.[4] New entities were created following the 'de Larosière Report'.[5] A European System of Financial Supervision (ESFS) was set up, consisting of the European Systemic Risk Board (ESRB) (dealing with macro-stability issues) and of three European Supervisory Authorities (ESAs): a European

[1] E. Vos, 'EU agencies: Features, Framework and Future', 3 *Working Papers, Maastricht Faculty of Law* (2013) p. 1 at p. 3.
[2] A. Botsch, 'Financial market reform in the EU – a trade union perspective', 16 *Transfer* (2010) p. 443 at p. 443.
[3] F. Lupo Pasini, 'Economic Stability and Economic Governance in the Euro Area: What the European Crisis Can Teach on the Limits of Economic Integration', 16 *Journal of International Economic Law* (2013) p. 211 at p. 215.
[4] P. Snowdon and S. Lovegrove, 'The new European supervisory structure', 83 *Compliance Officer Bulletin* (2011) p. 1 at p. 6.
[5] Final report of the High-Level Group on Financial Supervision in the EU, chaired by Jacques de Larosière, presented on 25 February 2009 (the 'de Larosière Report'), available at:
http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf.

Banking Authority (EBA), a European Securities and Markets Authority (ESMA), and a European Insurance and Occupational Pensions Authority (EIOPA). The new bodies were established as from January 2011.[6]

The idea behind ESMA was to have a European 'watchdog' that would resemble the US Securities and Exchange Commission. However, a more elaborate body had to be created, as the structure of the market is different in the European Union owing *inter alia* to divergences between national markets (including differentiated concentrations of trading and risk), and also the fact that national authorities operate at the national level. While discussing the options that were available for the creation of the agency, two possibilities were given serious consideration: the first was to create an agency with centralised powers, and the second was to establish an agency that would mainly enhance cooperation between national authorities (in line with the 'de Larosière Report').[7] The latter option was chosen. The reasons for this decision were diverse. According to one of the arguments which were put forward against the first option was that a pan-European agency would be detached from the market reality of individual states, while the functioning cost would be too high.[8] Member states were also unenthusiastic towards the idea of surrendering their powers to a pan-European agency.

Following the establishment of the three agencies suggested by the 'de Larosière Report', various regulatory changes were implemented and are still under way. Within a short period of time, the European Union regulatory landscape has changed almost beyond recognition.[9]

ESMA has limited powers, and it has also been acknowledged that its powers to make binding decisions may be called into question.[10] The Regulation establishing ESMA[11] was quite innocuous, with emphasis on

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[6] C. Di Noia and M. Gargantini, 'Unleashing the European Securities and Markets Authority: Governance and Accountability After the ECJ Decision on the Short Selling Regulation (Case C-270/12)', 15 *European Business Organization Law Review* (2014) p. 1 at p. 4.

[7] P. Snowdon and S. Lovegrove, *supra* n. 4, p. 12.

[8] *Ibid.* p. 13.

[9] N. Moloney, 'Current developments – European Union Law', 62 *International & Comparative Law Quarterly* (2013) p. 955 at p. 956.

[10] For arguments *see* H. C. H. Hofmann & A. Morini, 'Constitutional Aspects of the Pluralisation of the EU Executive through "Agencification"', 1 *Law Working Paper Series* (2012) p. 1 at p. 13.

[11] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, *OJ* [2010] L 331/84, 15.12.2010.

various issues concerning enhanced cooperation and harmonisation. It was, however, the first step towards the creation of a centralised pan-European body. If, or rather when, new rules were enacted granting more powers to ESMA, a fully-fledged agency would be able to take over the tasks assigned to it. The first step towards centralisation and the setting up of a hierarchical structure has already been taken. ESMA could not have more powers, since some member states were decidedly opposed to the idea of transferring any more of their powers to ESMA. However, the existing restrictions of case law[12] and the lack of any legal basis seem to be a sufficient barrier that would shield them against such an 'undesirable' outcome.

2. The nascent powers

Pursuant to Article 1(5) of the ESMA Regulation,[13] the objective of the Authority is 'to protect the public interest by contributing to the short, medium and long-term stability and effectiveness of the financial system, for the Union economy, its citizens and businesses'. ESMA is supposed to act within the powers set out in the ESMA Regulation and within the scope of existing directives and regulations, as well as within the powers conferred by 'any further legally binding Union act which confers tasks on the Authority'.[14]

ESMA has direct supervisory powers over credit rating agencies and trade repositories; indeed, ESMA is responsible for authorising and supervising credit rating agencies in the European Union.[15] ESMA can also issue non-binding opinions, guidelines and recommendations. Guidelines and recommendations are addressed to national supervisory authorities and financial market participants so as to establish consistent, efficient and effective supervisory practices and to ensure the common,

[12] *See* H. Marjosola, 'Bridging the Constitutional Gap in EU Executive Rule-Making: The Court of Justice Approves Legislative Conferral of Intervention Powers to European Securities Markets Authority: Court of Justice of the European Union (Grand Chamber) Judgment of 22 January 2014, Case C-270/12, *UK* v *Parliament and Council (Grand Chamber)*', 10 *European Constitutional Law Review* (2014) p. 500.
[13] *Supra* n. 11.
[14] P. Snowdon and S. Lovegrove, *supra* n. 4, p. 26.
[15] *See* also C. C. Verschoor, 'Oversight Of Credit Raters Still Lacks Teeth', *Strategic Finance* (2015) p. 17 at p. 17.

uniform and consistent application of EU law.[16] ESMA also assists the European Commission in formulating and adopting a single rulebook applicable to all EU financial institutions. For this purpose, ESMA is provided with the power to participate in procedures leading to the adoption of binding rules, as it has the task of developing draft regulatory and implementing technical standards.[17] Moreover, ESMA monitors and assesses market developments and can undertake economic analyses of the market.

The idea behind the creation of agencies is to have a competent authority, specialising in a certain field, which would monitor and tackle more effectively than the European Commission the problem of non-implementation, and react quickly to changing circumstances. Agencies are generally viewed as apolitical, flexible and professional entities. However, a problem of the scope and legality of certain powers of agencies has arisen and steadily gained ground. In 2012, the possibility of conferral of interventional powers to ESMA was questioned.[18] A clarification that came in the ECJ judgment of 22 January 2014 (Grand Chamber) in the Case C-270/12 *UK* v *Parliament and Council (Short selling)*[19] changed the institutional balance in the EU.

There have been diverse opinions about the decision of the Court. Without going into too much detail, two different aspects of the decision deserve our attention. The first one is quite simply the necessity of such an outcome, while the second one is the rather questionable legal basis for this particular solution. As far as the first issue is concerned – i.e. the apparent necessity of such a decision –, the decision had a tremendous impact on the European Union, as – in the apt words of Heikki Marjosola – it constituted an act of 'bridging the constitutional gap in the EU executive rule making'.[20] The decision is to a certain extent also the result of the political failure of the EU to establish a system of supervision that

[16] M. van Rijsbergen, 'On the Enforceability of EU Agencies' Soft Law at the National Level: The Case of the European Securities and Markets Authority', 10 *Utrecht Law Review* (2014) p. 116 at 120. Although guidelines and recommendations are not legally binding, the competent authorities and financial institutions 'shall make every effort to comply with those guidelines and recommendations', and have to explain the reasons for their non-compliance.
[17] *Ibid.* p. 120.
[18] *Supra* n. 12, p. 500.
[19] ECJ (Grand Chamber) 22 January 2014, Case C-270/12, *United Kingdom of Great Britain and Northern Ireland* v *European Parliament and Council of the European Union*.
[20] H. Marjosola, *supra* n. 12, p. 500.

would go hand in hand with market integration. The aforementioned decision was taken in a climate of fear, because if it had produced a different outcome 'it would have dealt a serious blow to the empowerment of agencies across a host of policy areas'.[21] As has been noted, this would also have brought the future of the European Banking Union into question.[22] As far as the second issue is concerned, the basis for such an outcome was rather feeble. What happened was quite aptly described by Carl Fredrik Bergström, who remarked that what the Court had opted for 'was to invent an invisible provision which could fill the hole in the Treaty'.[23]

As has also been noted, 'although it remains to be seen what use ESMA will make of its new powers of intervention in practice, it seems fair to suggest it will want to embrace its enhanced role going forward.'[24] The move to centralise powers in ESMA is also evidenced by other initiatives and regulations that enhance ESMA's role.[25]

3. The struggle

Having described the origins and some of the powers of ESMA, it is worth confronting them with the problems that – in theory as well as in practice – ESMA has to face. To begin with, financial markets are very difficult to control and regulate.[26] This is because states or their national unions have a limited impact on the globalised market. Moreover, in the European Union, unification and globalisation go hand in hand – and both of them increase the volatility of the market.[27] Moreover, the quite unique need to coordinate and supervise the actions of national authorities does not make things easier. The cooperation and 'network idea' is beneficial – especially in the case of cooperating states. However, it cannot hold a

[21] C. F. Bergström, 'Shaping the new system for delegation of powers to EU agencies: *United Kingdom* v. *European Parliament and Council (Short selling)*', 52 *Common Market Law Review* (2015) p. 219 at p. 225, 226.
[22] E. Howell, 'The European Court of Justice: Selling Us Short?', 11 *European Company and Financial Law Review* (2014) p. 454 at p. 468.
[23] *Supra* n. 21, p. 236.
[24] E. Howell, *supra* n. 22, p. 476-477.
[25] *Ibid.* p. 465.
[26] J. J. Wajszczuk, 'Regulatorzy wobec globalizacji rynków finansowych', 4 *Bank i Kredyt* (2001) p. 31; *see* also R. B. Thompson, 'Financial Regulation's Architecture within International Economic Law', 17 *Journal of International Economic Law* (2014) p. 807 *passim.*
[27] On unified financial markets, *see* H. Marjosola, *supra* n. 12, p. 526.

candle to centralised supervision, where unification of the market is in progress. There is also a current need to communicate in a foreign language, owing to the fact that different languages are used in the work of the national supervisory authorities. Interpretations and translations can therefore be the cause of misunderstandings and confusion.

Secondly, the new regulations will not necessarily improve the situation. In some instances there are serious doubts as to whether a given regulation will have a beneficial outcome or will actually work in the manner expected (e.g. the 'short selling regulation').[28] One must also remember that the financial regulations are relatively new and have for the most part not been tested. Even civil law institutions, which have been tested for hundreds of years, are still not perfect. In the case of the financial markets, there are provisions that have been created from scratch in a relatively short period of time. It is worth noting that credit rating agencies have been incorporated in the US law, and their regulation to date has to a certain extent led to the formation of an oligopoly in this sphere, with the result that their role in at least one crisis has been far from negligible.[29] Another less pivotal factor is that regulations are very complicated and becoming increasingly more so. There is a high probability that for the most part they may be unintelligible to a growing number of people. The more regulations exist and the more complicated they are, the more regulatory gaps there will be, as well as provisions that are difficult to interpret. As a result, there will be a certain zone of borderline operations and speculations. It has also been noted that 'introducing harmonized rules and regulations in a cross-jurisdictional context with different initial conditions of the single States may in fact not lead to increased harmonization, but rather to an unintentional increase in the divergence of single States.'[30] The complexity of rules will certainly not make things easier.

Another general but important consideration is that the law is always one step behind reality: first, there is a social or economic phenomenon, and then – some time later – comes a regulation. This is particularly noticeable in the financial markets. There are new phenomena which influence financial zones: crowdfunding, cryptocurrencies, and other novelties that are constantly emerging. The problem is that even if one

[28] E. Howell, *supra* n. 22, p. 458, 459.
[29] Y. Bayar, 'Recent Financial Crises and Regulations on the Credit Rating Agencies', 5 *Research in World Economy* (2014) p. 49 at p. 50.
[30] H.-J. Böcking, M. Gros and D. Worret, 'Enforcement of accounting standards: how effective is the German two-tier system in detecting earnings management?', 9 *Review of Managerial Science* (2015) p. 431 at p. 436, 437.

manages to deal with the risks associated with a new phenomenon in one part of the market, they reappear in some other corner and flourish. ESMA, as mentioned above, keeps a close watch on new phenomena, but the difference between keeping a close watch and actually having them under control is considerable, especially in view of the fact that the time which elapses between the initiative to pass a regulation and the passing of an act is quite long (and partial actions on the part of national authorities may not suffice).

Another consideration is that 'there are a multitude of prediction and analysis models that are becoming increasingly more advanced, but they have shown a limited capacity to foresee financial and monetary crises.'[31] Simply put: one cannot know what will happen and when. Moreover, in the scenario of integration, unification and globalisation, various kinds of market participant behaviours leading to financial turbulence can gain strength.[32] A particularly important phenomenon is that of herd behaviour, i.e. the rational or irrational following of the example of a group of investors. Another important phenomenon is that of noise traders, who instead of relying on fundamental data and analysis, are driven to invest by factors such as sentiment or informational noise associated with a particular area or project. An exacerbating factor is the existence of an increasing dependence on, and an increasing shift of power towards, private information-supplying entities (rating agencies, financial media, journals etc.).[33] This oligopoly gives them a strong position in the market, and so far has not been effectively countered.[34]

Another problem associated with the entities on the markets – rating agencies, investors, and financial newspapers – is that, although many of them exert a very great influence on the markets, none of them take into account the public (or social) interest. Also, big players can – even unintentionally – cause problems. The emergence of big, international or cross-border players has made it difficult for regulators to maintain a balance. Moreover, private entities, being more effective and flexible, can react more quickly to the changing circumstances. There is also much to be gained within the sphere of the financial markets. Recent scandals have

[31] N. San-Martín-Albizuri and A. Rodríguez-Castellanos, 'Country risk index and Sovereign ratings: do they foresee financial crises?', 9 *Journal of Risk Model Validation* (2015) p. 33.
[32] J. Glanc and P. Osiewacz, 'The second-generation informational problem in the financial markets', 14 *Ekonomia i Prawo (Economics and Law)* (2015) p. 341.
[33] *Ibid.*
[34] For the case of rating agencies, *see* Y. Bayar, *supra* n. 29, *passim.*

shown that there are people who are quite prepared to take risks for financial gain.

Credit rating agencies are an example of the problem with regulation and supervision. Legislative rules have been established to *inter alia* reduce over-reliance on credit ratings, increase their accountability, and encourage the entrance of more players into the credit rating market.[35] In the literature, the overview of ESMA actions with respect to rating agencies demonstrates that they are insufficient: a search of news databases in 2015 found no record of any prosecution for violations. It was therefore concluded that ESMA's enforcement actions were unsatisfactory and that the agency lacked teeth – especially in comparison with parallel findings of the SEC.[36] Doubts were also raised – and quite rightly – over the effectiveness of the new regulations in tackling the problem of credit rating agencies in general, as the changes were not likely to bring about any short-term increase in competition or to eliminate conflicts of interests completely.[37] In particular, the existence of an oligopoly in the credit rating agency zone should not be ignored on account of its impact on the market.

In the case of ESMA, there are already implementation problems, problems with reacting to guidelines and recommendations, as well as partially concealed animosity on the part of national governments and supervisors towards the proposed changes. Moreover, ESMA supervision outcomes – as in the case of rating agencies – have raised doubts. This is not to say that what ESMA does is meaningless – on the contrary, building the regulatory scheme and enhancing harmonisation is a good thing. Under normal circumstances, in which there is regular functioning of the market, ESMA and the network are able to withstand and minimise financial turbulence. However, in cases of serious financial instability, its effectiveness in protecting integrating markets can be called into question. The process of harmonisation is in its early stages and ESMA's powers have yet to be well established. In addition, the hierarchic model that is creeping into the supervisory model and the network is too weak, and in the case of a crisis could prove to be ineffective.

Another problem is that there is a serious flaw in the framework of financial integration[38] and, to use a slightly pretentious description, there is

[35] C. C. Verschoor, *supra* n. 15, p. 17.
[36] *Ibid.* p. 17.
[37] Y. Bayar, *supra* n. 29, p. 56.
[38] V. Chick and Sh. C. Dow, 'On Causes And Outcomes Of The European Crisis: Ideas, Institutions, And Reality', 31 *Contributions To Political Economy* (2012) p. 51 *passim*.

a failure in neo-liberal conceptions of the market. Although the risk associated with securities is considered to be less dangerous, risk and default in other areas could affect this sphere in a negative way. This is not to say that one should do nothing and stay put, but rather that the pressure on further integration should be eased. To begin with, firm regulatory frames should be set up and tested. Only then one would have solid foundations for any other moves. The current state of the markets is a strong argument against further financial integration. In times of crises it automatically endangers all the markets, leaving them with no satisfactory recourse. And this is where the paradox lies: to ensure financial stability, ESMA – acting against the goal of enhanced European integration – should, for the time being at least, postpone the goal of financial integration.

At this point, one more general remark must be made: the peculiarity of the discussion about the financial markets is that it revolves around their *status quo*. What this means is that, although there are many proposals for regulation, very rarely does the discussion touch on reshaping the core of the markets themselves. As a result, one might take as given existing trading models, freedoms, and even pathologies, and only then will he proceed to formulate regulations. Therefore, the outcome is a mere calming of the surface of market reality. In other words, the reforms are only superficial.

Financial markets are an entirely human construct. This, however, does not mean that they are good or beneficial *per se*. Weapons of mass destruction are also a human invention. The irregularities and pathologies of the market – and in particular the phenomenon of financialisation and the informational problem – are alarming because they are an indication that the goal of raising funds for the real economy and facilitating financing has been lost.[39] The financial market nowadays has begun to live for the sake of the financial market itself – to the detriment of small business and ordinary citizens – taking whole societies hostages. Seen in this light, ESMA is a crisis management measure – it does not solve the underlying problems, but actually solidifies the existing structure of the market. If this problem is not addressed, however, nothing can guarantee the stability and orderly functioning of the market.

The best advice that has been given so far is to opt for a new financial landscape, whose characteristics can be summed up as 'all starting with the letter S: smaller in size, slower in speed, simpler in structure, separated functionally, less short-term oriented, and, resulting from this, more

[39] A. Botsch, *supra* n. 2, p. 445-446.

stable'.[40] ESMA may be in a good position to put forward propositions and to promote them if it so wishes. In this context, its great strength lies in its highly professional staff and its direct contact with the markets and their problems.

Conclusion

On the whole, the structure of ESMA has been crafted correctly. Given the factual circumstances of its creation, the option chosen was the only viable one. It is to be highly commended, not only for the fact that its staff is highly specialised, but also for the fact that consultations with market participants do take place, and for the fact that it tries to stay in touch with market reality. However, the basis for granting ESMA far-reaching powers – as also their confirmation by the Court – does raise doubts. This is not to say that ESMA does not need powers of intervention, or that the powers it has been granted are unreasonable. Yet again, however, the Court has given a very far-reaching interpretation, discovering as yet undiscovered (and even undreamt of) realities. Matters of this calibre are too serious to be dealt with in such a manner. It should not take the place of a properly formulated legal basis. A feeble solution makes the whole construct a house of cards, which can hardly be capable of dealing with serious financial turbulences. Keeping in mind political constraints, however, the pressing question is rather: if there is no will to pass power to the EU level in the financial domain, should further financial integration be encouraged? Given the existing vulnerabilities and drawbacks of the financial markets, the whole thing smacks of an experiment, and a very big one at that. It must be said that at this moment in time, given the lack of stable centralised powers and the absence of necessary reforms, we have a paradoxical situation, in which ESMA needs to temporarily postpone the idea of further financial integration in order to ensure stability. Moreover, ESMA and the whole structure of supervision are more of a crisis management measure – which does not solve the underlying problems, but actually solidifies the existing structure of the market, which in itself generates problems. It has, however, the potential to become a centre for discussion and an initiator of change.

[40] *Ibid.* p. 446.

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17. KEYNOTE SPEECH: TACKLING THE FINANCIAL CRISIS THROUGH NEW FORMS OF GOVERNANCE

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Dear colleagues, ladies and gentlemen,

Thank you very much for the invitation. I am very happy to be able to address such a qualified audience. What I will try to do in, hopefully, less than half an hour, is to show how the specific means the EU has used in order to tackle the financial crisis may have an impact on the more general issue of EU governance. I shall be focusing on EU Agencies. I will use the example of the European Supervisory Authorities (ESAs) to show how the general landscape of Agency creation in the EU may have changed.

In order to give you a very broad background, I would like to recall that the use of Agencies is one of the means of the so-called 'new governance' in the EU. Broadly speaking, we can present the regulatory techniques used by the EU in three large categories. First, there is what used to be called 'the classic Community method', now the classic EU method, through Directives and Regulations leading to some degree of harmonisation. Then, there is the so-called 'new approach', which is not new anymore because it started off in 1985, but still this is what it is called. It is based on standardisation and mutual recognition, but typically still leads to some kind of 'hard law', while the EU Institutions still play an important role. And then, since the 2000s, there has been the so-called 'new governance'. For lack of a better definition, I shall say that this 'new governance' technique involves many actors, which were not foreseen in the Treaties but have become relevant in time, and it involves several procedures, which were not foreseen in the Treaties, such as self-regulation, the creation of policy networks and – among others – the creation of Agencies. Agencies will be my topic today.

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Why do we have Agencies in the EU? A first and very short answer is because they have been used for a long time and with quite a degree of success in the US. But this is not a very satisfactory answer. A more elaborate answer is that, as EU law evolved and the policy areas in which the EU has been active have increased, the need has emerged to work together in different and quite technical policy areas. What are the options for the EU that wants to put into place some coordination between member states in such areas? Choice number one is to give powers to the Commission. This has been done on several occasions, but you all know very well that member states are quite hostile to this option, because they tend to dislike the Brussels bureaucracy. Option number two is to expand the scope of competence of an Agency already in existence. I will come back to that. Option number three is that you make an intergovernmental arrangement, in the way the EFSM (European Financial Stability Mechanism) was created. A further alternative is that you build an expert network, such as the various 'Lamfalussy committees';[1] but, as the experience of the financial crisis has shown, the capacity of such networks may be limited. Another, similar but different, solution is to have national regulatory authorities work in a network, as is the case with the European Competition Network. The final alternative is to allow the private sector to come in and cover the need for coordination, through the creation of private standards or labels.

As opposed to all these options, Agencies do present several advantages, such as independence and avoidance of conflict of interests and the opportunity of tackling issues of a highly technical nature, in collaboration with social and other partners. The main advantage is that Agencies develop specific knowledge and permanent capacity on issues which are technical, scientific, sensible or complex. Agencies can be more or less controlled by member states or by the Commission: as we shall see, different Agencies are closer to one or the other (to the member states or the Commission). But there is capacity building and gathering of knowledge, and this is a good enough reason for opting for the creation of Agencies. And in fact, Agencies have 'mushroomed' in these last years, although the EU has started experimenting with them quite early.

The first Agency to be created was in 1975, the CEDEFOP (Centre de Formation Professionnelle), seated here in Thessaloniki, and then another

[1] *See* Final Report of the Committee of Wise Men on the Regulation of European Securities Markets, Chairman: Alexandre LAMFALUSSY, Brussels 15.02.2001, available at:
http://ec.europa.eu/finance/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf, visited 5 May 2015.

Agency in the same year, the EURO-FOUNDATION for training. Then, there are a few more Agencies in the 1990s, such as the European Environmental Agency (EEA), the European Training Foundation (ETF), the European Medicines Agency (EMEA) and many others – and I give you some indicative names because there are plenty of acronyms.

But then the real boom – and this is the second stage in Agency creation – comes in the 2000s, when we really have a plethora of Agencies being set up. During this period, a multitude of Agencies have been created in the broader Internal Market policies in the field of health, safety and security; the European Food Safety Agency (EFSA), being one of the most prominent examples, was created as a response to the mad-cow disease, together with the European Chemicals Agency (ECHA), which is responsible for managing the REACH Regulation.[2]

There are also Agencies in the field of transport, the most important ones being the European Aviation Security Agency (EASA), and the European Maritime Security Agency (EMSA). The latter was created as a response to another tragedy – the enormous environmental damage created by the *Prestige*, which sunk off the Norman coast and prompted the EU to come up with the creation of an Agency. The European Railway Agency (ERA) has been created as part of the successive rail liberalisation packages in order to replace national security standards and oversee national operators. There is also the ENISA, the European Network Security Agency. Other Agencies have been created in the broader area of fundamental rights, such as the Fundamental Rights Agency (FRA) and the European Institute for Gender Equality (EIGE). And we should not forget all these Agencies, quite well known in Greece, related to the so called 'Title IV' of the TFEU, which covers the Area of Freedom, Security and Justice (AFSJ): the FRONTEX, the EUROPOL, the EUROJUST, and lately the European Asylum Support Office (EASO). So, we witness a very important wave of Agency creation in the 2000s.

Then, in 2010 the third wave started. This basically consists of the institutionalisation of pre-existing networks or bodies, called under different names, and their transformation into Agencies. Actually this happened not only for the ESAs – which I am going to analyse in a while –

[2] Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, *OJ* L [2006] 396/1, 30.12.2006.

but also in other areas, notably in the area of electronic communications and in the area of electricity and gas.

Below follows a table with the main Agencies (up to date May 2016, source: my own compilation), their acronyms, what they stand for, and where they are seated.

Table 1

Name	Seat
CdT (Translation Centre for the Bodies of the European Union)	Luxembourg (LU)
CEDEFOP (European Centre for the Development of Vocational Training)	Thessaloniki (EL)
CEPOL (European Police College)	Budapest (HU) since 30/09/14; before, Bramshill (UK)
EFCA (ex-CFCA) European Fisheries Control Agency	Vigo (ES)
CPVO (Community Plant Variety Office)	Angers (FR)
EAR (European Agency for Reconstruction)	ABOLISHED
EASA (European Aviation Safety Agency)	Köln (DE)
ECDC (European Centre for Disease Prevention and Control)	Stockholm (SE)
ECHA (European Chemicals Agency)	Helsinki (FI)
EEA (European Environment Agency)	Copenhagen (DK)
EFSA (European Food Safety Authority)	Parma (IT)
EIGE (European Institute for Gender Equality)	Vilnius (LT)
EMCDDA (European Monitoring Centre for Drugs and Drug Addiction)	Lisbon (PT)
EMA (ex-EMEA) European Medicines Agency	London (UK)
EMSA (European Maritime Safety Agency)	Lisbon (PT)
ENISA (European Union Agency for Network and Information Security)	Heraklion (EL)
ERA (European Railway Agency)	Lille-Valenciennes (FR)
ETF (European Training Foundation)	Torino (IT)
EU-OSHA (European Agency for Safety and Health at Work)	Bilbao (ES)
EUROFOUND (European Foundation for the Improvement of Living and Working Conditions)	Dublin (IE)
EUROJUST (The European Union's Judicial Cooperation Unit)	The Hague (NTH)
EUROPOL (European Police Office)	The Hague (NTH)
FRA (European Union Agency for Fundamental Rights)	Vienna (AT)

FRONTEX (European Agency for the Management of Operational Cooperation at the External Borders)	Warsaw (PO)
GSA (European GNSS Agency)	Prague (CZ)
EUIPO (EU Intellectual Property Office) since 23/3/16, Ex-**OHIM** (Office for Harmonisation in the Internal Market)	Alicante (ES)
SRB (Single Resolution Board)	Brussels (BE)
EIOPA (European Insurance and Occupational Pensions Authority)	Frankfurt (DE)
ESMA (European Securities and Markets Authority)	Paris (FR)
EBA (European Banking Authority)	London (UK)
EASO (European Asylum Support Office)	Valetta (MT)
eu-LISA (European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice)	Tallinn (EE)
ACER (Agency for the Cooperation of Energy Regulators)	Ljubljana (SI)
BEREC (Body of European Regulators for Electronic Communications)	Riga (LV)

Source: Author

And there is a second table (up to date May 2016, by my own efforts, and hence its incompleteness), which shows that Agencies have been created at different moments in time, are seated in different places – sometimes in capitals but very often also in smaller cities, such as Thessaloniki, Heraklion, Parma, Bilbao, and so on. Their budgets vary greatly, from 9 million to 183 million euros, and their staffs vary from 30-40 people to several hundreds. The way they are funded may also differ, because some are funded directly from the budget of the EU, while others are self-funded, such as the EU Intellectual Property Office (EUIPO, previously the Office for Harmonization in the Internal Market OHMI), which is responsible for the European trade-mark. It is evident that there are different kinds of Agencies with many kinds of competencies, different structures and so on.

Table 2

Agency	Founded	Parent DG	Staff	Budget (m Euros)	EU contribution
CdT	1994	DGT (SG)	200	46	0%
CEDEFOP	1975	EAC (EMPL)	98	18	94%
CEPOL	2005	JLS (HOME)	30	8,341	100%
EFCA	2005	MARE	56		78%
CPVO	1995	SANCO (SANTE)	45	13,254	0%
EAR	2002	ELARG	ABOLISHED		
EASA	2002	TREN (MOVE)	676	176,479	35%
ECDC	2005	SANCO (SANTE)	290	> 50	98%
ECHA	2007	ENTR (GROW)	600	8,198	95%
EEA	1994	ENV	130	40	86%
EFSA	2002	SANCO (SANTE)		65,9	100%
EIGE	2007	EMPL		52,5	100%
EMCDDA	1993	JLS (HOME)	51-200		93%
EMA	1995	ENTR (SANTE)	>4.000		25%
EMSA	2002	TREN (MOVE)	> 200		100%
ENISA	2004	INFSO (DIGIT)	65	32	100%
ERA	2004	TREN (MOVE)	51-200		100%
ETF	1994	EMPL	130		96%
EU-OSHA	1994	EMPL	67		93%
EUROFOUND	1975	EMPL	99		100%
EUROJUST	2002	JLS (HOME)	240		100%
EUROPOL	1999	JLS (HOME)	>900	100,242	84.8%
FRA	2007	JLS (HOME)	105	21	100%

FRONTEX	2004	JLS (HOME)	165	114,053	97%
GSA	2004	TREN (MOVE)	121	26,840	100%
EUIPO (OHIM)	1994	MARKT (GROW)	501-1000		0%
SRB	2015	ECFIN (FISMA)	300(2017)		
EIOPA	2011	ECFIN (FISMA)		21,762	27%
ESMA	2011	ECFIN (FISMA)	160	28.3	
EBA	2011	ECFIN (FISMA)	154	31,515	27%
EASO	2011	JLS (HOME)	80	19,438	97%
eu-LISA	2012	(DIGIT)	137	5,250	
ACER	2010	(ENER)	77-93	16,558	99%
BEREC	2010	(CNECT)	27	3,498	

Source: Author

There are different types of classifications of the various Agencies. If you look at the official Europa web page, you will find a first classification, whereby they first put all together the so-called 'decentralised agencies', which are the ones I have presented so far.[3] Then, the second category consists of the 'executive agencies'; these are attached to specific EU-funded programmes. For instance, the Jean Monnet Programme, together with the Erasmus+ Programme, is run by the Executive Agency for Culture, Education, and Audiovisual (EACEA). As soon as these programs finish, the relevant Agency will become obsolete and will cease to exist. Next to the executive Agencies (third category) there are two EURATOM Agencies, and a fourth category on its own is formed by the European Institute of Innovation and Technology (EIT). This official classification, useful as it is, does not say much about what these Agencies actually do and the way they operate.

There is another classification on the basis of what they do precisely, which is followed *inter alia* by G. de Búrca[4] and Ramboll consulting. In

[3] *See* https://europa.eu/european-union/about-eu/agencies/decentralised-agencies_en.
[4] G. De Búrca, 'New Modes of Governance and the Protection of Human Rights', in P. Alston & O. De Schutter (eds.), *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (Hart Publishing 2005) p. 25 at p. 26-27.

this respect we can distinguish four functions. First, the collection of information, the provision of advice and of soft coordination: e.g. the CEDEFOP, or the College of Police (CEPOL), or the Fundamental Rights Agency (FRA). Second, the hard coordination and operational capacity, FRONTEX being the typical example, EUROPOL and EUROJUST. Third, the submission of individual applications, e.g. before the EU Trade-Mark Agency and the Aviation Security Agency. Fourth, the supervision – and more, as we shall see; here the ESAs may be included (for which see below).

There is a third classification, depending on the role Agencies occupy in the policy process. This distinguishes four phases in the policy process, i.e. a) agenda setting, b) policy formulation, c) policy decision, and d) policy implementation. Most agencies would be active in b) or d). As we shall see, however, the European Supervisory Authorities are active in all four stages of policy of the political process. There are yet more classifications, but I am not going to go through them.

Hence, Agencies work in different ways. Some of them are connected in their everyday life and work mostly with the Commission and Parliament. Others work essentially with the member states, as is the case with FRONTEX and EUROPOL. Others work with industry, as is the case with the Office for Harmonization in the Internal Market (OHMI). And then, a novelty introduced with the ESAs is that some can work with another Institution or Agency. For example, the ESAs work with the European Central Bank (ECB) and with other Agencies.

A final point, on which I am not going to spend time, is that different Agencies – depending on their subject matter – have different counterparts (national agencies, international agencies, NGOs, social partners, and so on).

One question needs to be raised in relation to all these Agencies: Are they any good? Have they been efficient so far? How can they be evaluated? Here the answer really depends on the eye of the beholder: if one reads the official EU literature, one gets the impression that Agencies have been a great success. Political scientists, on the other hand, typically reasoning at a more long-term level, are more skeptical. National Parliaments may be openly hostile; the UK's House of Commons' 2005-2006 Report on the creation of the ESMA, one of the best endowed EU Agencies, may be revealing in this respect:

'We have been concerned by the evidence we have received of the **chaos** surrounding the establishment of the European Aviation Safety Agency (EASA). It is clear that this organisation is not yet ready to do its job, and it is vital that the UK transfers no further responsibilities to it until

it has shown itself capable of undertaking its existing responsibilities. The brief history of the founding, planning and implementation of EASA inspires a feeling of despondency about the ability of those minded to make transnational European agencies work either effectively or efficiently. The Commission must examine closely the lamentable history of this half-baked, halfcock project, and apply the lessons learnt to future endeavours. We also hope it will seek to provide evidence of its competence by righting the situation of EASA promptly.'[5]

This is hardly a tactful statement, especially by British standards! Such reactions by National Parliaments, however, may be based on the Agency's (lack of) efficiency, but may also be underpinned by self-interest: Agencies take away powers from national decision-making bodies, typically (connected to) the national Parliaments.

One of the issues raised by those who criticise Agencies is that each one is different from every other one: there is no coherence, no single model for the creation and management of Agencies, and this is a problem for transparency and efficiency. In order to face these criticisms, the Commission has come up with a very important Communication in 2008,[6] and then with a long series of working documents, in the form of very detailed *fiches*, each one dealing with every aspect of Agencies' lives: how they should be created, where they should be seated, how they would be truly governed, to whom they should be accountable, how they should be named, how they should be communicated. All these *fiches* were summed up in a joint statement, in 2012, by the European Parliament, the Council and the Commission, on decentralised Agencies.[7] It is against this background that we should evaluate the creation of the ESAs.

The ESAs, as I said, came to be what they are now through their transformation, since they preexisted as bodies, as committees, created under the Lamfalussy Process, and then in 2010 were turned into fully-fledged agencies. These three new Agencies, the European Banking

[5] UK House of Commons Select Committee on Transport, **'**The Work of the Civil Aviation Authority (Thirteenth Report - 2005-2006)', HC 809, available at: http://www.publications.parliament.uk/pa/cm200506/cmselect/cmtran/809/80911.htm, visited 5 May 2015.

[6] European Commission, Communication to the European Parliament and the Council 'European agencies – The way forward', COM(2008)135 final, Brussels, 11.03.2008.

[7] 'Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralized agencies', available at: http://europa.eu/agencies/documents/joint_statement_and_common_approach_2012_en.pdf, visited 5 May 2015.

Authority (EBA),[8] the European Insurance and Occupational Pensions Authority (EIOPA),[9] and the European Securities and Markets Authority (ESMA),[10] are together responsible for the short-term management and governance in their respective areas, aided by their cousin, the European Systemic Risk Board (ESRB),[11] which is aimed at assuring stability at the 'macro' level. All these together are the pillars of the so-called Single Supervision Mechanism, itself the precondition for the Single Resolution Mechanism. The Single Resolution Mechanism, which was voted in July 2014,[12] is the way in which the EU will be able to save failed banks; it is also the political prerequisite for the activation of the European Stability Mechanism, which will only be activated once the other two 'single' (as opposed to national, which have proven inefficient) mechanisms fail.

A first observation to be made in relation to the ESAs is that despite the fact that they were created in 2010, at the time when the Commission was trying to rationalise Agency creation and was publishing the above-mentioned working papers, which eventually led to the Joint Declaration, ESAs do not even bear the name 'Agency' (as the technical *fiches* would want them to), and they are not governed in the typical way described in the Joint Statement: on top of the (generally foreseen) management body and director, the ESAs also have a board of supervisors (representatives of

[8] Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, *OJ* [2010] L 331/12, 15.12.2010.

[9] Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC, *OJ* [2010] L 331/48, 15.12.2010.

[10] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, *OJ* [2010] L 331/84, 15.12.2010.

[11] Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board, *OJ* [2010] L 331/1, 15.12.2010.

[12] Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, *OJ* [2014] L 225/1, 30.7.2014.

the member states' corresponding authorities, thus creating a strong intergovernmental element) and a chairperson common to all three Authorities (a more federative element) assuring coherence between them. Not only are ESAs atypical through their name and their governance bodies, but they also have a common Joint Committee, thus (further) putting the emphasis on coordination.

Most importantly, however, what makes them unique is not the way they are governed, because, as already mentioned, there are many variances on how to govern an Agency. What makes them distinct is the powers they have. Let me remind here that all three Agencies have been created through parallel Regulations, which follow the same drafting pattern, in a way that both the structure of the Regulations and the powers conferred to all three Agencies are very similar (and article numbers fully correspond).[13]

What are ESA's powers? First of all, they can draw *regulatory technical standards*, which will eventually be adopted in the form of Directives or Regulations. Although formally adopted by the Commission, its powers are quite limited: it can basically adopt what it is being presented with, or if it wishes to change it, the relevant Commissioner has to go together with the Chair of the Supervisory Authorities before the European Parliament and/or the Council and explain the sense of its modifications. In areas as technical as those covered by the ESAs, this is unlikely to constitute a generalised practice. Second, in order to implement the regulatory technical standards thus adopted, the ESAs may develop *implementing technical standards*. These, again, are technically adopted by the Commission which, however, may only block them, but may not modify them. Third, ESAs can issue *guidelines* and address *recommendations*. Hence, in a way, ESAs are sources of binding rules. What is more (Article 18, further discussed in what follows), in case of emergency and upon empowerment by the Council, they can adopt individual decisions addressed to member states, and if these do not comply promptly, to individual (financial) institutions.

This Article 18 has been too much for the UK to accept, and they decided to bring annulment proceedings against the Regulation that created ESMA to the Court of Justice of the EU (CJEU, hereinafter the Court). The arguments put forward by the UK were twofold. One line of argument is related to the legal basis used for the creation of the Agency. There are two possible legal bases in the TFEU: one is Article 352(1)

[13] *See supra* n. 8-11.

TFEU,[14] the general clause which says that, whenever a more specific provision is not in the EU Treaty, it may, through unanimous vote in the Council, adopt any measure necessary for the accomplishment of the Internal Market; this legal basis had not been used, specifically because of the UK's reluctance to submit to EU financial supervision. The second legal basis is Article 114(1) TFEU,[15] which is the generally used Internal Market harmonisation empowerment and which does not require unanimity. Actually, on this same issue, the UK had brought to Court a test case before the *ESMA* case, concerning the creation of the ENISA, the European Network Security Authority. The UK agreed to the creation of the ENISA, but, as a question of principle, they had brought the case to the Court, which held Article 114 TFEU to be the valid legal basis. The UK's argument was that, while Article 114 TFEU allows for the adoption of harmonisation *measures*, in this case what was created was a new *body*, which could eventually issue an unforeseeable number of *measures*. To that the Court responded that the EU needs some discretion in areas with complex and technical features, and held the creation of a body, charged with the adoption of non-binding supporting framework measures, to be appropriate.[16]

The UK considered that the above judgment could not possibly cover the creation of ESMA which, as stated above, has powers much greater than consulting, gathering information or issuing non-binding measures: it has real decision-making powers, both directly and indirectly (through

[14] Art. 352(1) TFEU: 'If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.'

[15] Art. 114(1) TFEU: 'Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market'.

[16] ECJ (Grand Chamber) 2 May 2006, Case C-217/04, *United Kingdom of Great Britain and Northern Ireland* v *European Parliament and Council of the European Union* (the 'ENISA case').

validation by the Commission). The Court, however, deviating from its *ENISA* judgment, held that the creation of a body with such powers could also be based on Article 114 TFEU.[17] Hence, the Court was forced into an extremely extensive reading of its ENISA judgment (if not a reversal thereof).

The second issue brought by the UK was the long-standing case law restricting delegation within the EU. There are these two cases, one more important than the other: the *Meroni* judgment, dating back to 1958,[18] which basically limited the delegation to very precise circumscribed implementation tasks and not to proper decision-making. Here again, the Court did not reverse *Meroni*, though it did give it a very wide interpretation. The Court was satisfied that both the criteria/conditions for the issuing of decisions by the ESMA and the kind of measures to be adopted are being described in the Regulation, no matter that the actual content of the measures is completely free for the supervising authorities to decide.

There was another case called *Romano*,[19] in which the Court ruled that no delegation is possible for the adoption of measures of general application. The Court plainly reversed this by stating that the TFEU has been modified since *Romano* was adopted. Similarly, the Court rejected the last argument put forward by the UK, according to which Article 290(1) TFEU[20] expressly foresees the possibility of delegation in favour of the Commission – and hence *a contrario* does not allow delegation to any other body.

While it is true that the abovementioned reversal and/or fine-tuning of the *Meroni/Romano* case law had been widely anticipated by the legal doctrine, it is also true that the Court found itself with 'the back against the wall': if it were to judge otherwise and to invalidate the Regulation setting up ESMA – and hence the other two ESAs – it would put into peril all the

[17] ECJ (Grand Chamber) 22 January 2014, Case C-270/12, *United Kingdom of Great Britain and Northern Ireland* v *European Parliament and Council of the European Union* (the 'ESMA case').

[18] ECJ 13 June 1958, Case 9/56, *Meroni & Co., Industrie Metallurgiche, SpA* v *High Authority of the European Coal and Steel Community*.

[19] ECJ 14 May 1981, Case 98/80, *Romano* v *Institut national d'assurance maladie-invalidité (INAMI)*.

[20] Art. 290(1) TFEU: 'A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.'

construct put into place by the EU in order to tackle the euro-crisis (Single Supervisory Mechanism, Single Resolution Mechanism, European Stability Mechanism) and would create unprecedented mayhem in financial markets. Hence, in order to cope with the way the other Institutions had handled the euro-crisis, the Court had to revise its own jurisprudence in relation to the creation of Agencies.

We saw that the efficiency and effectiveness of Agencies has been seriously questioned. The *Meroni* and *Romano* precedents have, in fact, been an important obstacle standing in the way of Agencies effectively performing their tasks. After the *ESMA* judgment, this obstacle has been, to a large extent, set aside. First of all, the EU can create Agencies through QMV (qualified majority vote), and there is no need for unanimity in the Council, hence negotiations on any new Agency are much more likely to bear fruit. Second, these Agencies can be entrusted with real decision-making powers. Hence, this may completely shift the paradigm of Agency creation in the EU and open up a new way of 'agencification', a true 'agencification' this time.