DEMOCRATIC LEGITIMACY IN THE EUROPEAN UNION AND GLOBAL GOVERNANCE

Building a European Demos

edited by
Beatriz Pérez de las Heras

Democratic Legitimacy in the European Union and Global Governance

‘This book offers a timely and insightful analysis about the theories and realities of democratic participation in Europe. Despite all the buzz around the so called EU democratic deficit, the EU offers many, yet underused, avenues for civic participation, including via national parliaments, the Charter, ECIs, and public consultations. At a time of unprecedented turmoil in Europe, the challenge ahead is to extend equivalent levels of transparency, participation and inclusiveness to the EU economic and fiscal governance.’

– Professor Alberto Alemanno, NYU School of Law, USA

‘In these times of superimposed crises (economic-financial, institutional, of refugees), the EU must improve its mechanisms of democratic legitimization. This is the only way to change from a technocratic and functional – or rather dysfunctional, due to its slow and complex decision-making procedures – to a project anchored in public participation and support. This book is a timely analysis of the instruments for citizen participation that might lead an active citizenry to acquire a feeling of collective ownership of the European project.’

– Professor José Luis de Castro, University of the Basque Country, Spain

Beatriz Pérez de las Heras
Editor

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Preface

This book analyzes the existing and potential future mechanisms that may contribute to the construction of a European *demos* as part of the process of political construction. It is based on research led by the European Integration research team at the University of Deusto. The project was funded by the European Commission within the framework of the Jean Monnet Centre of Excellence on European Union Law and International Relations at the University of Deusto. The research was completed during the period 2014–2015 and involved 15 researchers from the University of Deusto and other partner institutions from the USA (Indiana University -Purdue University and Florida International University) and Europe (Seville, Hull, Riga and Wroclaw).

The relevance of *Building a European Demos* is twofold. Firstly, it addresses one of the most significant challenges to the sustainability of the European political project: the deficit of trust and support among citizens. Secondly, it identifies missing elements of popular legitimacy and proposes ways they might be formally included in upcoming Treaty reform, while assessing the contribution that the European Union can make to global governance by extending a credible democratic model to other international actors.

The various contributions seek to answer three major research questions: Are the instruments of citizen participation and other elements of democratic identity introduced by the Lisbon Treaty actually fostering European identity and popular support for the EU? What aspects are lacking and need to be introduced if we are to be able to speak of a true participatory democracy or, more accurately, a European *democracy*? Why does the legitimacy of EU democracy matter for the rest of the world?

Building a European Demos is structured in four substantive sections. In Part I, four chapters analyze and assess the mechanisms of participatory democracy in the institutional and legislative process of the EU. Chapter 2, by Markus Thiel of Florida International University and Oana Petrescu of the Romanian Ministry of Justice, assesses institutional innovations introduced by the Lisbon Treaty to increase participatory and representative democratic channels in EU governance. The authors offer a somewhat mixed evaluation of these measures, designed to increase the legitimacy of the Union, in light of their record of implementation to date.

Chapter 3, by Karolina Borońska-Hryniewiecka of the University of Wroclaw, and Elizabeth Monaghan, from the University of Hull, assesses the European Citizens' Initiative (ECI), the world's first tool for transnational participatory democracy, three years after its introduction in the EU. The chapter argues that viewing the ECI solely as a policy-initiating tool limits the range of its potential democratic effects. Instead, the authors propose to conceptualize the ECI in a broader sense, as a mechanism for Europeanization and an instrument for building a European public space.

Chapter 4, by Karolina Borońska-Hryniewiecka, takes stock of the current role of national parliaments as indirect channels for citizen involvement in EU affairs. It concludes that despite a range of weaknesses in the currently operating mechanisms of subsidiarity monitoring and "political dialogue", there is still much unexploited potential in EU-oriented parliamentary activity which, if properly tapped, could have a positive impact on the EU's democratic legitimacy.

Using the case of the EU Fundamental Rights Agency and its civil society platform, Chap. 5 by Markus Thiel analyzes the effects of stakeholders on both input-legitimacy (the ability of civil society to contribute) and output-legitimacy (rights-maintenance in the EU). The author argues that while both kinds of legitimacy should be pursued simultaneously, in reality output-legitimacy is much harder to achieve, given the diverse claims of civil society and the obstructing influence of Member States. Thus while the agency and platforms are contributing to participatory governance in the human rights area, the overall output in terms of rights provisions is less impressive.

Part II contains three chapters that address the impact of the "constitutionalization" of fundamental rights on EU democratic identity. Chapter 6, by Beatriz Pérez de las Heras of the University of Deusto, argues that effective implementation of the EU Charter of Fundamental Rights is

furthering European integration in that its practical application is going beyond its literal terms and provisions. Drawing on recent legal and judicial developments, the chapter highlights how the Charter is gradually becoming an instrument that enables people to enjoy rights and how this process is contributing to increasing citizens' awareness of an EU dimension of fundamental rights.

Chapter 7, by Oana Petrescu, analyzes how the international and European context has influenced leaders to adopt various documents with a high impact in the field of human rights. The insertion of a specific Treaty provision on possible EU accession to the European Convention of Human Rights (ECHR) marked a crucial moment in the development of the protection of fundamental rights. In the author's view, this achievement would fill significant gaps in the EU's system of human rights protection. The chapter goes on to discuss how the rejection of the Draft Agreement on EU accession to the ECHR by the Court of Justice of the European Union (CJEU) will impact the possibility of subjecting the EU's legal system to independent external human rights control of the kind provided by the European Court of Human Rights.

Chapter 8, by Peter Gjørtler of the Riga Graduate School of Law, argues that a balance between democratic legitimacy and judicial activism is most clearly demonstrated by the CJEU in its case law concerning limits on EU powers. A more expansive judicial activism may be traced in other fields, such as the rights of individuals, both under the Treaty texts and the Charter, where the CJEU has significantly increased its role as an adjudicator of fundamental rights, thus contributing to reinforcing the democratic legitimacy of the EU.

The four chapters in Part III of the book explore and propose strategies and tools that might reinforce the political legitimacy of the EU and its acceptance by citizens. To be effectively promoted by the EU, some of these initiatives would have to be introduced into the treaties resulting from the next reform process.

Chapter 9, by Mª Luz Suárez Castiñeira of the University of Deusto, focuses on the increasingly problematic nature of European cultural identity, especially since the enlargement of 2004, with "culture" remaining an undefined term in most debates on European identity. However, despite the self-imposed political distance from culture, and the ambiguities contained in their statements, as early as the late 1970s, community institutions began introducing measures with a cultural impact to counteract a rising wave of Euro-skepticism and gain public support for the political

project. In a twofold approach, application of the European Economic Community Treaty to the cultural sector led the institutions to become engaged in preservation of the Community's cultural wealth and to develop cultural exchanges, particularly following inclusion of the "article on culture" in the Treaty of Maastricht (Article 128). The author argues that, despite the increasingly financial focus of the promotion of culture and the emphasis on culture as a catalyst for growth and employment within the 2020 strategy, the top-down mechanisms set in motion have directly supported the development of a European identity which is still in its incipient stages. The chapter concludes by stressing that the EU needs to contribute more decisively to bottom-up identity formation by offering a stronger presence and stronger visibility at the ever more frequent cultural events that attract large audiences from inside and outside Europe.

Chapter 10, by Ainhoa Lasa of the University of Alicante, analyzes the impact of the new European economic governance on the EU's constitutional framework. Considering the reinforcement of negative integration, the author discusses how the European economic constitution has adopted a *meta-grundnorm* role that not only determines the evolution of the integration process, but also its real scope. The chapter concludes by setting out some recommendations for redefining the economic bond, taking into account the perspective of social justice.

Chapter 11, by Ainhoa Lasa and Jone I. Elizondo Urrestarazu of the University of Deusto, explores the concept of the EU social model, particularly taking into account the recent social measures adopted to reinforce positive integration. Focusing on the objectives set by EU institutions and taking the case study of non-discrimination and gender equality proposals, the authors conclude that the conditions imposed on the structural design of the European social dimension by negative integration prevent these measures from extending beyond programmatic rhetoric to become true social rights outside the requirements of market constitutionalism.

Chapter 12, by Steffen Bay Rasmussen of the University of Deusto, focuses on the external dimension of EU citizenship as a possible source of increased citizen identification with the EU, analyzing how the EU provides consular assistance to its citizens in third states. In this regard, the creation of the European External Action Service and the April 2015 Council Directive are identified as key moments in a longer evolution that has set the EU firmly on an intergovernmental track in its provision of consular assistance, thereby excluding—for the foreseeable future—a shift to a supranational track that would more easily contribute to a strengthened

EU *demos*. The chapter concludes with a discussion of the way forward for the EU in terms of providing real added value to citizens and the communicative challenges associated with linking EU consular assistance practice to an increased identification with and loyalty toward the EU among EU citizens: in other words, a strengthened EU *demos*.

Part IV extends the analysis beyond the European borders, assessing the impact of the EU's democratic achievements on global governance. The four chapters outline some recent developments of particular international relevance which, together with internal accomplishments, have contributed to placing the EU's democratic model at the forefront of a larger emerging cosmopolitan order.

Chapter 13, by Aurelia Dercaci of the University of Deusto, refers to European external governance in the EU's neighboring countries. The author assesses the way democracy is being promoted through the European Neighbourhood Policy, analyzing its principal instruments and identifying a range of elements that might determine the extent of the EU's impact in its Eastern and Southern neighborhoods.

Chapter 14, by Antonio Manrique de Luna Barrios of the University of Deusto, analyzes the role of the EU as an actor for peace and security in international society. The EU has assumed a number of military and civil capacities that have allowed it to take a preponderant role in global governance. However, this has not been an easy task and these capacities have constantly had to be adapted to new circumstances and challenges. Regardless of the lessons learned and the norms and procedures developed, new situations still exist that require the EU to continue reinventing its policy in the area of peace and security if it wants to establish itself as a leading actor in the multipolar society of the twenty-first century.

Chapter 15, by Pablo Antonio Fernández Sánchez of the University of Seville, deals with the highly salient topic of the EU's efforts to come up with a European response to the challenge posed by the flow of immigrants and asylum seekers from third countries. It focuses on the EU's recent legal developments aimed to harmonize reception conditions and procedures and discusses the viability of the current EU model to address efficiently these human displacements.

Chapter 16, by Katerina Yiannibas of the University of Deusto, explains how EU institutions can democratize and legitimize the negotiation of international trade and investment agreements by providing for concrete measures to promote a model for proactive transparency as well as for effective and direct public participation. The author extracts and analyzes

practices from the negotiation of the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the USA.

Finally, the concluding chapter offers a compilation of the major considerations and findings of the various researchers involved from their respective investigations and reflections.

Leaving to one side the background interest that has guided its accomplishment, this publication is the product of valuable contributions by a group of experts and dedicated researchers from the Universities of Indiana, Riga, Wroclaw, Hull, Seville and Florida International University, who received our research project positively, contributing to its definitive design and accepted our coordination.

The institutional and financial support of the European Commission through the Jean Monnet Centre of Excellence at the University of Deusto was not only extremely motivating but was also decisive in developing the project with the recognition and resources it required.

As a result, *Democratic Legitimacy in the European Union and Global Governance. Building a European Demos* is intended to be the first detailed interdisciplinary study on the place and role of citizens in the landscape of European political construction and one that we hope may serve as a basis for further and deeper analyses of the EU's democratic legitimacy.

University of Deusto, Bilbao Beatriz Pérez de las Heras

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List of Abbreviations and Acronyms

CDDH	Council of Europe through the Committee of Ministers, the Steering Committee
CDDH-EU	Council of Europe through the Committee of Ministers, the Steering Committee for Human Rights—European Union
CETA	Comprehensive Economic and Trade Agreement
CFR	Charter of Fundamental Rights
CFSP	Common Foreign and Security Policy
CJ	Court of Justice
CJEU	Court of Justice of the European Union
COJ	Court of Justice (unofficial abbreviation)
COSAC	Conference of Parliamentary Committes for Union Affairs of Parliaments of the European Union
CSO	Civil Society Organization
CST	Civil Service Tribunal
DG	Directorate General
DRC	Democratic Republic of Congo
EACT	Treaty on the European Atomic Energy Community
EaP	Eastern Partnership
EC	European Community
ECB	European Central Bank
ECHR	European Convention of Human Rights
ECI	European Citizens Initiative
ECJ	European Court of Justice
ECSCT	Treaty on the European Coal and Steel Community

ECT	Treaty on the European Community
ECtHR	European Court of Human Rights
EEAS	European External Action Service
EEC	European Economic Community
EECT	Treaty on the European Economic Community
EEG	European Economic Governance
EMU	European Economic and Monetary Union
ENP	European Neighbourhood Policy
EP	European Parliament
EPP	Euro Plus Pact
EPPO	European Public Prosecutor Office
ESA	European Single Act
EU	European Union
EUFOR RD	European Union Force in the Democratic Republic of the Congo
EUMS	European Union Member States
EUPOL RD	European Union Congo Police Mission
EUSEC RD	European Union Security Sector Reform Mission in the Democratic Republic of the Congo
EUT	Treaty on the European Union (pre-Lisbon)
EWS	Early Warning Systems
FRA	Fundamental Rights Agency
FREMP	Fundamental Rights, Citizens Rights and Free Movement of Persons
FRP	Fundamental Rights Platform
GCT	General Court
IGO	Intergovernmental Organization
IPU	Integrated Police Unit
ISDS	Investor-State Dispute Settlement
MONUC	United Nations Mission in the Congo
MP	Member of Parliament
MS	Member States
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
OCS	Online Collection System
PKO	Peacekeeping Operations
SGP	Stability and Growth Pact
SME	Small and Medium sized Enterprise
SWD	Staff Working Document

TESM	Treaty establishing the European Stability Mechanism
TEU	Treaty on European Union
TFEU	Treaty on the Functioning on European Union
TSCG	Treaty on Stability, Coordination and Governance in the Economic and Monetary Union
TTIP	Transatlantic Trade and Investment Partnership
UfM	Union for the Mediterranean
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNHCR	United Nations High Commissioner for Refugees

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CHAPTER 1

Introduction

Beatriz Pérez de las Heras

The European Union (EU) is a project of political union, a European state in construction, whose development over the last 65 years has brought peace and prosperity to the European continent, while helping consolidate democracy in the countries that have joined it. The EU itself claims to be intrinsically democratic, as currently stated in Articles 2 and 49 of the Treaty on European Union (TEU).[1]

At present, the EU may be considered a model of economic and political governance and an example of successful globalization, encompassing supranational institutions, states and citizens united under a common legal order with democratic credentials. The EU is, indeed, the only political entity that extends beyond both a classic international organization and a nation state, endowed with supranational legally binding decision-making powers, representative structures and a democratic mandate.[2]

However, as the process of European integration has evolved and the union has expanded with the accession of new members, the institutional framework and normative dynamics have become increasingly complex and heterogeneous, intensifying the problems of efficient operation. A lack of transparency, due to opaque decision-making procedures and

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inter-institutional negotiations,[3] and the absence of political visibility and citizen involvement, has increasingly widened the gap between the EU and the peoples of its Member States, who should one day shape the European *demos* of a genuine political union. There is at this juncture a growing sense of dissatisfaction with EU policies among its citizens. This is largely due to the economic recession of recent years and the social consequences of the budgetary adjustments that Member States have been required to implement to calm markets and contain risk premiums. Indeed, the adoption of harsh austerity measures by European political leaders has pushed citizens and the EU further apart. In a recent Eurobarometer poll, only 40 % of Europeans said they trusted the EU, while 50 % felt that their voice did not count in Brussels.[4]

The lack of a European identity and the consequent deficit of popular support are the main obstacles to progress toward political union in Europe. Against this backdrop, how can the project for a politically united Europe be sustainable without its citizens supporting it and giving it legitimacy? The further the political integration process advances, the greater the need for direct popular authorization and sanction.

In 1993, the Treaty of Maastricht established the 'Citizenship of the Union', a new civil condition at supranational level, which creates a direct association between nationals of Member States and the EU. Over the last 23 years, the rights and freedoms associated with this citizenship status have been developed in financial and social areas. Nonetheless, achievements in the political realm have been scarce. One may conclude, therefore, that much of the substance of EU citizenship is still at an early stage of development.[5]

Over the last decade, the EU has introduced various forms of direct citizen participation, most designed and encouraged by the European Commission, in order to raise awareness, educate and inform the public as to the political significance of the process of European construction. Besides these institutional initiatives, new provisions of primary law introduced by Member States under the Lisbon Treaty in 2009 have enabled the use of tools of participatory democracy in the EU legislative processes, either through the citizens' direct involvement, or indirectly through their closest representatives, the national parliaments.

From the perspective of popular legitimacy, the new architecture of fundamental rights is also contributing to the democratization of the EU: the entry into force of the Charter of Fundamental Rights, as a specific supranational catalogue, has transformed the meaning and extent of

EU citizenship by attributing new rights to citizens not provided for in national statutes. It also extends recognition of a similar number of rights to nationals of third countries, thus projecting the EU democratic profile beyond the strict confines of European citizens. Within the framework of this new legal universe, the EU will be subject to external judicial control when it becomes a signatory to the European Convention on Human Rights (as all its Member States already are). EU membership of this international judicial system, which allows direct access by individuals, is expected to become a new parameter of democratic identity for the EU, both *ad intra* and *ad extra*.

Following an analysis of recent experiences arising out of the implementation of these political and legal developments, this book identifies some missing features and proposes that they be included in the EU's forthcoming democratic agenda. The promotion of culture as a tool of citizen participation and social cohesion, the establishment of a European economic government, the definition and implementation of a European social system and the diplomatic protection of citizens' rights and interests by EU delegations are some of the innovations that could significantly reconnect citizens with the EU and transform it into a truly democratic political community, based on the solidarity of states and citizens, as well as economic and social progress.

Finally, the book assesses the contribution that the EU can make to global governance by extending a credible democratic model as a part of an emerging democratic world order within a cosmopolitan community. Cosmopolitism opposes any regional or national approach to citizenship, fundamental rights and democracy. The *cosmopolitanization* of these values reflects a seminal change in the current economic, social, political and cultural reality, which is the result of the growing interdependence and interconnection of social phenomena. The European integration process itself provides an example of globalization and cosmopolitism. Even if the EU's current legal competences in the field of citizenship, fundamental rights and other democratic elements remain incomplete and diffuse, the EU is already developing a remarkably advanced democratic profile when compared to other international organizations, such as the African Union or the Organization of American States.

In this regard, besides internal democratic achievements, the shaping of a new model of external governance through the neighborhood policy, the contribution to global peace and security, the setting up of a European asylum

system and the direct public participation in EU international economic negotiations may, among other factors, become valuable contributions to this potential worldwide ethical/political community. The Nobel Peace Prize awarded to the EU in 2012 was both a recognition and a stimulus to keep a steady course on this shared voyage that began in 1950 and which now journeys through a cosmopolitan landscape.

Notes

1. Article 2 of TEU provides that "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society where pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail". Article 49.1 states that "Any European state which respects the values referred to in article 2 and is committed to promote them may apply to become a member of the Union". With an eye to future memberships from Eastern European countries, in 1993 the EU adopted the so-called Copenhagen criteria, which require that the candidate country demonstrates "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities". On the conditions for membership, see http://ec.europa.eu/enlargement/policy/conditions-membership/index_en.htm; Heather Grabbe, *The EU's Transformative Power. Europeanization Through Conditionality in Central and Eastern Europe*, Palgrave, London, 2006.
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4. European Commission, *Standard Eurobarometer 83, Spring 2015*, available at: http://ec.europa.eu/public_opinion/archives/eb/eb83/eb83_first_en.pdf
5. Carlos Carnero and José Candela, "European Citizenship, Quality of Life and Political Participation", in *The State of the European Union. How European Citizens Deal with these Times of Crisis*, Dir. Diego López Garrido, Fundación Alternativas and Friedrich Ebert Stiftung, Madrid, 2014, p. 51.

PART I

Institutional Mechanisms for Citizen Involvement and Innovative Instruments of Participatory Democracy: An Attempt to Promote an Active Citizenship and Improve the Legislative Legitimacy of the EU

Markus Thiel

1 Introduction

The first part of this book looks at the various ways in which European democratic legitimacy could be enhanced. Many of the instruments to do so were instituted through the Lisbon Treaty, such as the European Citizens' Initiative (ECI), the collaboration of civil society with the EU Fundamental Rights Agency or the increased role of national parliaments, as well as earlier attempts to "bring the Union closer to the citizens", including the petition rights to the Parliament and the work of the Ombudsman. Together, these mechanisms show that there the EU institutions have attempted to provide for more bottom-up political opportunity structures for citizens, civil society groups and parliaments over time.

The first chapter provides an overview of a number of initiatives that have been implemented in the more recent stage of European integra-

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tion, in order to foster governance that is closer to its citizens. Its first part details the avenues for citizen involvement: among others, the ECI, participation in NGOs and the right to petition the European Parliament. The second half describes the impact of those mainly Lisbon-based measures on the democratic legitimacy of EU citizens. The chapter highlights at the outset that the role of citizens in EU integration was negligible, and that each of the recent treaties only gradually added instruments that would enable a more direct civic engagement with EU institutions. It problematizes the democratic deficit further, and asks if participatory and representative democratic channels are equally important in the EU's strategies and what this means for citizens and policy-makers in the EU multilevel governance system. The second section responds to these questions and provides a preliminary evaluation of the impact of these instruments on policy-makers and the citizenry. The chapter describes the legal and political origins of the three above-mentioned policy instruments, and indicates their potential to increase participatory governance, but also highlights their constraints. It points to some implementation issues that limit the true potential of these participatory instruments; these constraints are more heavily pronounced in the case of the ECI than in regards to consultative civil society involvement, petition rights or access to the Ombudsman office.

The second chapter focuses exclusively on the ECI and examines the empirical record, as well as the challenges and opportunities of this direct democratic measure thus far. It argues for a broader conceptualization of the ECI that views it as a democracy-enhancing, deliberative tool, rather than simply a means for popular agenda-setting. Thus it is analyzed as an agenda-setting, deliberative, awareness-raising and citizen-activating tool, as each aspect contributes to more holistic understanding to the ECI's potential. It concludes that while the ECI has the potential to perform various legitimacy-enhancing roles beyond policy-initiation, these are still limited by technical hurdles and the inadequate legislative design of the ECI, which may make it a redundant policy tool if these problems are not addressed. A review of the ECI has already suggested a number of ways to address some of these issues, but they need to be implemented in order to foster the democratic legitimacy of this mechanism.

The third chapter reports on the involvement of national parliaments as a complementary tool to foster democratic legitimacy through the strengthening of national level decision-making bodies. Given their elected nature, their important standing as intermediaries in the EU's multilevel

governance, and the fact that they are the ones that have to transpose EU law into the national realm, more involvement in EU affairs could provide a fruitful avenue for enhancing democracy. To this end, it evaluates the role of national parliaments in subsidiarity control, their function within the political dialogue with EU institutions, as well as a potential pro-active stance as policy proponents in the green card initiative. It concludes that there is still room for improvement, or more precisely, incorporation, of these significant mandate-holders into EU governance processes, which would provide a positive feedback loop in terms of Europeanization of national policy-makers and the general public. The latter two effects could bring significant benefits for enhancing the democratic legitimacy of the Union on a political-legal as well as a discursive level.

The fourth chapter concentrates on the role of Civil Society Organizations (CSOs) in the EU Fundamental Rights Agency, and asks to what extent the collaboration of civil society and EU agency produces input-, throughput- and output-legitimacy in EU governance. The cooperation of civil society with EU institutions in the rights area is an increasingly important one, given the rights issues related to the Euro- or Refugee-crises nowadays, and represents a test case to examine input-opportunities, the throughput-oriented quality of interactions of CSOs and the agency, and outcome-oriented rights policy improvements to enhance the EU's democratic legitimacy. Presenting the results of a survey among CSOs, the chapter proposes that the degree of input-, throughput- and output-legitimacy is conditioned not only upon the cooperation of groups among themselves to represent issues vis-à-vis the agency but also upon the institutional embeddedness of the agency within the EU's multilevel, multi-actor environment.

CHAPTER 2

Institutional Instruments for Citizen Involvement and Participation: Their Impact on the EU's Political Processes and Institutional Legitimacy

Markus Thiel and Oana Petrescu

1 General Considerations

For a long time, the "political voice" of European citizens, a prerequisite of a democratic society, contributing to the political development of the former European Communities,[1] was not taken into consideration in EU policy-making. This was due to various social (e.g., gaps of gender employment and social cohesion in adopting the relevant policies for Europeans), economic and political factors (for instance, the economic and political centralization in Brussels [Belgium] leading to a severe deficiency of communication between citizens and central and local authorities involved

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in the decision-making processes both at national and former European Communities level).

In this context, the general perception was that a democratic deficit existed within the Communities and the citizens were not in possession of theoretical and practical tools to reduce this deficit.[2] This issue became particularly pressing considering that the intention to adopt an instrument providing for a set of rights for European citizens, including the right to express themselves as participants in the decision-making process of the Community institutions, was non-existent in the early 1950s, when a new social and geopolitical dimension in Europe was configured after the Second World War.

In order to change this situation and to provide the opportunity for European citizens to be heard and participate in a democratic manner, a proposal aiming at a future involvement from the political point of view was drafted by the European Commission, a proposal considered to be too ambitious in the 1970s.[3]

However, the idea to initiate, adopt and implement new tools of direct participation of citizens in the democratic life of the Communities was still a distant idea during the 1970s and 1980s, because other issues were considered more important at that time by national and European politicians.[4] And yet, over time small steps have been made at the European level by adopting the Decision and the Act on the election of the representatives by direct universal suffrage[5] and by organizing the first elections by direct suffrage of the representatives in the European Parliament by the Member States of the European Communities in 1979.[6]

Later on, between the 1990s and the mid-2000s, a few quasi-political rights were added to benefit the European citizens, including the right to petition before the European institutions, bodies and offices and the right to complain to the European Ombudsman. These were important amendments brought to the Treaties,[7] together with other already recognized political rights.[8] And yet these amendments were not sufficient to augment the political role of the citizens in European-level policy-making, in spite of the fact that important changes were brought to the European institutions during this period, with the final aim to grant a stronger "voice" to citizens so as to strengthen Europe at all political and institutional levels.

Finally, the situation changed in 2009 when significant amendments were included in the most recent Lisbon Treaty regarding the participation of the citizens in the decision-making procedures at the European level, encouraging active cross-border public debates on relevant EU policy

issues (see below). Thus, a reference moment in enhancing the democratic participation of citizens in the European legislative process, as part of their fundamental rights as well as an essential complement of the civil rights and the existing tools of direct democracy, is marked by the adoption in 2011 of Regulation (EU) no. 211/2011[9] on the citizens' initiative.

The next section analyzes from a historical perspective the main policy measures adopted in order to ensure improved involvement of citizens in the EU's political construction. As such, it provides an overview of the main policy instruments adopted to better integrate citizens in EU governance, while the following section evaluates those mechanisms in regard to how they have been implemented thus far, and in how far they contribute to greater democratic legitimacy.

2 The Main Policy Measures Adopted to Involve Citizens in EU Governance

The role of citizens in the legislative process of the former European Communities was almost non-existent before 1976 due to a lack of legal initiatives to establish their presence.[10]

Nevertheless, "*opening the frontiers for trade in industrial and agricultural goods* [through the former European Communities has] *open*[ed] *the* [physical borders as well] *so that citizens* [enjoyed their] <<*European* [political] *rights*>>[11]", when the situation improved through the adoption of the Decision and Act on European elections by direct universal suffrage and the organization in June 1979 of the first elections to the European Parliament at the level of all nine[12] Member States of the European Communities that existed at that time.

Thus, this electoral tool represents, from our point of view, the moment when one of the key elements of the European citizenship, the democratic participation of citizens, was officially enshrined in the Treaties and started to be shaped in a more concrete manner.[13] It added, on the one hand, to the political development of the European Community,[14] and reduced, on the other, the democratic deficit, despite the fact that the important role in the legislative process was given to the European institutions "*involved* [already] *in the legislative process*, [but] *with separate* [and clear] *attributions*".[15] Yet it contributed mainly to the strengthening of parliamentary representation in the EU, whereas newer measures have focused more directly on participatory governance mechanisms.

In the wider context of strengthening the participatory dimension of democratic governance, between 1976 and 1984 other relevant documents and policy measures[16] in the field were adopted in such a way that it was officially declared that "*citizens of the Union shall take part in the political life of the Union in the forms laid down by the Treaty* [on European Union], *enjoy*[ing] *the rights granted to them by the legal system of the Union and be subject to its laws*[17]" (article 3 of the Draft Treaty on European Union[18]).

In 1992, through the reforms brought to the original Treaties, the Treaty on European Union (TEU) (1992) introduced in its new Part Two entitled *"the Citizenship of the European Union"* (Articles 8—8e EC Treaty) a new concept of citizenship based on a democratic practice defined as "participatory democracy"[19] by which a limited number of political rights[20] were conferred to the European citizens. These were designed to reduce the EU's democratic deficit and form a base for the construction of a genuine European identity.[21] On the other hand, through the following Treaty of Amsterdam (1997), the only right recognized for the benefit of citizens and enshrined in former Article 8d was the right to write to any of the European *"institutions or bodies"* and to receive a reply in any of the official languages.[22] The intention of many Member States was to extend the citizenship rights sphere by adding other privileges, with the final goal to diminish as much as possible the democratic deficit, an attempt which proved to be unsuccessful at that point.[23] In spite of all these efforts, European citizens were still unable to participate effectively and consequentially in European political life.

Even though incremental changes to European citizenship have been adopted through the Treaty of Nice (2001)[24] by extending the qualified majority voting to free movement of citizens within the European territory, the said treaty did not add further political rights for citizens. However, for the first time after 1992, the Laeken European Council summit of December 2001 represented the moment when the need to increase the EU's democratic legitimacy and adopt legal instruments in the field for better democratic scrutiny at all levels of government was viewed as serious enough for European political leaders to state in the Final Declaration on the Future of the European Union[25] that "*the Union,* [as a whole and] *the European institutions* [in particular] *must be brought closer to its citizens, calling* [also] *for a clear, open, effective, democratically controlled Community approach*".[26] This strategy included adding new political rights for citizens, such as the right to participate more frequently in the political

life of the EU, which was not put into practice until the reform of the Lisbon Treaty (2009),[27] due to the inability of European political leaders to find a proper way to adopt a normative act in this respect.

In 2009, the democratic participation of citizens in the decision-making process was finally enhanced through the reformed Lisbon Treaty which stipulated, without any compromise, that citizens *"participate in the democratic life of the Union"* (art. 10 para. 3 TEU). As part of their new political role, their indubitable political right to initiate proposals, or a popular initiative was enshrined,[28] and the right to send them to the European Commission to be registered on its website (if the legal requirements are fulfilled). While several provisions regarding this topic are provided for in the legally binding Charter of Fundamental Rights of the European Union, they place the issue of political rights *"in the context of a new emphasis on representative and participatory democracy, including a new agenda-setting citizen's initiative*[29]*"*.

For a better understanding of the legal and political tools given to citizens to participate in the political life of the EU, in the following section we analyze briefly a few of these instruments which are relevant in this regard.

2.1 Participation of Citizens in NGOs and CSOs

Given the social, economic and political changes that occurred in the last decades affecting the status of European citizens in different ways, nowadays national and European civil societies are more dynamic, vibrant and influential than ever before. They evolved significantly from a weak political agenda setter to change and improve national and European governance into an active political involvement of the citizens, marked by a new social and political context: the domestic and European internal markets that have created many opportunities for citizens to engage more and more in the political life of their national and European societies.[30]

In this context, the active participation of citizens in Non-Governmental Organizations (NGOs) and Civil Society Organizations (CSOs), as one of the political tools of a modern society, represents an important and influential method for citizens to express themselves through these organizations at national and European level in order to fight for recognition of various social, economic, cultural or political rights, including special rights, such as for persons with disabilities, and for national or sexual minorities.[31]

Furthermore, both NGOs and CSOs are suitable tools to create the conditions necessary for citizens to engage in political life on a regular basis and not only from time to time, as is the case of the national or European elections; to create a specific framework for citizens to advocate for their legitimate rights and interests and contribute to the development of a vibrant, modern and transparent national and European democratic society; to contribute to the quality of the adopted national and European policies and their smooth implementation at national level as regards the European legislative and non-legislative acts; to facilitate citizen participation in consultations on various public policies, at national and European level, no matter the field; and to allow citizens to organize and express themselves freely with no legal or political obstacles, thus making the entire process of participation more transparent.

The right to citizen participation through (trans)national NGOs and CSOs is stipulated in the national legal systems as a constitutional right or as a right derived from some other rights that enjoy direct constitutional protection, as in the case of Hungary, for example, where the Constitution (2011)[32] obliges the national government to cooperate with CSOs in carrying out its duties and responsibilities. Similarly, in the case of the UK citizen participation is governed by the Code of Practice on Consultation since January 2004,[33] which proclaims six consultation criteria that must be mentioned within all the consultation documents and observed by the national authorities during the entire process of public consultations on national legislation or on European directives.

At the EU level, the issue of citizen participation in NGOs and CSOs has different meanings given the unique nature of the Union's structure. If before 2001 such participation was almost non-existent, the situation changed when the White Paper (2001) proposal on European governance[34] on consulting civil society drew more interest than any other topic. It suggested that more openness to and better consultation of civil society are in the interest of the EU, thus providing better policies and more efficient implementation of these policies. The envisaged implication and consultation is distinct from an inter-institutional dialogue point of view (with the European Parliament, the European Economic and Social Committee, the Committee of the Regions, etc.) and from social dialogue between management and labor representatives. In this respect, according to Article 11 TEU the European institutions are required to consult and inform the citizens and their representative associations on various issues which are debated at the European level,

ensuring *"that the Union's actions are coherent and transparent"* (Article 11 para. 3 TEU), thus giving the opportunity to citizens to make their views known in all areas of Union action.

In practice, the aim of Article 11 TEU was "translated" in various actions adopted in recent years, as follows:

- Starting in 2007, the European Parliament created a link between the European Parliament and European civil society called the "Agora" process, with the intention to enable Europeans to take part in the policy-making process by inviting 500 representatives of civil society organizations to discuss and debate particular issues. These Agora conclusions were then submitted to the European and national institutions and widely disseminated to all those involved.[35]
- Council Regulation (EU) no. 390/2014[36] established the multiannual *"Europe for Citizens"* programme between 1 January 2014 and 31 December 2020, having as its main objective to contribute to citizens' understanding of the EU, its history and diversity, but also with the intention to improve the conditions for proper civic and democratic participation.
- A new website dedicated to citizens was set up in 2014 by the European Commission, called *"Your Voice in Europe"*, and was available in all the official languages of the EU.[37] On this website, the citizens and their representatives can find information on consultations, discuss their views in forums or blogs on a variety of topics, starting from banking and finance and ending with Neighbourhood policy,[38] and get in touch with their regional members of the European Parliament or with national representatives at the Committee of the Regions or the European Economic and Social Committee, thus playing an active role in the European policy-making process.

2.2 The Right to Petition/Complain Before the European Institutions, Bodies and Offices

Although in the founding Treaties there was no such reference, the right to submit petitions to the former Assembly (presently, European Parliament) by citizens, and the procedure to examine these petitions were stipulated in the Rules of Procedure of the Common Assembly of the European Coal

and Steel Community (ECSC) between 1952 and 1953 and in the Rules of its successor, the European Parliamentary Assembly, starting with 1958 onwards.[39]

Later on, the TEU in 1992[40] provided for European citizens, the legal persons residing or having their registered office in the territory of a Member State, companies and organizations or associations with their headquarters in the EU with the right to submit, individually or in association, a petition to the European Parliament on matters which come within the Union's spheres of activities and which affect them directly. On the other hand, the reforms brought by the Lisbon Treaty (2009) did not envisage amendments to the right of petition to the European Parliament as initially set out in the Treaty of Maastricht (1992).

Thus, the right to submit a petition to the European Parliament based on Article 227 Treaty on the Functioning of the European Union (TFEU), as one of the fundamental rights, represents a means to apply the European law or to act in a certain way on subjects which come within the EU's fields of activity and which affect them directly.[41] Such petitions give the European Parliament the opportunity to call attention to any infringement of a European citizen's rights by a Member State, local authority or other institution.

From a quantitative viewpoint, every year the European Parliament registers approximately 1500 petitions on various matters, but after being analyzed only a small number of them are declared admissible, given the restrictions of the Treaty with reference to the areas of EU competence in this field. If the petitions are declared admissible, they are mostly discussed in the Committee on Petitions[42] together with the petitioners and the national competent authorities and forwarded to the European Commission, which also examines these petitions in the light of the primary and secondary European legislation. It is worth mentioning that in a number of cases, petitions lodged by citizens have resulted in a Member State being brought before the European Court of Justice for infringement of the Treaty.[43]

The right to complain to the European Ombudsman was stipulated by former Articles 21 and 195 of the Maastricht Treaty (1992) dealing with complaints which can be lodged by the citizens in regard to the maladministration of the institutions and bodies of the EU. The European Ombudsman oversees the implementation of good administration in the EU's own institutions, bodies, organs and agencies, and it is completely independent and impartial from other European institutions, bodies, organs and agencies and from national authorities of the Member States.

In 2000, this right was included in the European Charter of Fundamental Rights, which was legalized a few years later in the Lisbon Treaty (2009), and since then the European Ombudsman has been the principal institution ensuring that the European institutions, organs, bodies and offices implement the Charter in their own operations.[44]

The reforms brought by the Lisbon Treaty in 2009 did not envisage amendments to the right to complain to the European Ombudsman as initially set out in the Treaty of Maastricht (1992), which remained the same, being enshrined in Articles 20 para. 2 letter d, 24 and 228 TFEU. And yet the category of institutions against which a complaint can be lodged on the grounds of maladministration has been broadened through the Lisbon Treaty by including the European Council, which is an institution in accordance with art. 13 TEU, in the general sentence *"Union institutions, bodies, offices or agencies"* (art. 24 TFEU).

Bearing in mind the important role of the European Ombudsman in safeguarding the fundamental rights of citizens living in Europe, Europeans have the right to complain to the office if they have concerns relating to maladministration[45] of the institutions and bodies of the EU on the following grounds: administrative irregularities; unfairness; discrimination; abuse of power; lack of information; refusal of information and unnecessary delay. In achieving its obligations, the European Ombudsman ensures open and accountable administrations within the EU and good practice on behalf of the EU institutions, promotes good administrative behavior, ensures easy access to information by everyone about the EU and its work, and finally, ensures that the European Commission, as the guardian of the Treaties, upholds its obligations in pursuing Member States that fail to implement EU law.[46] On the other hand, the European Ombudsman cannot investigate the national, regional or local authorities in the Member States, the European courts in their judicial capacity, including the activities of the national courts or ombudsmen, companies or private individuals.[47]

In accordance with the general procedure, complaints can be lodged either by post, fax or e-mail, while a complaint guide[48] and a specialized form called *"Complaint about Maladministration"*[49] are available on the Ombudsman's website. When a such complaint is lodged, the European Ombudsman will inform the institution concerned in order to solve the problem. If it is not solved in a satisfactory manner, the European Ombudsman will try to find an appropriate solution for the problem, having the role of a mediator in this case. Furthermore, if the effort to

conciliate both parties and to find the best solution for them fails, the European Ombudsman can make recommendations to solve the problem. If the institution concerned does not accept them, then a special report drafted by the European Ombudsman is sent to the European Parliament in which case all the measures taken in the respective case are explained in detail.

2.3 The Right to Initiate Proposals Based on Regulation (EU) No. 211/2011 on the European Citizens' Initiative

In 2009, after a long and difficult process in recognizing the political role of citizens following the rejection of the Constitutional Treaty in 2005, the Treaty of Lisbon stipulated in Article 10 paragraph 3 TEU that *"every citizen shall have the right to participate in the democratic life of the Union"*, encouraging "*the cross-border public debate about* [the most relevant] *EU policy issues"*,[50] for example political, education, environment, economic, cultural, social, mass-media and so on. In such situations, citizens are encouraged to participate in the political life of the Union with no restrictions in exercising their rights and with more trust in the democratic system.[51] They are supposed to ask the European Commission to submit a legislative proposal *"within the framework of its powers"*, as provided for in Article 11 para. 4 TEU through a new instrument called *"the European Citizens' Initiative"*. The same political rights are enshrined in Articles 39 and 40[52] of the Charter of Fundamental Rights of the EU.

After two years from the provisions enshrined in Article 24 TFEU[53] and after adoption of several decisive instruments (e.g., resolution of the European Parliament in May 2009,[54] proposal of the European Commission in March 2010), at the level of secondary European legislation, in February 2011, Regulation (EU) no. 211/2011 on the European Citizens' Initiative was adopted and entered into force on 1 April 2012, with the aim to facilitate Europeans' active participation in EU-level policy-making.

The European Citizens' Initiative (ECI), as one of the four types of participations of citizens,[55] represents the first supranational instrument of direct democracy participation because it was adopted by the Union as an entity, and not by a certain EU Member State or group of Member States, creating at the same time an additional direct connection between European citizens and EU institutions.[56] Thus, an innovative European legal instrument was created, with a potential for the further development of European transnational democracy.

From another perspective, it is worth mentioning one of the specific elements of ECI,[57] namely the political element, in which the citizens represent the new political bottom-up "actor" who joined the European institutions in drafting and adopting the secondary legislation of the EU. It is hoped that they participate actively in the decision-making process, being co-initiators of some of the future legislative proposals together with the European institutions. In other words, citizens can expect that their "voice is finally heard" through the medium of initiatives and are taken into consideration (only) when several conditions are met.

For a better understanding of this new tool, some qualifications are in order:

- this right is enshrined but only as regards the initiatives drafted in the field of secondary EU legislation, because, as concerns the primary legislation, Article 48 TEU (as amended by the Lisbon Treaty) regulates clearly which are the revision procedures[58] and who can use them;[59] to what extent the subjects can use these procedures; which institutions need to be consulted during the revision procedures[60] and so on;
- there is a clear distinction between the citizens' initiative, as *"the power"* of citizens to call directly on the European Commission to bring forward new proposals for legal acts based on their proposed initiatives, and the petition which is submitted by the citizens to the European Parliament and the right to complain to the European Ombudsman, which are lodged to these institutions on the basis on Articles 227, respectively 228 TFEU;
- the citizens' initiative[61] is a novelty, representing a *"new generation of democracy tool, a more direct and more transnational instrument than any participatory procedure before it"*,[62] and possibly a *"perfect iDemocracy tool for the twenty-first century"*,[63] if we take into consideration that all the initiatives are proposed and registered online, and not through the classic method, on paper.

Regarding the impact of such an instrument, starting on 1 April 2012 and every three years afterwards, the European Commission shall present a report on the implementation of this Regulation, which was furnished in March 2015 when the first report was published.[64] With this occasion the usefulness of such a tool has been highlighted considering that *"In the past three years, an estimated six million Europeans have supported European Citizens' Initiatives (ECI) and used their voice to bring important causes directly to the*

attention of European policy makers",[65] while the intention of the European legislator is to *"look for innovative ways to encourage greater and more effective use of the tool"*. Moreover, between 1 April 2012 and 1 June 2015 approximately 50 citizens' initiatives were registered on the European Commission's website, but only "*two* [of them][66] *have gone through the full process show*[ing] *that the Regulation establishing the ECI has been fully implemented*".

In order to have a better understanding of this Regulation, some remarks need to be made:

- an initiative must be supported by at least one million EU citizens from at least one quarter of all EU Member States (which means seven or more), while the minimum number of signatures is provided in Annex I of the Regulation;
- the citizens' committee must organize the initiatives and must be composed of at least seven EU citizens who are resident in at least seven different EU countries;
- the minimum age required to organize and to support an initiative is the voting age for European Parliament elections which is currently 18 years in every country except Austria, where it is 16 years;
- the organizers have to ask for the registration of their initiative in one of the EU's official languages in an online registry made available by the European Commission, and if the initiative is registered, the organizers can ask to add translations of their initiative in other official EU languages[67];
- the signatures can be collected either on paper or online and must comply with the models provided in Annex III of the Regulation. Starting from the date when the initiative was registered, the organizers will have only one year to collect these signatures.

So far, only three initiatives[68] for which the collection of one million signatures in the EU in at least seven Member States was recorded received feedback from the European Commission, which already presented its conclusions. In addition, in at least one case, namely the European initiative "Right2Water",[69] the European Commission declared in a Communication[70] that one of the next concrete steps that will be taken is to "*launch an EU-wide public consultation on the Drinking Water Directive* […]", including to modify the Council Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption.

3 An Evaluation of the Impact of these Instruments on Policy-makers and Citizens

In the beginning of our chapter, we posited that the EU's instruments were strategies to increase participatory democratic legitimacy, and thus decrease the EU's democratic deficit. Just as there has been a notable debate in the scholarly literature about the extent of such a deficit,[71] and of the means to mitigate it, so are the presented political and legal instruments for more civic involvement up for discussion: To what extent do civil society, petition rights and European citizen initiatives constitute appropriate and effective means to address EU governance issues? Can an increase in participatory governance instruments possibly rectify shortcomings in the EU's democratic legitimacy? Are participatory and representative democratic channels equally important in the EU's strategies, and what does this mean for citizens and policy-makers in the EU multi-level governance system? The following section responds to these questions and provides a preliminary evaluation of the impact of these instruments on policy-makers and the citizenry.

The introduction of participatory instruments as intermediaries between European citizens and the EU's governing institutions constitutes a fairly novel approach, beset with a number of normative as well as operational questions about the best way to improve democratic legitimacy in a complex multi-level setting such as the EU. While the Maastricht Treaty of 1992 ended the "permissive consensus" by which European leaders led and citizens passively acquiesced, the Lisbon Treaty represents more of a beginning, rather than an end to an institutional transformation that could reshape the EU's structures and policies. Kohler-Koch and Rittberger[72] have argued that democratic legitimacy in the EU can be viewed alongside three dimensions, each of which juxtaposes features of representative democracy with elements of participatory democracy. These are political institutions versus civil society, voting versus deliberation, and instrumental participation as opposed to intrinsic participation, respectively. The first opposite pair views existing legal and political institutions as in need of a civic complement that enhances a democratic public sphere through civil society action. Secondly, voting as a routinized mechanism of largely exogenous preferences is contrasted to deliberation as a process by which endogenous preferences can be formed and expressed. Lastly, the instrumental participation of citizens as a means to control government could be altered to include an intrinsic motivation that includes participation as

an end in itself. The three democracy-enhancing goals of civic participation, deliberation and intrinsic participation are all part of what is generally viewed as participatory democracy, even though sub-varieties, such as direct or deliberative democracy, exist underneath this umbrella term.

Participatory democracy, in turn, has been defined by Barber as "self-government by citizens, rather than representative government in the name of citizens", whereby *"self-government is carried on through institutions designed to facilitate ongoing civic participation in agenda-setting, deliberation, legislation, and policy implementation"*.[73] It becomes evident that, on the one hand, the concept of participatory governance may be problematic for representative democracy as we know it. On the other hand, if implemented, participatory strategies challenge citizens to become more active and knowledgeable stakeholders in the political process, but they equally confront policy-makers with how to balance both forms of political power, as well as their own. Applied to the EU context, the participatory governance discourse refers primarily to organized and/or collective actors, and, according to the European Commission, may be useful to increase the problem-solving quality as well as compliance and acceptance of political regulation.[74] The latter notion highlights "organized" civil society, as opposed to individual political or social movement action, and problematizes already the EU's own instrumental as well as normatively legitimizing vision of participatory input. Hence the EU's traditional basis of representative democracy as enshrined in the treaties (Article 10 TEU) has been expanded by the inclusion of a strong participatory dimension (Article 11 TEU) that highlights public consultations and regular civil society dialogue.

Keeping the three dimensions of participatory governance in mind, as well as the challenges the concept poses to liberal representative democracy, the following section examines how far the three political innovations represent a viable way to enhance the EU's democratic legitimacy.

3.1 Civil Society: NGOs and CSOs

If the large number of associations grouped together under the umbrella term "civil society" represents in fact, according to Michael Walzer, *"the sphere of uncoerced human association between the individual and the state, in which people undertake collective action for normative and substantive purposes, relatively independent of government and the market"*,[75] then a number of qualifications are necessary when evaluating the role of civil

society in the context of EU governance. An independent civil society in European public spheres is on the one hand quite fragmented, given the nationally distinct organizational and cultural characteristics, so that it is difficult to speak of the emergence of a truly transnational European civil society. Rather, we observe the split of predominantly domestic CSOs that may or may not be linked up with their EU-level umbrella organizations in Brussels. On the other hand, the independence from government may be more true in the domestic arena, but on an EU level many large and, in European Commission language, "representative" CSOs receive substantial funding from the European Commission, which potentially restricts the autonomy of such associations.[76]

By enshrining civil society participation in policy processes, the EU not only lifted the profile of civil society actors but also applied a fairly high consultative threshold for its inclusion in policy formulation. The requesting of input from civic society thus forced groups to transform from an independent civil society to an organized one capable of collecting and channeling rights claims to the appropriate EU venues. As a result, the dual nature of organized civil society, simultaneously being a critical partner by voicing public concerns about policies while at the same time becoming a loyal cooperation partner for EU bureaucrats, raises questions about the legitimacy of such actors in this complex multi-actor governance system.[77] However, given that EU institutions as well as CSOs are provided with reputational gains (CSOs being heard as representatives of European citizens, and EU institutions listening to citizens' demands) that increase their respective legitimacy in the public sphere, both sets of actors continue this symbiotic relationship.[78]

As far as citizens' online consultations and deliberative meetings of multiple stakeholders are concerned, civic participation seems restricted to promoting discussion among citizens on topics that are pre-chosen by the European Commission. The small number of participants, usually in the hundreds for face-to-face meetings and a few thousand for online consultations, makes it evident that such measures are aimed primarily at specialists on any given topic, and represent a way for EU institutions to have citizen concerns voiced without necessarily feeling bound by the results.[79] Given these limitations, these kinds of mechanisms hardly serve as participatory or efficient correctives to existing representative-institutional EU-level policy-making. In terms of the three dimensions postulated by Kohler-Koch and Rittberger, the move to integrate civil society more strongly as a participatory element into the EU's representative system has provided both sets of

actors with added opportunities to increase the democratic legitimacy in an ever more politicized EU, but runs the risk of remaining too elitist and not consequential enough in terms of impacting on policy development. The second dimension of deliberation to form endogenous preferences is rather limited, as organized civil society as well as individual citizens' consultations are for the most part pre-determined by the European Commission (in an effort to receive policy-relevant input). The last criterion of participation as a means in itself is more difficult to judge, as the post-Lisbon period has certainly seen an increase in civic participation, but this activist input aims still predominantly at the oversight of governments in power, or the instrumental input in a purely consultative manner.

To sum up, the inclusion of civil society through the EU has not just provided normative and legal-political opportunity structures for an expansion of democratic legitimacy, but such linkage to the EU institutions has also brought its own challenges for civil society in terms of organizational influence and (their own) democratic legitimacy. This means that civil society actors have to weigh the input opportunities that are presented with the potential credibility costs that arise as a result of co-optation by EU institutions. If civil society is consequentially included in the EU's consultative process, then *"bottom-up involvement ultimately refashions guiding norms for the political work of EU political elites in Brussels, so that rights-based policies will not be deduced from abstract principles or imposed by governance institutions, but rather arrived at conjointly with civil society input"*.[80]

3.2 Right to Petition/Complaint

As mentioned earlier, the past decade and a half has seen the emergence of the right to petition the European Parliament to take up issues of concern by citizens, as well as the right to complain to the European Ombudsman if a case of EU maladministration is suspected. In the case of the petitions submitted to the European Parliament, the establishment of the office of Ombudsman—which is elected by the parliamentary body—has possibly led to a slight growth in usage of the petition-right from about 2000 around the year 2010 to closer to 3000 per year for the past two years, roughly 65–70 % of which are declared permissible.[81] The use of this right can be impactful if the petition is found to be valid, as the European Parliament's petition committee can debate the issue in a broader circle and forward it to the European Commission and, eventually, the Court of Justice, although it cannot override decisions taken by previous authorities

and is thus, just like the European Ombudsman office, reliant on cooperation with the other institutions. In the case of the European Commission, the collaboration is often ambiguous, given the European Commission's own policy prerogatives. In addition, the number of petitions outstrips the capability of the Parliament's petitions committee to investigate each petition similarly so that a prioritization takes place that reflects the makeup of the Committee members, such as their national concerns and their party membership.[82] This also means that certain issues of interest to the parliamentarians are highlighted whereas others are not, thus making it vulnerable to criticism. In this context, there also exists no judicial review by EU courts of the petition committee's treatment of the cases; only their admissibility is subject to review, which can lead to strategic neglect even if a petition has been admitted.[83] In comparison with other European Parliament committees, it is considered one of the less powerful ones, based on its output,[84] yet it compares well, in terms of functionality, with other national petition systems (except on issues of transparency and publicity).[85] Finally, given the similar corrective objectives of the European Parliament's petition committee, the European Ombudsman office and the new ECI, there have been discussions about the value of these instruments in the face of diminished EU resources.

In contrast to the petitions committee, according to most observers the European Ombudsman has in a relatively short period of time successfully established an impactful rapport between EU institutions and the general public. Despite the limitations on the cases that he can take on in terms of applicability to EU administrative acts, the double-positioning as independent investigator and public liaison has not only aided the image of the Union but also strengthened the democratic (administrative) legitimacy.[86] While the number of complaints lodged with the European Ombudsman has remained relatively constant over the past five years with about 2–2500 cases each year, the office has become more visible to the public, as fewer complaints outside its remit are recorded. Cases increasingly have to do with a perceived lack of information (21.5 % of all cases in 2014), personnel selection issues (19.3 %) and the European Commission fulfilling its duties as "guardian of the treaties" (19.3 %). In one third of the closed cases, a friendly solution for settling the case was found, while in 40 % no further inquiries were justified, in 20 % no maladministration found, yet in 10 % such malpractice was evident.[87] Interestingly, as it pertains to the deliberative dimension of democratic legitimacy the European Ombudsman is said to promote the principles of transparency, participation

and explanation and thus promote a more deliberative administrative philosophy.[88] To illustrate, in the past year some of the main activities were related to demands for more transparency in the transatlantic negotiations of the Transatlantic Trade and Investment Partnership (TTIP), as well as public consultations over the (in)effectiveness of the ECI. And newer research has indeed empirically validated that the European Ombudsman helps to enshrine accountability and transparency as EU citizenship rights and as a platform for citizens to express these rights.[89]

If we consider the aforementioned legitimizing dimensions of civil society involvement, deliberation and intrinsic participation, then the two institutions fare in a similar manner: the European Parliament's petition committee as well as the European Ombudsman office aim to address the concerns of individuals as well as collective actors, although in practice organized civil society is better informed about the petition opportunities that are at their disposal. The deliberative criterion challenges the EU institutions to become more open to stakeholder discussions so as to allow for an endogenous preference formation of affected populations. Applied to the two institutions under observation, it appears at first glance that the petitions committee as the body to register proposals for the improvement of EU policy implementation and EU institutional responsiveness—as opposed to the purely corrective function of the European Ombudsman—corresponds better to the deliberative ideals that contribute to democratic legitimacy. However, the European Ombudsman has in the past few years inserted itself more strongly into policy debates that have a broader deliberative impact, such as the debates surrounding TTIP transparency, or the effectiveness of the ECI, and thus increased the deliberative quality of these debates in the public. In terms of the last dimension, intrinsic participation as an end to develop human capacity and not only instrumental means for control of authority, both institutions lack in efforts to encourage civic intrinsic participation as their mandates are strongly correlated to the control of EU institutions and policies. However, it could also be said that the right to petition as a principle of citizenship is already a first step in moving beyond passive, instrumental participation of citizens.

3.3 The European Citizens' Initiative (ECI)

The ECI started out with high expectations by all sides, including policymakers who saw it as a democratically legitimizing tool to move "closer to the citizens", as well as civil society representatives who found it an

ideal complement to other communication and advocacy channels in the EU. While the EU saw indeed the idea being put into practice and taken up by civil society, with 51 initiatives proposed and 31 registered (as of 2015),[90] at various stages problematic issues materialized. From the side of CSOs, the relatively high threshold required in terms of Member States and supporting signatures challenges the capacity to organize horizontally across borders, and on the institutional side many concerns regarding the online registration process, as well as legal considerations exist, such as the appropriate scope of this new instrument (in comparison to existing corrective petition instruments).[91] Once registered and supported by more than one million citizens throughout the Member States, the evaluation through the European Commission presents yet another hurdle: of the two ECIs thus far that almost reached the two million signature mark, "The Right to Water" advocating for keeping water supply a right-based public good, and "One of Us" arguing for the recognition and protection of early embryonic life, neither received a consequential, legislative follow-up by the European Commission. In fact, the European Ombudsman has actually taken up the issue of the lack of responsiveness of the European Commission, in order to evaluate ways in which the ECI could become more effective, and the European Parliament as well as many ECI organizers feel that the Parliament should be interlocutor and evaluator of such requests, rather than the European Commission.[92] Another reform idea that was expressed suggests the creation of a Citizens' Initiative Centre to support the initiative process,[93] but a lack of political will as well as material resources will have to be overcome first.

More details about the implementation and challenges of the ECI will be detailed in the following chapters, so that we concentrate here on an evaluation based on the three participatory dimensions required for greater democratic legitimacy. If one considers the criterion of moving from political institutions toward civil society involvement, the ECI certainly offers the potential to more strongly engage individual as well as collective civic actors. The chance to propose potentially new legislation that is of direct concern to a large number of European citizens not only motivates, but at the same time also stimulates, the advocacy activities of a broad field of actors. A cursory look at the range of initiatives logged with the European Commission reveals not only specialized issues of concern to public interest groups, such as data protection or more social protection, but also more broadly spread "populist" campaigns such as anti-abortion or cannabis legalization.[94] This point relates well to the second

dimension of democratic legitimacy in the Union, the move toward deliberative participation. Given that the ECI represents a broader participatory mechanism involving CSOs from a number of countries working together on a campaign, thus going beyond the Brussels beltway, it is viewed as a potentially transformative instrument strengthening democratic legitimacy through participatory democratic means.[95] Yet if the technical problems and high threshold persist, and even campaigns that clear these hurdles are not responded to appropriately, the ECI could be viewed as a mostly declaratory EU public relations tool, with a resulting loss of confidence in this mechanism over the next few years. The last democratizing dimension, intrinsic participation rather than passive, instrumental behavior, cannot easily be attributed to the ECI. While it empowers people to become active citizens in the EU integration process, it also represents a utilitarian instrument as the costs and barriers of a transnational European campaign are only realistically considered if the outcome could potentially result in actually occurring policy initiatives or changes. This is exactly what makes the ECI such an attractive mechanism: it has obvious public-discursive impact but also serves to guide EU policy-makers as to what important issues exist for a large number of Europeans. In sum, the ECI has a number of potentially beneficial outcomes for policy-makers as well as European citizens, but will need to be reformed so as to become more accessible, as well as responsive in terms of outcomes.

4 Conclusions

This introductory chapter analyzed the evolution of citizens' political rights starting with the recognition of certain rights and ending with enshrining the newest political right in a treaty, the right to initiative. It has become evident that public participation in European political life has been gradually increased, taking different forms, such as active participation in non-governmental organizations and civil society organizations fighting for legitimate rights and interests, thus creating the conditions to engage the citizens in political life; the right to petition before the European institutions either to request the institutions to act in order to apply EU Law or to act on subjects which come within the EU's fields of competence; and the right to complain before the European Ombudsman when the maladministration of the institutions and bodies of the EU has occurred.

After the failure of the Convention on the Future of Europe (2002), where the right to initiative was stipulated for the first time in former Article 45 (the principle of representative democracy) as a step towards the development of European civil society, the Lisbon Treaty represents the second major European treaty that clearly recognizes this political right. Translated into practice in the adoption of Regulation (EU) no. 211/2011 of the ECI, a brand new transnational instrument was established with the principal goal to consolidate democracy in Europe, its democratic values and foundations empowering the citizens to participate directly in the political life of the Union together with the main European institutions with legislative roles, the European Parliament (Art. 225 TFEU) and the Council (Art. 241 TFEU).

Although several European initiatives have already reached one million signatures, the European Commission only took further steps regarding one of these initiatives, namely the European initiative "Right2Water".[96] In this singular case, the European institution declared in a Communication[97] that one of the next concrete measures will be to "*launch an EU-wide public consultation on the Drinking Water Directive* […]", including to modify the Council Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption. We hope, but cannot ascertain, that in the future the European institutions will involve citizens more and more in the EU's consultation practices, based on the initiatives proposed by European citizens, should these fulfill the many conditions set out for them.

Furthermore, from our point of view this new democratic tool has the power to contribute in a public-discursive manner to trans-European debates on Union issues, as we have already seen, becoming in time *"a policy-creating instrument that will improve citizens' influence in the EU political context by reinforcing the exchange of civic competence and fostering civic inclusion at a supranational level"*,[98] if it is implemented properly, with no implementation gaps or other procedural shortcomings.

Finally, the Eurocrisis has furthered the debate about the state of EU democratic legitimacy (e.g. of the Troika, or the European Central Bank, or the Eurozone member states vis-à-vis the rest of the Union). This means that while institutional arrangements to improve the democratic quality of the EU polity have been piecemeal and lagging behind, in terms of institutionalization and utilization, the current crisis has politicized EU governance to a hitherto unknown extent. Given the recent centrality of democratic legitimacy in European integration processes, it can be

expected that more, and stronger, political strategies and instruments will be called for and devised—as well as existing ones reformed—that correspond to citizens' expectations. If the Union wants to retain popular support, it needs to improve in this regard.

Notes

1. Currently, European Union; Alex Warleigh, "Purposeful Opportunists? EU Institutions and the Struggle Over European Citizenship", in *Citizenship and Governance in the EU*, ed. Richard Bellamy and Alex Warleigh, Continuum, London, 2001, pp. 34–35.
2. Andreas Follesdal and Simon Hix, "Why There is a Democratic Deficit in the EU", *Journal of Common Market Studies*, Vol. 44, no. 3, 2006, pp. 533–562.
3. Jo Shaw, "E.U. Citizenship and Political Rights in an Evolving European Union", *Fordham Law Review*, Vol. 75, Issue 5, 2007, p. 2549.
4. For example, recovering and consolidating the European economies; implementation of a new common regional policy by creating the European Regional Development Fund in December 1974; the fight against the increased pollution in Europe; see Oana-Mariuca Petrescu, "The European Citizens' Initiative: A Useful Instrument For Society And For Citizens?", *Revista Chilena de Derecho*, Vol. 41, no. 3, 2014, p. 994.
5. These documents were signed in Brussels on 20 September 1976 and entered into force on 1 July 1978 after its ratification by all the Member States; Adam Stanislas, "Electoral Rights Under the Review of the European Court of Justice: Judicial Trends and Constitutional Weaknesses", *CYELP no. 3*, 2007, p. 418.
6. Before 1979, the members of the European Parliament were delegated by national parliaments of the Member States.
7. Treaty on European Union, published in OJ C 191 of 29.07.1992 and Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, published in OJ C 340 of 10.11.1997.
8. Namely, the right to vote; the right to be elected in the legislative bodies or other representative organs; the right to hold public offices and so on.
9. Regulation (EU) no. 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative, JO L 65 of 11.03.2011.
10. Oana-Mariuca Petrescu, "Strengthening the Idea of 'By Citizens, for Citizens' in the Context of the European Citizens' Initiative—Brief

Analysis of Initiatives", *Romanian Journal of European Affairs*, Vol. 14, no. 2, 2014, p. 8.

11. Oana-Mariuca Petrescu, "The European Citizens' Initiative: A Useful Instrument for Society and for Citizens?", *Revista Chilena de Derecho*, Vol. 41, no. 3, 2014, p. 997.
12. Germany, France, Italy, the Netherlands, Belgium, Luxembourg, Denmark, Ireland, the UK.
13. Dominique Schnapper, *The European Debate on Citizenship*, Daedalus Collection, The MIT Press, Portland, 1997, p. 203.
14. Oana-Mariuca Petrescu, "The Political Citizenship in the Context of the Lisbon Treaty", *Romanian Journal of European Affairs*, Vol. 13, no. 1, 2013, p. 50.
15. Oana-Mariuca Petrescu, *op.cit.*, p. 46.
16. For example, a report on European identity concerning the special rights given to the citizens and the need to safeguard principles of representative democracy, rule of law, social justice, and respect for human rights; establishing a working group to study the possibility of a future unique European passport, and the harmonization of the legislation affecting foreigners, including the abolition of the passport controls within the Community territory; a resolution supporting the European citizenship. This resolution was adopted by the European Parliament, in 1977; Willem Maas, "The Politics of European Rights" For Panel 15-5, The Construction of Individual Rights in the European Union, 2001, Yale University, p. 2, available at: www.yale.edu/leitner/resources/docs/2001-26.pdf (accessed 11 May 2015); and finally a proposal for a Council Directive on a right of residence for nationals of Member States in the territory of another Member State (Proposal for a Council Directive on a right of residence for nationals of Member States in the territory of another Member State, COM(79) 215 final, 26 July 1979) with the goal of abolishing all remaining restrictions on movement and residence for nationals of Member States.
17. Available at: http://www.cvce.eu/obj/draft_treaty_establishing_the_european_union_14_february_1984-en-0c1f92e8-db44-4408-b569-c464cc1e73c9.html (accessed 11 May 2015).
18. The Draft Treaty establishing the European Union, known as "*Spinelli draft*", published in OJ C 77 of 14.02.1984.
19. Dominique Schnapper, *op.cit.*, p. 203.
20. We are talking about the right to vote and to stand as a candidate in the local and regional elections as well as for the European Parliament; the right to free movement within the entire territory of European Union and the right to consular protection by other EU states' embassies.
21. Oana-Mariuca Petrescu, *op.cit.*, p. 999.

22. Namely, Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish and Swedish.
23. Oana-Mariuca Petrescu, *op.cit.*, p. 47.
24. Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed at Nice, 26 February 2001, published in OJ C 80 of 10.03.2001.
25. Annex I attached to the Final Declaration, 2001, p. 20 (SN 300/1/01 REV 1).
26. *Ibid.*, p. 21.
27. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (unconsolidated version), published in OJ C 306 of 17.12.2007.
28. Luis Bouza García, et al., "The European Citizens' Initiative—A First Assessment", College of Europe, Bruges, 2012, p. 62.
29. Paul Craig and Gráinne de Búrca, *EU Law, Text, Cases and Materials*, 5th ed., Oxford University Press, 2011, p. 819.
30. Available at: http://www3.weforum.org/docs/WEF_FutureRoleCivilSociety_Report_2013.pdf (accessed 2 June 2015).
31. Elisabeth Prügl and Markus Thiel, *Diversity in the European Union*, Palgrave, New York, 2009.
32. The Hungarian Parliament adopted on 18 April 2011 Hungary's new Fundamental Law, which came into effect on 1 January 2012, available at: http://www.kormany.hu/en/news/the-new-fundamental-law-of-hungary; http://www.kormany.hu/download/e/02/00000/The%20New%20Fundamental%20Law%20of%20Hungary.pdf (accessed 16 June 2015).
33. Available at: http://webarchive.nationalarchives.gov.uk/20051020170743/http://cabinetoffice.gov.uk/regulation/consultation/documents/pdf/code.pdf (accessed 16 June 2015).
34. Available at: http://ec.europa.eu/governance/docs/comm_rapport_en.pdf, 2003, p. 8 (accessed 9 September 2015).
35. Available at: http://www.europarl.europa.eu/atyourservice/en/20150201PVL00041/Agora (accessed 24 June 2015).
36. Council Regulation (EU) no. 390/2014 of 14 April 2014 establishing the "Europe for Citizens" programme for the period 2014–2020 published OJ L115 of 17.04.2014, available at: http://eur-lex.europa.eu/legal-ontent/EN/TXT/PDF/?uri=CELEX:32014R0390&from=EN (accessed 24 June 2015).
37. Available at: http://ec.europa.eu/yourvoice/index_en.htm (accessed 24 June 2015).
38. Currently, there are 26 subjects waiting for opinions coming from the approximate 500 million citizens of the Member States, available at:

http://ec.europa.eu/yourvoice/consultations/2015/index_en.htm (accessed 24 June 2015).

39. Available at: http://www.cvce.eu/en/collections/unit-content/-/unit/d5906df5-4f83-4603-85f7-0cabc24b9fe1/4d58b147-42c8-45dc-a657-a9003b13f870 (accessed 16 June 2015).
40. Former article 21 and article 194 of the Treaty establishing the European Community (EC), presently art. 20 para 2 letter d. and article 227 TFEU, available at: http://www.cvce.eu/en/collections/unit-content/-/unit/d5906df5-4f83-4603-85f7-0cabc24b9fe1/4d58b147-42c8-45dc-a657-a9003b13f870/Resources#9a75a9fd-ee63-46a5-9c3a-6371f6f1efa5_en&overlay (accessed 16 June 2015).
41. Oana-Mariuca Petrescu, "Strengthening the Idea of 'By Citizens, for Citizens' in the Context of the European Citizens' Initiative—Brief Analysis of Initiatives", p. 12.
42. Available at: http://www.europarl.europa.eu/committees/en/peti/home.html (accessed 28 June 2015).
43. Available at: http://www.eppgroup.eu/topic/Citizens%27-right-to-petition-the-European-Parliament (accessed 17 June 2015).
44. Available at: http://www.civitas.org.uk/eufacts/download/BO.4.Ombudsman.pdf (accessed 17 June 2015).
45. "*Maladministration*" means poor or failed administration and occurs if an institution fails to do something it should have done, if it does it in the wrong way, or if it does something it should not have done.
46. *Ibid*.
47. Available at: http://www.ombudsman.europa.eu/atyourservice/ata-glance.faces (accessed 17 June 2015).
48. Booklet, *The European Ombudsman's Guide to Complaints*, 2011, available at: http://www.eurojust.europa.eu/doclibrary/EU-framework/EUframeworkgeneral/European%20Ombudsman%20guide%20to%20complaints%20%282011%29/EUOmbudsman-guidetocomplaints_2011_EN.pdf (accessed 18 June 2015).
49. Available at: https://secure.ombudsman.europa.eu/en/atyourservice/secured/complaintform.faces (accessed 18 June 2015).
50. Background speaking points for Zita Gurmai, "MEP: The ECI Regulation—The Contribution of the European Parliament", held in Barcelona, 25 March 2011, p. 1.
51. Ken'ichi Ikeda, et al., "Does Political Participation Make a Difference? The Relationship Between Political Choice, Civic Engagement and Political Efficacy", *Electoral Studies*, no. 27, 2008, p. 78.
52. Thus, article 39 of the Charter "Right to vote and to stand as a candidate at elections to the European Parliament" stipulates that: *"1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the*

European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State. 2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot". According to article 40 of the Charter *"Right to vote and to stand as a candidate at municipal elections", "Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State"*.

53. Article 24 TFEU provides that: *"The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the provisions for the procedures and conditions required for a citizens' initiative within the meaning of Article 11 of the Treaty on European Union, including the minimum number of Member States from which such citizens must come"*.
54. European Parliament Resolution of 7 May 2009 requesting the Commission to submit a proposal for a regulation of the European Parliament and of the Council on the implementation of the citizens' initiative (008/2169(INI), available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0389+0+DOC+XML+V0//EN (accessed 29 June 2015).
55. The types of participation of citizens are a) horizontal civil dialogue (citizens between themselves); b) vertical civil dialogue (citizens with institutions); c) consultation (institutions asking citizens for their opinion); and d) the ECI (citizens asking institutions to make a legislative proposal). For more, see Samantha Besson and André Utzinger, "Toward European Citizenship", *Journal of Social Philosophy*, Vol. 39, no. 2, 2008, pp. 185–208.
56. Luis Bouza García, et al., *op.cit.*, p. 2.
57. Ken'ichi Ikeda, et al., *op.cit.*, p. 78.
58. Vaughne Miller, "Recent EU Treaty Amendments and UK Ratification", Standard notes SN/IA/6503, International Affairs and Defence Section, House of Commons, 2012, p. 2.
59. For example, the Government of any EU Member State, the European Parliament, the European Commission and so on.
60. For example, the European Parliament, the European Commission in specific cases or the European Central Bank in the monetary area.
61. Available at: http://ec.europa.eu/citizens-initiative/public/faq#q12 (accessed 29 June 2015).
62. Bruno Kaufmann, "The European Citizens' Initiative Pocket Guide", Initiative and Referendum Institute Europe and the Green European Foundation Belgium, March 2012, p. 11.
63. *Ibid*.

64. Available at: http://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-145-EN-F1-1.PDF (accessed 20 June 2015).
65. Available at: http://europa.eu/rapid/press-release_IP-15-4729_en.htm (accessed 20 June 2015).
66. Namely, the European Citizens' Initiative *"Water and Sanitation are a Human Right! Water is a Public Good, Not a Commodity!"*, available at: http://ec.europa.eu/citizens-initiative/public/initiatives/finalised/details/2012/000003; the European Citizens' Initiative *"One of us"*, available at: http://ec.europa.eu/citizens-initiative/public/initiatives/finalised/details/2012/000005 (accessed 20 June 2015).
67. The initiative entitled "Water and Sanitation are a Human Right! Water is a Public Good, not a Commodity!" initially registered in English and then translated into 20 languages.
68. These initiatives are "Right2Water" also known as "Water and Sanitation are a Human Right! Water is a Public Good, Not a Commodity!" (1,884,790 signatures), "One of us" (1,897,588 signatures) and "Stop Vivisection" (1,326,807 signatures).
69. Available at: http://www.right2water.eu/ (accessed 25 September 2015).
70. Available at: http://ec.europa.eu/transparency/regdoc/rep/1/2014/EN/1-2014-177-EN-F1-1.Pdf (accessed 12 September 2015).
71. Andreas Follesdal and Simon Hix, *op.cit.*, pp. 533–562.
72. Beate Kohler-Koch and Berthold Ritteberger, *Debating the Democratic Legitimacy of the European Union*, Lanham, 2007, pp. 14–18.
73. Benjamin Barber, "Strong Democracy", in *Democracy: A Reader*, ed. Ricardo Blaug and John Schwarzmantel, Columbia University Press, 2001, p. 447.
74. Michael Greven, "Some Considerations on Participation in Participatory Governance", in *Debating the Democratic Legitimacy of the European Union*, ed. Beate Kohler-Koch and Berthold Ritteberger, *op.cit.*, p. 236.
75. Cited in: Michael Edwards, *The Oxford Handbook of Civil Society*, Oxford University Press, 2013, p. 4.
76. Rosa Sanchez-Salgado, *Europeanizing Civil Society*, Palgrave, New York, 2014.
77. Ulrike Liebert and Hans-Jörg Trenz, *The New Politics of European Civil Society*, Routledge, New York, 2013, pp. 1–16.
78. Markus Thiel, "European Civil Society and the Fundamental Rights Agency: Creating Legitimacy Through Civil Society Inclusion?", *Journal of European Integration*, Vol. 36, no. 5, June 2014, pp. 435–451.
79. Andrea Fischer-Hotzel, "Democratic Participation? The Involvement of Citizens in Policy-Making at the European Commission", *Journal of Contemporary European Research*, Vol. 6, no. 3, 2010, pp. 335–352.
80. Markus Thiel, *Ibid*.

81. European Parliament, Petitions Committee Report 2012, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bREPORT%2bA7-2013-0299%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN (accessed 6 August 2015).
82. Brendan Carroll, "Petitioning the European Parliament: The Committee on Petitions as Gatekeeper to Citizen Interests", Paper presented at the ECPR Conference, 2013.
83. New Europe, European Parliament's Petitions Committee may not be challenged before a Court, 17 July 2014.
84. Nikoleta Yordanova, *Organising the European Parliament: The Role of the Committees and their Legislative Influence*, ECPR Press, Colchester, 2013, p. 39.
85. European Parliament/Tiago Tiburcio, "Right to Petition Study", 2015, p. 6, available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519223/IPOL_STU%282015%29519223_EN.pdf (accessed 6 August 2015).
86. Paul Magnette, "Between Parliamentary Control and the Rule of Law: The Political Role of the Ombudsman in the European Union", *Journal of European Public Policy*, Vol. 10, no. 5, October 2003, pp. 677–694.
87. European Ombudsman, Annual Report 2014, available at: http://www.ombudsman.europa.eu/en/activities/annualreports.faces (accessed 5 August 2015).
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CHAPTER 3

The European Citizens' Initiative as Democratic Legitimacy-Enhancing Tool: Toward a Broader Conceptualization

Karolina Borońska-Hryniewiecka and Elizabeth Monaghan

While looking for the most innovative aspects of the Treaty of Lisbon, the introduction of the European Citizens' Initiative (ECI) can surely be deemed one of them. Labeled as the world's first tool of transnational participatory democracy, the ECI, which allows one million citizens to prompt policy solutions for 28 European states, has become a beacon of hope for increasing the democratic legitimacy of the European Union (EU). In operation since 2012, the ECI underwent its first official review carried out by the EU institutions in 2015. It is certainly a good time to evaluate the scale of success of this new instrument and assess the extent to which it fulfills the function of participatory democracy in the EU.

To this end, as a continuation of the previous contribution, this chapter places the ECI under a magnifying glass to dissect its potential effects for the democratic legitimacy of the EU. Departing from a focus on the

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limited performance of the ECI as policy-initiating tool, this chapter builds on the premise that any comprehensive evaluation of the mechanism should go further, and be carried out in broader than just legislative terms (Sect. 1). Consequently, this chapter proposes an extended conceptualization of the ECI not only as a legislative instrument but also as a dialogue-enhancing tool, a deliberative space or an agenda-setting mechanism (Sect. 2). In order to account for how the ECI performs in these dimensions, the empirical part of the chapter (Sect. 3) presents the perceptions on the ECI of various actors involved in its operationalization, including feedback submitted to the European Ombudsman by ECI campaigners (both individuals and NGOs), reports of EU institutions,[1] as well as opinions of scholars and observers extracted from interviews, consultations or studies on the functioning of the ECI. The chapter concludes with the argument that that while the ECI has the potential to perform various democratic roles beyond policy initiation, these roles are still limited by technical hurdles and the inadequate legislative design of the ECI.

1 The European Citizens' Initiative: Its Record So Far

Although enshrined in the Treaty of Lisbon (2009),[2] the ECI became fully operational only on 1 April 2012, by the implementation of the secondary law in the form of Regulation 211/2011.[3] According to the Regulation, an ECI might be brought forward to the European Commission by not less than one million citizens who are nationals of at least a quarter of EU Member States, and should refer to matters or policy areas over which the Commission enjoys legislative powers. This provision formally puts citizens on equal footing with the European Parliament and the Council, who as EU co-legislators enjoy their right of indirect legislative initiative according to Arts. 225 and 241 of the Treaty on the Functioning of the European Union (TFEU) respectively.

To become operational, an ECI requires a "citizens' committee" composed of citizens from at least seven different Member States to register the initiative with the Commission outlining the legal basis for the proposed legal action. After successful verification of the initiative, the organizers have 12 months to collect at least one million statements of support in the form of signatures from at least seven Member States. After verification, the Commission is required to publish the ECI in a register, and to receive the organizers at the appropriate level to allow them to explain the details of their request.

More importantly, the organizers are given an opportunity to present the initiative at a public hearing held at the European Parliament (EP).

Since the launch of the ECI in April 2012 to June 2015, 51 ECIs were officially submitted to the Commission, out of which 31 were finally registered. From those, however, only three ECIs succeeded in gathering the required number of signatures and prompted the Commission to make a formal response.

The first successful ECI was the "Right2Water" campaign launched on 10 May 2012 and submitted to the Commission on 20 December 2013. Its general purpose was to propose legislation implementing the human right to water and sanitation and promoting the provision of water and sanitation as essential public services for all. After validation, the ECI gathered over 1.659,543 signatures[4] in 13 Member States. In line with the ECI regulation, on February 2014, the public hearing on the Right2Water took place at the European Parliament. In spite of the amount of support for the ECI, the Commission decided not to undertake any legislative action in response to the ECI, a decision for which it was criticized not only by the campaign organizers but also by other EU institutions.[5] Nevertheless, the Commission did commit itself to several actions to address the issues raised in the ECI in a non-legislative manner (see below).

The second ECI, entitled "One of Us", was launched on 11 May 2012 and aimed at phasing out EU funding of research involving human embryos. This was the ECI which collected the largest number of signatories: 1.721,626 from 18 Member States. The organizers of the ECI presented their cause in a public hearing in the European Parliament on 10 April 2014, and the Commission reacted with a Communication on 28 May 2014. Also in this case the Commission decided not to submit a legislative proposal, and nor did it take any other follow-up action explaining that the existing legal framework regulating the issue was adequate.[6] The decision was criticized as unjustified and anti-democratic by the authors of the ECI, who even brought a formal action against the European Commission to the Court of Justice of the European Union (CJEU). In their petition to the CJEU from July 2014, they demanded that the Commission's reply to their initiative be annulled, and that the Commission be obliged to issue another, more appropriate response to the ECI.[7]

The third successful ECI, "Stop Vivisection", was submitted to the Commission on 3 March 2015 and called for the EU to stop animal testing by repealing Directive 2010/63 on the protection of animals used for scientific purposes. It collected 1,173.130 signatures from nine EU

countries. The public hearing organized on 11 May 2015 was highly controversial with members of different European Parliament committees expressing very diverse opinions. On 15 June 2015, the Commission published its formal response to the ECI in which it said that while it shares the conviction that animal testing should be phased out in Europe, its approach for achieving that objective differs from the one proposed in the ECI. The organizers of the ECI argued that the Commission's response was "superficial", "generic" and disproportionate given the extent of the public support for and scientific basis of the campaign,[8] and promised to lodge a complaint with the European Ombudsman.

2 Beyond Initiating Legislation: Toward a Broader Conceptualization

Taking into account the experience of the ECI tool during its first three years of operation, if one were to evaluate it as a legislation-initiating tool prompting policy change, the verdict would have to be unequivocally negative as it had resulted in precisely zero legislative proposals. Such a view of the ECI, however, conceptualizes it in a narrow, solely vertical sense and consequently limits an understanding of the range of its potential effects. Like other democratic innovations,[9] the ECI should not be considered a unitary tool aimed at achieving a single end. From the moment of its inception it has carried the weight of multiple expectations about what it *can* and what it *ought* to achieve or secure for EU democracy. Even the European Ombudsman emphasized that, in terms of the substantive outcomes of the ECI process, the Commission coming forward with a legislative proposal should not be the only measure of success.[10]

In general the ECI was supposed to bridge the gap between EU citizens and decision-making institutions in order to "bring citizens and EU institutions closer together". What this actually means in practice can take multiple forms, since any abstract democratic principle can be implemented in different ways. Consequently, beyond the idea of the ECI as a tool for initiating legislation, there are other visions of its potential and purpose. This section outlines several such other dimensions in which the ECI might perform different "democratic roles". These are: the ECI as a communication- and dialogue-facilitating tool; an awareness-raising tool; an agenda-setting tool; a deliberative tool; and a citizen-activating tool. Each of these dimensions in turn corresponds to often quite different conceptions of the relationship between democracy and participation as found in democratic theory.

2.1 Communication- and Dialogue-facilitating Tool

In the vertical sense, the central mission of the ECI is to connect Brussels institutions and decision-makers with citizens and show them that the EU is humane, responsive and accessible. The ECI opens up a channel for communication and dialogue between citizens and EU institutions of the kind that had not previously existed. It allows for interaction to take place directly between citizens and EU institutions without parliamentary or executive intermediaries. Furthermore, other participatory structures found within the EU political system have tended to be indirect and informal[11] or, actually in practice, aimed at "elite" rather than ordinary citizens.[12] Launching the ECI and anchoring its operational nucleus at the Commission's Secretariat might also improve its image of a distant bureaucracy and give it a better idea of the concerns of European citizens. In this sense, the ECI offers a broader communicative hinterland that the legislative and agenda-setting functions of the instrument are couched in.

However, the dialogue- and communication-enhancing function of the ECI should also be viewed in a horizontal dimension. In this sense, the ECI can be conceptualized as a transnational dialogue- and network-building tool between citizens and groups across Europe. The requirement built into Regulation 211/2011 that an ECI be led by a seven-member "citizens' committee" reflects an attempt to ensure that campaigns were genuinely "European", and to encourage discussion and coalition-formation across Member State boundaries. To this extent it is consistent with a longer-established tendency on the part of the Commission to favor as societal partners transnational representative associations over multiple nationally-based and organized interests.[13]

2.2 Awareness-raising Tool

Linked to the communicative and dialogue-facilitating dimension of the ECI but analytically separable is a dimension concerning the awareness-raising potential of the ECI. The idea here is that participation in an ECI can serve a cognitive function whereby citizens' knowledge and understanding of the EU is enhanced in the process. Awareness-raising can on the one hand be about increasing citizens' knowledge about the EU political system—a form of "learning by doing", given that successive Eurobarometer surveys have suggested that knowledge of the EU institutions is not widespread among European populations. On the other hand, awareness-raising can be about the specific citizenship rights of the EU

that accrue to citizens. In 2013 the European Commission promoted a "European Year of Citizens", the focus of which was to convey to citizens the citizenship rights they had as EU citizens and to encourage them to activate these rights.[14]

Bound up in this dimension of the ECI are assumptions about the relationship between knowledge and understanding, and support for and trust in EU institutions and policies. It is argued that even if citizens do not use this opportunity structure they should be aware of its existence since it can reinforce a feeling that they are not only objects of Brussels' decisions and policy-making but can be active creators of these policies. The awareness-raising element of the ECI might also serve to alleviate the feeling of distrust toward the EU caused by lack of understanding of its functioning. In other words, the ECI might perform an educative and Europeanizing function for citizens and give meaning to European citizenship. The analysis of the relationship between understanding and support in the EU is, however, inconclusive. Inglehart's notion of cognitive mobilization was premised on a link between *education, an ability to relate to a remote political community, and support for such a community.*[15] On the other hand, the end of the so-called permissive consensus saw an increased understanding of and concern on the part of citizens of the impact of European integration on their lives, with wavering degrees of support for the pace and direction that integration was taking.[16]

2.3 Agenda-setting Tool

The ECI can be understood as having an agenda-setting dimension—a feature which is close to but looser than its legislation-initiating dimension. Instead of focusing on the ECI as a vehicle for prompting the EU policy-making process, this view places value on the ability of citizens to put items on the Commission's—but also other EU actors'—agenda. Agenda-setting is understood as a specific stage of the policy-making process even before the policy-initiation stage where the legal right of the Commission to make a legislative proposal appears. Not every policy idea which is placed on the agenda will end up being taken forward as a concrete proposal, but in the longer term it may serve to draw attention to an issue and signal to policy-makers the support an issue has among the broader citizenry. Each ECI reflects that a group of European citizens felt this was a worthy enough issue to go to the effort of organizing it. Even those initiatives which either fail to

gain the requisite number of signatures or fail the admissibility criteria can nevertheless succeed in placing issues on the agenda since each initiative which is submitted has to go through an admissibility check and as such ends up on the Commission's *ECI website*. In this way the Commission's sole right of initiative is preserved but an opportunity to get things on the agenda is granted by the ECI mechanism.

2.4 Deliberative Tool

As well as its "vertical" dimensions of enhancing the linkages between citizens and EU institutions, the ECI mechanism can be seen as having potential horizontal dimensions, specifically as a tool prompting *deliberation* across borders and thus creating a transnational deliberative space on policy issues which are subject to EU competence that are important to citizens. The deliberative outcomes that occur can take various forms: in the process of securing signatures (which is thought to require a number of interactions and conversations); prior to launch in the process of refining the perceived problem to meet the requirements of the regulation (commission-proofing the initiative); after signature collection in the EP hearings (if the ECI gets to that stage).

In this regard the ECI and its surrounding processes can be viewed as having the potential to contribute to the formation of a European public sphere through deliberative processes on a "Habermasian" view. The Commission alluded to this in the discussions leading up to the adoption of Regulation 211/2011. In the Explanatory Memorandum accompanying its proposal for the Regulation, and in the context of its proposed admissibility check at an early stage, the Commission gave an indication that the process of an ECI was to be valued as a way of contributing to a European public sphere: "a major objective is to promote public debate on European issues, even if an initiative does not finally fall within the framework of the legal powers of the Commission".

2.5 Citizen-activating Tool

A final dimension of the ECI examined here concerns the effects of the instrument not on the decision-making process, or on the societal-level, but instead on the individual citizen who participates. The EU institutions and many of the civil society actors who have monitored the ECI closely tend to focus on the potential for it to lead to better EU policy, or create

a community of Europeans. However, there are difficulties associated with viewing outcomes only at the system level as many other factors impact on whether there is a concrete policy proposal or an enhanced public sphere. By contrast, the transformation involved at the level of the individual can be acute. In the process of lending a signature to a campaign, the person involved has been transformed from a private individual to an active citizen.

This dimension of the ECI is consistent with a radical understanding of the relationship between participation and democracy, or in other words a genuine understanding of participatory democracy. For participatory theorists such as Pateman, the real democratic value of participation was that it promoted human development and made democracy count in people's lives. As such, feelings of low political efficacy could be challenged and something closer to the liberal ideal of free and equal citizens could thus be achieved.[17]

3 How Well Does the ECI Perform the Envisaged Functions? Actors' Perception and Feedback

Whether the various dimensions of the ECI outlined above correspond to participants' own experiences of it is another matter. In 2014 the European Ombudsman conducted an own-initiative inquiry into the functioning of the mechanism which sought feedback from organizers and other civil society groups. These inputs are analyzed here to explore the extent to which the ECI is perceived as performing the various functions and how well it is considered to do so.

3.1 Communication- and Dialogue-facilitating Tool

Many agree that the ECI possesses the capacity to enhance pan-European dialogue between citizens and decision-makers.[18] Yet, more profound analysis of this function requires taking into account two kinds of considerations, namely communication with the EU at the technical and political level.

At the technical level, considerations relate to operability of the technical infrastructure and guidance that EU institutions offer within the framework of the ECI. In this respect, there seems to be a generally positive perception with regard to institutions' availability and openness. The majority of inputs made by ECI organizers to the European Ombudsman

admitted that the Commission, and especially its Secretariat-General, had been open and helpful, and the staff had been accessible to explain how to approach the procedure. The Commission also proved helpful on several occasions when technical problems arose. For example, in 2012, the Commission offered to host several of the first registered ECIs on its own servers in Luxembourg and made its IT staff available to help organizers with questions regarding the installation of software.[19] In this regard, some campaigners also expressed gratitude to the Commission for helping them to draft all the documents needed in order to comply with the data protection legislation.[20]

There are, however, also critical voices as regards contact with the Commission. For example, the organizers of the "Compassion in world farming" ECI complained that there was no clear channel of communication when they wanted to obtain more assistance in designing their initiative.[21] On the other hand, some ECI activists have gone further, expecting the Commission to not only assist them with registering the ECI but also to help them build a platform of communication where more support could be gained for the ECI. As the MEET ECI supporters observed, "they (EU institutions) do not help with anything like putting you in touch with organizations they know dealing with the same topics, or connecting you to existing activities in the field. So unless you are already a network all over Europe… it is a daunting process".[22]

The communication aimed at resolving technical hurdles connected with operating the Online Collection System (OCS) seemed to cause the greatest criticism. For example, the campaigners of the unsuccessful ECI on the "European Free Vaping Initiative" complained that the Commission's IT team administering the OCS was not in a position to solve the problems related to the certification procedure, a result of which was that their ECI lost 1.5 months of the signature collection window yet the Commission declined to extend the deadline.[23] To quote other campaigners, "while they (Commission IT people) were very open and communicative and really tried to solve the problems, any changes we asked for took a very long time to be implemented and even at the end of the year the OCS still did not fulfill the purpose of being a useful campaign tool".[24]

Another weakness of the dialogue and communication function of the ECI refers to the fact that ECI Regulation (EU) no. 1179/2011[25] prevents the storage of ECI supporters' emails, which eliminates the possibility of further contact either between EU institutions and citizens or between the campaigners and supporters of the ECI. This effectively limits

the communication capacity within the ECI, making it impossible to even reply or inform the supporters about the progress or the outcome of the ECI.[26] Some citizens also provided the campaigners with the feedback that due to the fact that they would not receive a confirmation email, they did not know whether their signature had been counted.[27]

With regard to the way the ECI facilitates dialogue at the political level, two kinds of issues require consideration: the quality of the Commission's responses to the ECI and the nature of the public hearings. With regard to the former, some voices of criticism can be drawn from the feedback sent to the European Ombudsman. For example, in the opinion of the organizers of the "One of Us" campaign, the Commission's reaction to the initiative revealed that an ECI with over 1 million statements of support was not treated much differently to any letter from a lobbyist or advocacy group.[28] In a similar vein, "Right2Water" campaigners noticed that the way the Commission answers the ECIs gave the feeling of "being heard but not being listened to".[29] In the "Right2water" press communication the organizers considered the Commission's response as lacking any real ambition to respond appropriately to the expectations of 1.5 million citizens. Similarly, "Stop Vivisection" campaigners deemed the Commission's reply as overtly generic and superficial, pointing out that it did not take into account any of the ECI pledges and requests substantiated by robust scientific expertise.[30] In this regard, some ECI organizers raised a fundamental question when it comes to enhancing dialogue with EU institutions, namely whether it is appropriate for an administrative body like the Commission to be the sole arbiter of the fate of an initiative backed by more than one million citizens. Should such a decision to close down an ECI not be taken by the European Parliament or the Council representing Member States for example?[31]

Another source of information regarding the dialogue and communication dimension of the ECI is the perceptions related to the nature of the public hearing organized before the Commission issues its response to the ECI. In principle, the purpose of the hearing, which takes place at the premises of the European Parliament, is precisely to establish a direct forum for dialogue between the Commission and ECI organizers. Given that the Commission is not required to come up with a legislative proposal as a follow-up of the ECI, such a hearing is the only opportunity for the ECI organizers and EU institutions to confront each other and engage in a public debate on an issue of citizens' interest.[32]

The evaluation of the hearings conducted up to June 2015 is quite mixed. According to the letter sent to the European Ombudsman by the campaigners of "One of Us" ECI, the hearing was handled rather badly by EU institutions. Apparently, the organizers were not consulted on its agenda and the time slots assigned to the ECI speakers were shorter than those allocated to the EP representatives. As reported in the feedback, the representation of the Member of the European Parliaments (MEPs) was quite biased, with all but one of the MEPs belonging to the same political group of Social Democrats (S&D) who naturally opposed the initiative, including an MEP) who voiced hostile comments addressed to the ECI before the hearing took place.[33] The campaigners had the feeling of being contested rather than listened to with MEPs prepared to counterbalance the ideas put forward within the ECI. The organizers were also refused the opportunity to bring to the hearing a scientific expert able to respond to the "evidence-based" criticism. The "One of Us" organizers also complained about the lack of understanding among the MEPs of the purpose of the hearing, which in their view is to listen to citizens' or interest groups' concerns and proposals. As the campaigners observed, "instead they prefer to hear themselves speaking to make their opinions known". The organizers admit "these were rather strange arrangements for a hearing in which the EU institutions should listen to citizens rather".[34]

On the other hand, the feedback on the "Right2Water" and "Stop Vivisection" ECIs was quite positive. Moreover, experience shows that not only ECIs which gained 1 million signatures could end up having a hearing. On 26 February 2015, the European Parliament organized a public hearing on the "End Ecocide" ECI which had gathered only 182,000 supporters but generated enough salience to prompt the European legislator to take interest. This historic hearing can be viewed as some evidence of goodwill on the part of EU institutions to engage in a dialogue with citizens.

3.2 Awareness-raising Tool

There is a general agreement among the stakeholders that the various ECIs have helped raise awareness of socially salient issues. ECI campaigners also admit that participation in the ECIs inevitably educates citizens on how EU politics work. Yet, this "Europeanizing function" of the ECI is rather limited to the handful of people actively involved in the campaigns and does not meaningfully extend to the general public. There is also

little evidence to support the hypothesis that citizens will become better informed about the EU by merely signing an ECI. Finally, knowledge about the ECI itself is still very low among citizens.

All feedback sent to the European Ombudsman on the functioning ECI stated that still now the instrument is not known among the general public; its procedure is not understood and therefore many people remain skeptical.[35] Some stressed that the ECI is known only by "Europhiles working in the institutions or similar"[36] or by "European elites in Brussels". As a result, as observed by other voices, the campaigners have to confront a double challenge of explaining not only the cause of their ECI but also what the ECI is and how it differs from an ordinary petition which requires citizens to provide less personal data.[37]

In the stakeholders' view, the ECI will not be able to perform educative or Europeanizing functions if it itself remains unknown. In order to change it, public attention has to be generated principally through the media, which should report on the functioning of the instrument and organize discussions on particular ECI topics. To quote one of the ECI campaigners, "as we are competing in a media- and advertisement-driven world, a certain amount of airspace on radio, TV as well as space in national newspapers should be provided by the EU for organizers of ECIs, even if this is very short[38]".

Another weakness which prevents the ECI from performing a more systematic awareness-raising function in practice is the fact that for the majority of people the ECI experience finishes with a signature. As signaled earlier, the ECI operating system lacks an important integrative element between the people and ECI organizers as it does not allow for collection of email addresses of ECI signatories. In the view of the technical director of the "Right2Water" ECI, "the software was designed in an extremely restrictive way: once a person signs, the interaction is over. You don't have any opportunity to register for a newsletter. And legally we don't have the right to use the data of the supporter".[39] Consequently, it makes it impossible to create mechanisms of follow-up that would keep the people informed and connect like-minded Europeans both within and across Member States on issues of common interest. Several campaigners underlined that it is essential to be able to stay in contact with the supporters of an ECI.[40] Yet, the lack of two-directional contact deprives people of the possibility to liaise in the long term. So, as observed by "MEET ECI" campaigners, "there is no way you can create a community of fellow thinkers". Of course, people can track the ECI online or follow its developments on special social portals but this requires their initiative for which many people do not have time or they simply forget about.

3.3 Agenda-setting Tool

According to some scholars, although the Commission has no legal duty to translate citizens' initiatives into legislation, the ECI has "significant potential" as an agenda-setting instrument. In their view, the ECI can make an issue salient and put pressure on EU institutions to act.[41] Yet, the overview of the experience as well as the perceptions of ECI participants reveal a quite mixed picture and point to a rather poor Commission follow-up on the issues brought up by the ECIs.

For example, in the case of the first ECI, "Right2Water", when the Commission did not decide to undertake any legislative steps, neither did it commit itself to refrain from initiatives aimed at liberalizing water and sanitation services, which was regretted by the campaigners. It also did not commit to exclude these services from Transatlantic Trade and Investment Partnership (TTIP) negotiations.[42] The "Right2water" organizers welcomed some of the Commission's follow-up on their ECI such as the commitment to promote universal access to water in the EU's development policies and to promote public-private partnerships in this regard. These, however, have to be viewed as rather general and symbolic gestures. A more meaningful reaction to the ECI was viewed as the Commission's decision to exclude water and sanitation services from the concessions directive.[43]

While in the case of the "One of Us" ECI, the Commission's follow-up has been practically non-existent, with regard to the "Stop Vivisection" ECI, it shared citizens' view that animal testing should be phased out but did not agree that this required annulment of the Directive 2010/63/EU, which the ECI sought to repeal.[44] While no legislative action was taken, the European Commissioner responsible for Environment, Maritime Affairs and Fisheries, Karmenu Vella, said that the ECI has prompted the Commission to enable faster progress in the uptake and use of alternative approaches in research and testing. Moreover, the Commission committed to analyze technologies, information sources and networks from all relevant sectors with potential impact on the advancement of the Three Rs,[45] and to present by the end of 2016 an assessment of options to enhance knowledge-sharing among all relevant parties. The Commission also agreed to the suggestion of the petitioners to organize a scientific conference by the end of 2016 to evaluate the validity of animal research to exploit the advances in science for the development of scientifically valid non-animal approaches and advance toward the goal of phasing out animal testing.

The agenda-setting function of the ECI has found its controversial moment in the case of the rejection of the ECI "Stop TTIP", which was backed by over 220 organizations from 21 EU countries. When the Commission rejected the initiative on procedural grounds, Michael Efler, a spokesperson with the Stop-TTIP Alliance, said that this only confirmed the Commission's strategy of excluding citizens and parliaments from the TTIP and Comprehensive Economic and Trade Agreement negotiations and to listen only to lobbyists. Nevertheless, it has been argued that the unprecedented level of protest and debate surrounding TTIP, including that manifested in the ECI, has put trade negotiations back in the spotlight and on political agendas in ways not previously imagined.[46]

3.4 Deliberative Tool

Early experience also provides a mixed picture with respect to the deliberative function of the ECI. First of all, the main part of the ECI, that is, the signature collection, does not fit well in a deliberative model because it does not provide an opportunity for a public debate or for the transformation of the points of view of the contenders. In this sense, signing an ECI rather constitutes an aggregative form of political participation.[47] The stage at which the ECI has the potential to foster genuine deliberation on EU affairs is the public hearing organized at the European Parliament (see above). In this sense, one of the purposes of the hearing is to politicize citizens' concerns by bringing them to the political debate. While such a debate usually includes conflict (of interests, of opinions), it is assumed that a meaningful ECI should be able to generate a genuine discussion with pros and cons aired freely.

In assessing the deliberative dimension of the ECI, one has to answer the question whether all stakeholders, including those who oppose the initiative, should have the room to express their views and comments during the public hearing. Such a view of the matter is not, however, shared by everyone. As discussed above, the "One of Us" ECI campaigners did not wish to see the hearing as a place of too heated debate and contestation, but rather as a one-way channel of presenting citizens' views and ideas to EU policymakers. In this vein, they observed with disappointment that "many MEPs either did not understand, or did not want to understand the purpose of the event (…): they were in a debating mode, not in a listening mode".[48]

In fact, the hearing's formal framework described in Regulation no. 211/2011 and the European Parliament's rules of procedure allows

considerable flexibility with regard to its organization. In such a context, different visions of what an ECI should look like clash and no commonly agreed strategy of how it should be organized exists. In this context, one of the factors that effectively diminishes the deliberative character of the hearing is that external organizations and experts who either support or oppose the ECI are not invited, which—according to observers—does not contribute to the quality of the debate.[49] In this regard, one of the stakeholders interested in the "Right2Water" ECI (AquaFed[50]) but presenting quite a different view on the matter complained that its formal request to participate in a hearing as an expert was rejected by the EP.[51] In his view, the fact that the current ECI procedure does not allow for a genuine deliberation by blocking access of third parties to the hearing does not guarantee that the debate in the Parliament and the written response of the Commission are fully informed and balanced.[52]

Similarly, in the first two hearings, the Parliament also did not allow for the participation of the ECI-supporting experts who could assist the campaign organizers to respond more substantially to the questions posed by EU representatives. While ECI organizers are activists who know the matter they present, they often do not possess the necessary expertise to respond to technical questions on policy details. For example, commenting on the ECI hearing section on water policy, the observer noticed that "the ECI organizers struggled with their role as experts for water policy".[53] In this context, the Commission and the European Ombudsman advocate to have experts and interested stakeholders from both sides represented, given that the three-month period between the submission of an ECI and the Commission's formal response is too short to undertake a stakeholder consultation.[54]

While this limitation in the first two hearings was the subject of criticism, a lesson appeared to have been learnt and the third hearing allowed for participation of external experts. For this reason, the hearing on the "Stop Vivisection" ECI can be assessed more positively as reflecting the deliberative character of the mechanism. According to the observers, the MEPs representing different parliamentary committees were defending diverse opinions thanks to which the ECI led to a vibrant debate regarding the issue and external experts could address the questions raised by EU institutions.[55] It has been admitted also by the opponents of the "Stop Vivisection" campaign that the ECI has re-invigorated the European scientific community and prompted it to expand their engagement with politicians, journalists and citizens on the issue of animal testing for medical purposes.[56]

While the deliberative character of a public hearing still needs to be verified and agreed upon by the various stakeholders, the general idea of the ECI provides in itself the conditions for the emergence of (transnational) debates about citizens' concerns and EU policy solutions in the media. Yet, for it to happen, the latter ones have to become a transmission belt between the bottom-up ECIs and the general public and engage in creating a European public space. This does not happen yet, and there is still much scope for action at the national levels in this regard.

3.5 Citizen-activating Tool

With 51 ECI committees formed and over six million signatures gathered in total, the ECI can surely be viewed as a tool for activating citizens' participation. Yet, while soon after the launch of the ECI in 2012 there was a great deal of interest in the procedure reflected in the number of initiatives put forward for registration, this engagement has decreased over time and in 2015 it had virtually stopped. Some even talk about a de facto boycott of the mechanism.[57]

According to the feedback received from people directly involved in organizing the different ECIs, one of the main factors that discourages participation in the procedure is its bureaucratic complexity and burdensome nature. According to "MEET ECI", the ECI procedure is so complicated that it is beyond the understanding of an ordinary citizen.[58] Several ECI supporters see the poor software and unreasonable security requirements as factors that make any ECI a very costly undertaking, placing it beyond the reach of most citizens' groups.[59] The organizers of the "Compassion in world farming" ECI complained that the dysfunctionality of the Commission software was the main reason they had to withdraw their ECI. They also pointed out that operationalizing the software themselves would have cost them 50, 000 dollars. Organizers of other ECIs regretted that due to problems with software, they lost two months of precious time from their signature collection.[60] Authors of the rejected ECI "My voice against nuclear power" admitted they had to sub-contract the website and hosting to a service provider who had to adapt the software. In their view, the cost incurred was far beyond the scope available for small organizations and posed a strain to resubmit another ECI.[61] The majority of users also admit that it requires a huge amount of time and IT expertise or money to be able to certify your own or Commission-hosted OCS platform, and it cannot be expected that ECI organizers are skilled

IT specialists.[62] In this vein, some campaigners observed that their ECIs could probably not have been launched without the support of bigger and well-established institutions.

In the opinion of Xavier Dutoit, the IT specialist who developed the online campaign for the "Right2Water" ECI, by rejecting valid national ID formats, the OCS software is either dysfunctional or designed to reject as many signatures as it can. Dutoit continues: "when people who tried to sign were finding out that they were denied the possibility, they would tell their friends that this ECI "doesn't work". So not only are you losing the signatures of the people who tried to sign but also the potential of a snowball effect to promote the ECI and reach out to friends and friends of friends".[63]

Problems with admissibility are another issue discouraging ECI supporters. Between April 2012 and June 2015, 20 out of 51 ECIs submitted to the European Commission for registration were declared legally inadmissible. This high refusal rate can be seen to dissuade other potential campaigners from *considering* using the ECI, but also raises serious questions about the appropriateness of a pre-registration legal admissibility check.

While successful campaigns have not attracted much media attention, the rejection of the "STOP TTIP" ECI has been widely commented on in the media, which also influenced the perception of the ECI as an ineffective tool. Yet, not everybody gets discouraged. As the TTIP campaign organizers underline, "Democracy arises through social intervention and participation in the political process; it is not something to be granted or denied by Brussels. That is why we will be launching a self-organized ECI. The European Commission is trying to ignore us; it will not succeed".[64]

Finally, the factor that discourages citizen participation is that requirements for personal data differ among Member States and are too excessive. According to the "Letmevote" ECI organizers, the ECI's rules have made it nearly impossible to collect signatures on paper from several different countries which have different rules as to how to sign an ECI. While in some countries (Finland) you need to just provide country of residence, in others (Greece and Bulgaria), you also have to provide father's name or even the place where your ID was issued (Italy). According to statistics about how many people click on "sign now" and how many actually sign, the results are disappointing: only 44 % of those who click on "sign now" actually sign. But these numbers vary across countries, suggesting a strong correlation between commitment to sign and the amount of data required

per country.[65] One of the most urgent problems is that in many Member States, citizens living abroad cannot sign an ECI; for instance, since in the UK a permanent UK address is required to sign an ECI, British citizens living outside of the UK cannot participate.[66]

4 Conclusions

This chapter aimed at providing a broader conceptualization of the democratic tool of the European Citizens' Initiative beyond its legislative function. Consequently, it has sought to analyze and evaluate the ECI in five different dimensions: as a dialogue- and communication-enhancing tool, an awareness-raising tool, an agenda-setting instrument, a deliberative space and a citizen-activating mechanism. The analysis of the perceptions of actors involved in the ECI campaigns reveals that in all of the analyzed dimensions, the ECI has demonstrated both its potential and its limitations. While the majority of the problems lie with the legislation of the ECI as enshrined in Article 11 and in Regulation 211/2011, some also refer to the insufficient handling of the ECI by EU institutions in the period since April 2012 when it became operational.

A comprehensive simplification and reform of the ECI might require treaty changes as well as changes to secondary legislation. While the former is rather unlikely in the current EU political context, provided there is sufficient cross-institutional support, an official revision of ECI Regulation 211/2011 could be initiated in a much shorter time. Despite this, by 2015 and the first official review of the mechanism by the EU institutions it already appeared that a good deal of enthusiasm had been lost. Nevertheless, this might be arrested were some low-level amendments made to the way in which the ECI operates. Suggestions of such changes have included a simplification and harmonization of the data requirements for signatories; redesigning the signature collection system to make it more user-friendly; a better support network at the Commission including a dedicated ECI help desk; allowing the collection of email addresses; increasing media coverage of the ECI; more promotion of the ECI by national authorities including parliaments; better promotion of the ECI procedure and of all ECIs by the Commission itself; working more with schools and youth projects to educate young people about their rights as EU citizens; and making the EP hearings more deliberative and attracting media attention.

Many of these improvements which might allow a more credible legislation-initiating dimension could also enhance the communication- and dialogue-facilitating, awareness-raising, agenda-setting, deliberative and citizen-activating dimensions as well.

Notes

1. On 31 March 2015, the Commission presented its first report on the application of the ECI Regulation. In April 2015 the European Parliament published its assessment of the implementation of the ECI.
2. Article 11(4) Treaty on European Union.
3. Regulation no. 211/2011 of the European Parliament and of the Council of 16 February 2011on the citizens' initiative entered into force on 1 April 2011, but owing to a number of technical adaptations needed at Member State level to establish a streamlined verification process, the ECI Regulation only became applicable a year later.
4. Official figures differ depending on whether or not the French and Danish results are taken into account, both of which arrived after the ECI was submitted. With France (17,247) and Denmark (3495), the certificates total 1,680.285. The campaign's website states 1,884.790 signatures, which obviously reflects the support before verification.
5. European Economic and Social Committee own-initiative opinion, adopted 15 October 2014. OJ C 12/33 of 15 January 2015; European Parliament ENVI committee's report on the follow-up to the European Citizens' Initiative Right2Water (2014/2239(INI)).
6. Communication from the Commission on the European Citizens' Initiative "One of Us", COM(2014) 355.
7. *One of Us* and Others v. Parliament and Others—Case T-561/14; date of application: 25.07.2014.
8. Press release 5 June 2015, http://stopvivisection.eu/en/content/press-releases
9. Graham Smith, *Democratic Innovations: Designing Institutions for Citizen Participation*, Cambridge University Press, 2009.
10. http://www.ombudsman.europa.eu/en/cases/decision.faces/en/59205/html.bookmark
11. Michael Nentwich, "Opportunity Structures for Citizens' Participation: The Case of the European Union", in *Political Theory and the European Union*, ed. A. Weale and M. Nentwich, Routledge, London, UK, 1998, pp. 125–140.
12. Paul Magnette, "European Governance and Civic Participation: Beyond Elitist Citizenship?", *Political Studies*, Vol. 51, issue 1, pp. 144–160.

13. Justin Greenwood, *Interest Representation in the European Union*, Palgrave Macmillan, 2011.
14. http://europa.eu/citizens-2013/
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16. Leon N. Lindberg and Stuart A. Scheingold, *Europe's Would-be Polity: Patterns of Change in the European Community*, Prentice Hall, 1970.
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18. The ECI Campaign, *Report of 16 June 2015 Conference The European Citizens Initiative and the Promise of Participatory Democracy*, available at: https://www.democracy-international.org/sites/democracy-international.org/files/PDF/Publications/the_european_citizens_initiative_and_the_promise_of_participatory_democracy_-_report_of_16_june_2015_conference.pdf
19. Carsten Berg and Janice Thomson, *The ECI That Works. Learning From the First Two Years of the European Citizens Initiative*, available at: http://ecithatworks.org/wp-content/uploads/2014/04/An_ECI_That_Works.pdf
20. Feedback from the ECI "End Ecocide in Europe" to own-initiative inquiry OI9/2013TN/ into the functioning of the European Citizens Initiative procedure, available at: http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/54515/html.bookmark
21. Feedback from the ECI "Compassion in world farming" to own-initiative inquiry OI9/2013TN/ into the functioning of the European Citizens Initiative procedure, available at: http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/54501/html.bookmark
22. Feedback from "MEET ECI" to own-initiative inquiry OI/9/2013/TN into the functioning of the European citizens' initiative (ECI) procedure, available at: http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/54506/html.bookmark
23. Feedback from the ECI "European Free Vaping Initiative" to own-initiative inquiry OI9/2013TN/ into the functioning of the European Citizens Initiative procedure, available at: http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/54505/html.bookmark
24. Feedback from the ECI "End Ecocide in Europe", op.cit.
25. Regulation No. 1179/2011 of 17 November 2011 laying down technical specifications for online collection systems pursuant to Regulation (EU) No. 211/2011 of the European Parliament and of the Council on the citizens' initiative.
26. For example, feedback from the ECI "Right2water" to own-initiative inquiry OI9/2013TN/ into the functioning of the European Citizens

Initiative procedure, available at: http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/54514/html.bookmark
27. Feedback from the ECI "End Ecocide in Europe", op.cit.
28. Feedback from the ECI "One of Us" to own-initiative inquiry OI9/2013TN/ into the functioning of the European Citizens Initiative procedure, available at: http://www.ombudsman.europa.eu/cases/correspondence.faces/en/53239/html.bookmark
29. Feedback from the ECI "Right2water", op.cit.
30. http://stopvivisection.eu/en/content/press-releases
31. Feedback from the ECI "One of Us", op.cit.
32. Cf. Julian Plottka, The First Public Hearing on an ECI, available at: http://ecithatworks.org/wp-content/uploads/2014/04/212__FirstPublicHearing.pdf
33. Feedback from the ECI "One of Us", op.cit.
34. *Ibid*.
35. Feedback from the ECI "Right2water", op.cit.; Feedback from the ECI "Compassion in world farming" to own-initiative inquiry OI9/2013TN/ into the functioning of the European Citizens Initiative procedure, available at: http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/54501/html.bookmark; Feedback from the ECI "End Ecocide in Europe", op.cit.
36. Feedback from "MEET ECI", op.cit.
37. Feedback from the ECI "Compassion in world farming", op.cit.
38. Feedback from GLOBAL 2000—Friends of the Earth Austria, op.cit.
39. op.cit.
40. Feedback from "MEET ECI", op.cit.; Feedback from OpenPetition gGmbH ECI.
41. Alberto Alemanno, "Unpacking the Principle of Openness in EU Law, Transparency, Participation and Democracy", *European Law Review*, Vol. 39, no. 1, 2014, pp. 72–90.
42. Also please see Sect. 1 of this chapter.
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44. Communication from the Commission on the European Citizens' Initiative "Stop Vivisection" Brussels, 3.6.2015 C(2015) 3773 final, available at: http://ec.europa.eu/environment/chemicals/lab_animals/pdf/vivisection/en.pdf
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46. Ferdi De Ville and Gabriel Siles-Brugge, *TTIP: The Truth About the Transatlantic Trade and Investment Partnership*, Polity, 2015.
47. Cf. Louis Bouza Garcia, "Anticipating the Attitudes of European Civil Society Organisations to the European Citizens' Initiative (ECI): Which

Public Sphere May it Promote?", *Bruges Political Research Papers*, no. 24, 2012, pp. 23–51.

48. Feedback from "One of Us", op.cit.
49. Julian Plottka, op.cit.
50. AquaFed gathers privately controlled companies, not citizens.
51. Feedback from the AquaFed to own-initiative inquiry OI9/2013TN/ into the functioning of the European Citizens Initiative procedure, available at: http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/54511/html.bookmark
52. *Ibid*.
53. Julian Plottka, op.cit.
54. ECI review, p. 15 and Decision of the European Ombudsman closing her own-initiative inquiry OI/9/2013/TN concerning the European Commission, 4 March 2015, see point 22 and guideline 5. 79 Follow-up to the European citizens' initiative Right2Water, Rapporteur Lynn Boylan (GUE, IE), 2014/2239 (INI).
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56. http://speakingofresearch.com/2015/05/19/stop-vivisection-initiative-fails-at-eu-hearing/
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59. Feedback from the Corporate Europe Observatory to own-initiative inquiry OI9/2013TN/ into the functioning of the European Citizens Initiative procedure, available at: http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/54510/html.bookmark; Feedback from the ECI "Compassion in world farming", op.cit.
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61. Feedback from GLOBAL 2000—Friends of the Earth Austria to own-initiative inquiry OI/9/2013/TN into the functioning of the European Citizens Initiative, available at: http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/54502/html.bookmark
62. Feedback from "OpenPetition gGmbH", op.cit.; Feedback from "European Vaping Initiative", op.cit.
63. http://ecithatworks.org/wp-content/uploads/2014/04/AN-ECI-That-Works-Back-To-The-Drawing-Board.pdf
64. https://stop-ttip.org/european-commission-faces-court-challenge-over-trade-talks/?noredirect=en_GB
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CHAPTER 4

From Legislative Controllers to Policy Proponents: The Evolving Role of National Parliaments in EU Multi-Level Governance

Karolina Borońska-Hryniewiecka

One of the reasons behind the widely lamented European Union's (EU) democratic deficit is the fact that its system of governance suffers from a shortage of *input-oriented* legitimacy which pre-supposes that the powers of government are exercised in response to the articulated preferences of the governed.[1] In modern political systems, this Lincolnian function of "government *by the people*" is—next to the tools of direct democracy such as referenda—usually exercised by parliaments as legitimate and directly elected representatives of the society. Yet, in the multi-level and differentiated structure of the EU polity, preconditions for a democratic, parliamentary accountability are not fully realized for several reasons.

First, for a long time, the process of European integration has gradually increased the power of executive actors in the EU decision-making (i.e. national ministers in the EU Council and unelected appointees in the Commission) to the detriment of parliamentary control.[2] Although the Treaty of Lisbon formally strengthened national parliaments and the European Parliament (EP) in the EU institutional structure, the shift to intergovernmental decision-making as a response to the Eurocrisis has

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marginalized them even more to the benefit of the European Council. Institutional reforms such as the Fiscal Pact or the European Stability Mechanism, adopted outside the EU legal framework—with limited parliamentary scrutiny—have clearly decreased parliamentary leverage in economic and fiscal governance. Moreover, the European Parliament is still weak in terms of its democratic representativeness and political leverage. Electoral turnout in the 2014 European elections did not even reach 43 % and was the lowest ever. EU citizens still do not identify with European parties and EP elections are thought to be "second-order".[3] One of the reasons for this state of affairs is that the EU—as a polity—has no *demos* that would provide the basis for a parliamentary expression of democracy. Finally, lack of transparency of EU policy processes due to opaque decision-making procedures and inter-institutional negotiations[4] discourages many from even trying to understand how the Union works and prevents building trust in EU institutions.

Such a state of affairs calls for considering complementary ways of indirect citizens' involvement in EU affairs, thus posing a question about the role of national parliaments as channels of such engagement. Although, in their own capacity, national parliaments cannot (and should not) compensate for the democratic accountability gap at the EU level—as they represent national interests and national points of view—they have an important role to play in the EU as legitimacy intermediaries. At the end of the day, the desired European *demos* would be nothing else than a Europeanized sum of multiple *demoi* embedded in national societies who express their preferences and policy postulates through their national parliaments. In this sense, as institutions who control their governments in EU affairs as well as those who often transpose EU legislation into domestic orders, national parliaments should be expected to be well suited to translate the needs and wants of the different national *demoi* into European policy approaches and the other way round. It could be assumed that their role as "guardians of subsidiarity"[5] granted by the Treaty of Lisbon should allow for indirect citizens' oversight of the EU legislative process with respect to whether the EU action is necessary and effective. Moreover, national parliaments participate in the so-called political dialogue with the European Commission where—besides the subsidiarity aspect—they express their views on the proportionality and content of EU policy proposals. Recently, national chambers have made a step forward and, in addition to scrutinizing and commenting on EU legislation, they have come up

with an idea to suggest policy solutions at EU level through the so-called green card initiative.

This chapter takes stock of the current roles of national parliaments in the EU and seeks to answer the question of whether the various forms of parliamentary involvement in EU affairs enhance the democratic legitimacy of the EU. It evaluates the subsidiarity controlling role of national parliaments, their discussants' function within the political dialogue and a potential pro-active stance as policy proponents in the green card initiative. The chapter concludes that despite a range of weaknesses of the currently operating mechanisms, there is still much unexploited potential in the parliamentary involvement in EU affairs, which might produce positive effects with regard to EU democratic legitimacy.

1 National Parliaments in the Post-Lisbon Institutional Context

One of the underlying goals of the Lisbon Treaty (Treaty on European Union, hereafter TEU) was to increase the democratic legitimacy of the EU through giving national parliaments a more direct role in EU policy-making. In this vein, the treaty **set out for the first time the function national parliaments should play in the EU. Specifically,** Article 12 TEU provided that their main task was to "*contribute actively to the good functioning of the Union*". To this end, the treaty granted them a broader catalogue of rights regarding access to EU information and a control of the EU legislative process and treaty revision procedures. As regards the first aspect, national parliaments now receive information directly from EU institutions (not filtered by their governments) (art. 12a TEU). This information right regards not only EU draft legislative acts but also Commission consultation documents (green and white papers and communications), annual work programs, and any other instrument of legislative planning or policy. National parliaments should also receive minutes from the EU Council deliberations on legislative acts and the annual report of the Court of Auditors.[6] With regard to controlling powers, national parliaments should be informed about the content, development, and results of the evaluation system of policy implementation in the area of freedom, security and justice. They are also, together with the EP, authorized to scrutinize the activities of two important EU institutions, Europol and Eurojust.[7] Moreover, the treaty involves national parliaments in simplified

treaty revision procedures by allowing them to participate in the use of the general *passerelle clause* which moves the decision from unanimity voting to qualified majority voting in the Council, or from a special legislative procedure to the ordinary procedure.[8]

However, in terms of political and legal leverage, the most important institutional provision of the Lisbon Treaty related to parliamentary control over EU affairs has undoubtedly been the right of national parliaments to object to EU policy proposals on grounds of subsidiarity breach.[9] In line with the treaty, national parliaments have the opportunity to review the compliance of an EU draft legislative act with the principle of subsidiarity, that is, to detect whether, in the area of shared competences, EU level is in fact the most suitable and effective one at which the proposed action should be pursued.[10] This assessment takes place *via* a mechanism known as the Early Warning System (EWS) for subsidiarity control. Within its framework, national parliaments have eight weeks from the date of the Commission's transmission of an EU draft legislative act to scrutinize it and issue a reasoned opinion if they consider that the draft in question does not comply with the principle of subsidiarity. Two procedures can emerge from this process.

Parliaments can raise a "yellow card" when at least one third of them (one vote per chamber in bicameral systems) oppose the draft legislative act on the basis of its non-compliance with the subsidiarity principle. In such a case, the initiator of the contested draft must review the proposal. He may then decide to maintain, amend or withdraw the draft; however, reasons must be given for each decision.[11] Parliaments can also raise an "orange card" (which applies only to EU draft legislative acts under the ordinary legislative procedure) when more than half of them oppose a draft legislative act on grounds of a breach of subsidiarity. In such a case the act must be reviewed. The European Commission, as an initiator of legislation, may then decide whether to maintain, amend or withdraw the proposal. If it decides to maintain it, it has to provide a reasoned opinion justifying why it considers the proposal to be in compliance with the subsidiarity principle. On the basis of this reasoned opinion and that of the national parliaments, the European legislators (by a majority of 55 % of the members of the Council or a simple majority of the votes cast in the EP) shall decide whether or not to block the Commission's proposal. If either of them shares the opinion of the national parliaments with respect to the breach of subsidiarity, the legislative proposal will not proceed.[12]

In addition, Article 8 of Protocol no. 2 on the application of the principle of subsidiarity and proportionality attached to the Treaty of Lisbon granted national parliaments the right to bring legal action before the Court of Justice of the EU (hereafter CJEU) on the basis of a subsidiarity breach, provided that they had previously issued a reasoned opinion within the EWS.

The role of parliaments as guardians of subsidiarity has a strong legitimacy component to it since it grants them the opportunity to ensure that EU action is necessary, brings added value over and above what could be achieved by member states' action alone and—the former two being satisfied—that the decisions are taken as closely as possible to the citizens in accordance with the Preamble of Lisbon Treaty. In this sense, the EWS should have a considerable normative appeal to citizens as representing "good" and "just" rule of governance.[13]

2 National Parliaments as Subsidiarity Controllers: Evaluation of the State of Play

The introduction of the EWS was awaited by many with high expectations to the extent that the Lisbon Treaty was even named a treaty of parliaments.[14] Yet, five years down the line, there is little satisfaction as regards the institutional dynamics and political output of the mechanism.

Already the first year of implementation of the EWS demonstrated that parliaments are poorly equipped to conduct effective analyses of EU legislation in a time span of eight weeks, while at the same time cooperating among themselves to deliver a collective response to the Commission. In 2010, only around 60 % of initiated scrutiny processes were completed on time and parliaments issued a total of over 34 opinions.[15] Although the following three years (2011–2013) witnessed a relative increase in the number of reasoned opinions sent to the Commission (64, 70, 88 opinions respectively),[16] 2014 marked a rapid decline in the number (only 21 opinions), which represented a decrease of 76 % compared to the previous year.[17] The considerably lower number of reasoned opinions in 2014 should only to some extent be explained by a decrease in the number of legislative proposals made by the Commission toward the end of its term of office.[18] Another reason should be looked for in the general disenchantment of national parliaments with regard to the influence they can exert by the EWS.

With respect to political output, until September 2015, there have been only two yellow cards raised by national parliaments. The first one, issued in May 2012, related the Commission's proposal for a regulation "On the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services", also known as "Monti II".[19] Its aim was to develop a legislative framework for transnational industrial action (the right to strike) in the context of the EU internal market. Reasoned opinions were delivered by 12 national chambers representing 19 votes under the EWS.[20] The main arguments against the regulation were lack of clarity as to its purpose; lack of EU competence over industrial relations; and its potential incompatibility with the well-functioning national arrangements in the area of labor law.[21] The proposal also met with strong opposition among trade unions, who stated that it undermined workers' rights and freedoms contravening the EU Charter of Fundamental Rights, the European Social Charter and the European Convention on Human Rights.[22] As a result, the Commission decided to withdraw the proposal.[23] The second yellow card, raised in October 2013, challenged the Commission's proposal to create a European Public Prosecutor Office (EPPO), a supranational body which would investigate and prosecute EU fraud and other crimes affecting the EU's financial interests. Its establishment could be viewed as an important step for the development of "a single judicial space" in the Area of Freedom, Security and Justice. Reasoned opinions expressing concerns about the proposal amounting to 18 subsidiarity votes were issued by 11 member states.[24] In this case, however, the Commission decided to maintain the proposal. At the time of finalising this chapter, the third yellow card was issued in May 2016 on the revised Posting of Workers Directive. It is yet to receive a response from the Commission.

While in quantitative terms the exercise of subsidiarity control cannot be called a success, it is difficult to say whether the three issued cards can be viewed as proof of increased national parliamentary leverage in EU affairs. In the first case, paradoxically, although the Commission decided to withdraw the Monti II proposal, its motivation was not dictated by the reasoned opinions of national parliaments but by the concerns of insufficient support for the proposal within the EP and the Council.[25] Moreover, the Commission observed that the subsidiarity principle was in fact not breached but did not address other concerns of national parliaments expressed in their opinions or engage in any form of a dialogue with them.[26] In the case of the second yellow card, although the Commission's response to national parliaments was more

comprehensive than with regard to Monti II, it did not result in reviewing of repelling the proposal. In its 13-page argumentation, the Commission, *inter alia*, dismissed the possibility for the proposal to be in breach of the principle of subsidiarity and referred to article 86 TFEU which provides necessary legal basis for the establishment of an EPPO as a new European actor with direct powers of investigation and prosecution.[27] Yet, although the yellow card did not stop the legislative process, it generated a further debate on the proposal at the level of the Council. Due to significant disagreements between the member states on the structure and remit of the EPPO, two years down the line, the legislative process regarding the dossier remains at a standstill.[28]

Taking into account parliamentary perception of the EWS, there is a broadly shared dissatisfaction among national parliaments not only about the effects of the yellow cards that materialized so far but also with regard to the overall functioning of the mechanism. The main weaknesses pointed out by national parliaments are too short scrutiny periods, too narrow scope of the EWS (excluding the principle of proportionality[29]) and insufficient feedback of the Commission to parliamentary reasoned opinions.[30] With regard to the scope, parliaments admit that the purely controlling character of the EWS, excluding other than subsidiarity aspects of legislative proposals, does not allow parliaments to engage meaningfully in the process of EU policy co-shaping. Conducting the subsidiarity test in legalistic terms does not allow for a broader political debate within the parliament that, ideally, takes into account all the circumstantial parameters and policy impact of the proposed legislation which would constitute the essence of parliamentary democracy. As to cooperation with the Commission, its responses to national parliaments' contributions tend to come late, are prohibitively brief and give little impression of influence being exerted by them on the EU legislative process.[31] According to respondents, at times the Commission's responses are a "copy and paste" from previous reasoned opinions.[32] For some parliaments, the complex technical character of subsidiarity checks and little time for conducting the analyses add up to the general conviction that the EWS is a costly institutional exercise entailing incomparably more effort than yielding benefits.[33] In this sense, broadening the scope of parliamentary scrutiny to include the principle of proportionality and policy substance would surely be more conducive to increasing EU legitimacy.[34]

When it comes to evaluating the scope of parliamentary engagement in the EWS, it has to be observed that it is quite uneven among the member states, with Sweden issuing more opinions (48 until the end of 2013) than Luxemburg, the French Senate and the Dutch *Tweede Kamer* together.[35]

Moreover, eight out of 28 EU member states have sent fewer than five reasoned opinions, which might reflect either their low interest in controlling EU legislation, weak administrative capacities or skeptical attitude toward the leverage of the EWS. In fact, even among the more active parliaments, empirical findings reveal that EU affairs attract, in general, little interest among the majority of members of parliament (MPs). While there is a handful of MPs from EU commissions who keep track of the Brussels agenda, others have neither the time nor the willingness to get engaged in scrutinizing EU dossiers and learn more about the upcoming EU legislation. Involved in domestic politics and gaining support of their voters, MPs do not perceive their potential engagement in the EWS as particularly politically rewarding. This is also why the EWS does not lead to plenary debates on EU affairs. Limited electoral salience regarding European affairs does not help to boost parliamentary engagement with Europe.[36] And finally, what constitutes a major brake to the "legitimacy intermediation" function of national parliaments is that citizens are not aware of the function their parliaments perform with regard to EU policy control. Although some parliaments, like the Dutch *Tweede Kamer*, try to communicate actively with voters, using social media and more traditional channels, about their EU-oriented activity, the majority of parliaments do not. According to a recent study, only two parliaments (Finland and Austria) admitted that the EWS might attract public interest in EU affairs.[37]

Notwithstanding the flaws of the system, the EWS has also produced several positive effects with regard to the democratic legitimacy of the EU. Firstly, it has increased the visibility of national parliaments in EU affairs. On the occasion of the withdrawal of "Monti II-regulation", European news agencies referred to national parliaments as those that were able to pressure the Commission and influence EU legislation. Moreover, according to the Commission, the reasoned opinions do not remain unnoticed at the EU level. The Commission acknowledges taking some of the observations into account even if the quorum is not reached.[38] Moreover, the EP opened itself to the feedback of national chambers and receives all reasoned opinions coming from them, which in turn become part of the documents related to further EU legislative procedure.[39] Parliaments also agree that the EWS has contributed an opportunity structure to them to restore a controlling function *vis-à-vis* their governments over EU policy. As one of the representatives of the Italian Senate noted, the EWS allows parliamentary chambers to gain visibility at the national level where the

previous practice in European affairs was dominated by executive decisions, effectively insulated from parliamentary scrutiny.[40]

Introducing the EWS has also generated a process of Europeanization of parliamentary administration and, although to a lesser extent, parliamentary elites.[41] Institutional reorganization, introduction of new procedures or mobilization of additional human resources has taken place in virtually all chambers. The EWS, which formally bridges the gap between EU policies and domestic politics, is also viewed as a catalyst of the process of EU-learning and increasing parliamentary knowledge about EU legislation and functioning of European institutions. Finally, the EWS, which requires an exchange of views and opinions among various national chambers, is a useful way of accelerating not only vertical Europeanization (EU–Member State) but also horizontal, political Europeanization when national MPs discuss the contents of EU draft legislative acts with their counterparts in other national assemblies in order to deliver collective yellow cards. In this way, the EWS is conducive to improving transnational inter-parliamentary cooperation, which, to some extent, constitutes an element of the European public space.

3 National Parliaments as Commission's Interlocutors Within the Political Dialogue

Apart from their subsidiarity control activity, national parliaments also communicate with the Commission in a more informal way, through the so-called political dialogue (known also as the Barroso Initiative). Introduced as early as 2006 by the former Commission's President José Manuel Barroso, political dialogue gives national parliaments the possibility to comment on EU draft legislative acts in a broader sense than under the EWS, that is, with regard to the questions of proportionality and policy substance.[42] In other words, under the political dialogue, parliaments can express their views on all aspects of *what should be the form and nature of EU action*. Yet, although political dialogue allows them to provide more meaningful opinions on the draft legislative acts, this procedure is non-binding in the sense that it does not oblige the Commission to take into account parliamentary inputs.

Yet, in spite of its informal and non-binding character, political dialogue generates much more engagement on the parliamentary side than the formal and binding EWS. Just to compare, from December 2009 to

June 2015, the EP received almost 2000 submissions from national parliaments, of which over 1650 were contributions within the political dialogue and around 300 were reasoned opinions related to subsidiarity. In 2014 only, EWS opinions accounted for only 4 % of the political dialogue, and in the current legislative term (until June 2015) this percentage has so far been around 6 %.[43]

These comparisons are not surprising, since reasons for higher parliamentary activity within the Barroso Initiative are obvious. Parliaments issue reasoned opinions when they detect subsidiarity breach, which does not happen often. As Raunio noted, the "*image of the Commission and other EU institutions constantly stretching and overstepping the limits of their powers is* (…) *outdated*".[44] Consequently, even if they undertake more scrutiny within the EWS, at the end of the day they issue reasoned opinions only sporadically. On the other hand, a broader scope of scrutiny under political dialogue gives parliaments the opportunity to comment on practically all relevant draft legislative acts (and non-legislative proposals). Moreover, subsidiarity tests are perceived by some parliaments (e.g. Belgium, Germany) as a negative tool aimed at blocking EU decisions, which is why there is more use of the political dialogue—sometimes even to express support for European integration.[45]

Yet, political dialogue also has its weaknesses. First and the foremost is its lack of any binding power. Not only is the Commission not obliged to take into account the views and suggestions of national parliaments, but it is also not obliged to reply at all. In practice, however, it tends to do so whenever "crucial points of law or policy" are raised in the contributions. It also has increased efforts to reduce the time it takes to respond to national chambers from seven to three months. Yet, an analysis of parliamentary exchange of views between national parliaments and the Commission within the political dialogue reveals that the Commission's responses to parliaments are quite often not satisfactory. They do not address parliamentary concerns in a sufficient way and do not justify the legislative initiatives undertaken by the EU.[46] A study commissioned by the *Tweede Kamer* reports that many parliaments find the Commission's answers vague and of little content-value.[47] The same research reveals that if a parliament wants to influence legislative outcomes, personal contacts between national MPs and the Commission are said to be more effective than formal contacts through the EWS or even the political dialogue. Moreover, parliamentary participation in the political dialogue is even more asymmetrical than in the case of the EWS, with over 70 %

of the comments coming from seven member states (Portugal, Italy, Czech Republic, Germany, Sweden, the UK and Romania) and many others barely using the mechanism (Croatia, Slovenia, Estonia, Hungary, Slovakia, Latvia and Cyprus).[48] Finally, similar to the case of the EWS, citizens are in general not aware of the mechanism in question, so if the political dialogue helps narrow the gap between the EU and national parliamentary level, it does not affect citizens' perception of the EU.

4 National Parliaments as Policy Proponents: The "Green Card" Initiative

The certain disillusionment with the functioning of the yellow card procedure as well as the political dialogue has developed in parallel with some national parliaments' ambition to play a more pro-active, in addition to re-active, role in EU policy-making. The ambition materialized in the so-called green card initiative endorsed by several national chambers including the British House of Lords, the Danish Folketing and the Dutch *Tweede Kamer*.[49]

In January 2015, on the occasion of a meeting of 14 national legislative chambers and the EP in Brussels, the *Tweede Kamer* published a discussion paper presenting conditions for a green card as a way for a group of parliaments working together to provide the European Commission with constructive suggestions of EU policy initiatives or for reviewing and repealing existing EU legislation.[50] In line with the Dutch paper, any parliamentary chamber would be able to formulate a proposal for a green card including the reasons, anticipated benefits and preferred type of reaction from the Commission. To qualify as a green card, a proposal should gain an agreed number of signatories (parliamentary chambers) and be delivered to the Commission within a specified period of time.[51] To avoid the necessity of a treaty amendment,[52] the authors of the initiative envisage it as building on the existing infrastructure of political dialogue through which parliaments and the Commission exchange views on the content of EU policy proposals (see above). Yet, while in the case of Barroso Initiative the exchange of information between national parliaments and the Commission does not oblige the latter to (formally) respond to parliamentary comments, the current green card proposal envisages such a possibility. The discussion paper proposes that the Commission, similar to the case of the European Citizens' Initiative,[53] publishes a formal response to a green card within a specified

deadline (e.g. 8 or 12 weeks) stating whether it intends to take the proposed action and give reasons for its decision. The authors of the initiative also suggest that a relevant Commissioner could go to the initiating chamber to respond to the green card in the presence of all the co-signatories.

It might be precisely due to these technicalities that the European Commission's attitude toward the green card initiative is rather careful. While in June 2014 the former Commission's President Barroso expressed his readiness to consider national parliaments' input concerning possible EU legislation or reviews thereof, the new Commission's vice-president, Frans Timmermans, in his letter to the Latvian Parliament in February 2015, changed the tone, stating that, *rather than entering into a potentially complex discussion on new institutional arrangements not foreseen by the treaty*, the cooperation between the Commission and national parliaments on upstreaming EU legislation should be addressed in a *more pragmatic and immediate way*.[54] This might suggest that the Commission is reluctant to tie itself to any new accountability relation with national parliaments.

The position of the EP on the green card is unclear. On the one hand, it supports the idea of a more constructive involvement of national parliaments in EU affairs as long as it does not amount to a real right of legislative initiative not foreseen by the treaties.[55] On the other, it does not envisage a scenario where national parliaments receive a green light to propose legislation at EU level through a gentleman's agreement with the Commission.[56] In fact, the green card might be perceived by the EP as a danger to its institutional position in the EU as it would *de facto* grant national parliaments indirect right of legislative initiative, thus bringing them closer to an equal footing with the European legislature. This the EP would like to prevent as it perceives itself as a sole legitimate level at which EU accountability should be realized. For this reason, it has long fought against the creation of any mechanism that could challenge its position as the sole EU-level parliamentary forum, preferring to strengthen parliamentary democracy in the EU by tools it can control. In this regard, in a response to a 2015 COSAC[57] questionnaire about the green card, European Parliament's Committee for Constitutional Affairs (AFCO) expressed its openness to consider further developments in the dialogue with national parliaments in the framework of the right of initiative that the EP enjoys under Art. 225 TFEU.[58] In this vein, it can be assumed that the EP would prefer to view the green card as an enhancement of its own legislative activity rather than an alternative or complementary channel of decision-making in the EU.[59]

Finally, the position toward the green card does not seem to be uniform even among national parliaments themselves. The responses to the abovementioned COSAC questionnaire inquiring about national chambers' positions on the green card reveals that some of them remain apprehensive, pointing out that the procedure might be incompatible with the treaties, unnecessary, or explain, as does the Polish Senate, that they are not domestically equipped with institutional competences to make use of it. Such a state of affairs might be explained by quite heterogeneous national parliamentary traditions, and different perceptions of parliamentary roles in EU governance. For example, while the Dutch *Tweede Kamer* seeks to be an active player in the EU, there is consensus between the Swedish, Finnish and German chambers that parliaments should not have an independent role at the EU level, but should limit themselves to the control of their own governments.

In order to test the feasibility of the project, in June 2015, the EU Committee of the House of Lords initiated the first "green card" on food waste, inviting the Commission to adopt a strategic approach to the reduction of food waste within the EU.[60] The green card in the form of a letter sent to the President of the European Commission, Jean-Claude Juncker, was co-signed by 18 out of the 41 national parliamentary chambers.[61] The solutions proposed by national parliaments did not amount to a new legislative proposal, but stressed the necessity to boost the Commission's concrete actions in the so-called circular economy package, a legislative proposal which had been withdrawn from the Commission work program at the beginning of 2015 to be tabled in a revised version later.

By issuing this green card, national parliaments have also added synergy to a citizens' initiative on the same topic launched in seven European countries and calling for support for an EU directive that will require all supermarkets in Europe to pass on their unsold supplies to charities instead of utilizing them.[62] In addition, in July 2015, under a resolution regarding circular economy, the EP adopted an amendment whereby it *calls on the Commission to promote the creation in Member States of conventions proposing that the retail food sector distributes unsold products to charity associations.*[63] The Commission formally responded to the green card on 17 November 2015. On 2 December 2015, it published its Circular Economy Package, which addressed majority of national parliaments' suggestions on food waste. While it has sent a positive signal to national parliaments and the citizens that a cumulative effort of various democratic actors might bring tangible policy results and enhance the democratic legitimacy of the EU one should not be too enthusiastic about its impact. In its response to national

parliaments, the Commission referred to the green card as an 'opinion' not a 'proposal'.[64] This reveals that, while endorsing the sort of dialogue sought by national parliaments, the Commission does not treat it as a form of legislative initiative.

5 Conclusion

National parliaments constitute an additional, indirect channel of citizens' representation in the EU. In this respect, their exchange of information with the European Commission should allow the latter to follow citizens' preferences more closely. This chapter analyzed three mechanisms of such exchange, namely, the EWS for subsidiarity control, the political dialogue and the green card initiative, each of them constituting a different transmission belt between the Commission and national parliaments.

While in principle the EWS was expected to make the Commission vertically accountable to the collective of national parliaments—and thus indirectly to European citizens—under the threat of a yellow card, the experience limits this effect. Narrow scope of subsidiarity scrutiny, uneven participation of national chambers, rarity of yellow cards and insufficient consideration of parliamentary opinions by the Commission do not guarantee national parliaments the desired influence at EU level. Consequently, its effect on establishing a better link between citizens and the EU is very limited. On the other hand, the main weakness of the political dialogue, which has a broader scope than the EWS, lies in its informal and unbinding character. For these reasons, the two mechanisms should be rather perceived as Europeanization and capacity-building tools for national legislatures rather than bridging the gap between the EU and the European *demos*.

Since genuine policy development upstream is much more appealing to citizens than the control of subsidiarity or proportionality, it seems that from the three analyzed parliamentary engagement mechanisms the green card might be the most conducive to the idea of strengthening EU legitimacy. By providing national parliaments a platform for development of joint policy proposals, it has the potential to translate the parliamentary engagement into co-responsibility for EU governance, awareness of its costs and increase in its effectiveness when it comes to implementing legislation. Yet, the mere bald assertion that granting national parliaments the right to suggest legislative proposals to the Commission will automatically increase EU democratic legitimacy is too simplistic and hardly convincing. For this

to happen, a comprehensive revitalization of parliamentary engagement in EU affairs needs to take place.

To this end, independent of the channel through which national parliaments communicate with the Commission, they should invest further in translating Europe to their voters and show that they are capable of transmitting voters' preferences upstream to the EU level. This, in turn, requires that the EU be discussed more in the national parliaments. Consequently, national parliaments should invest further in increasing the awareness of the MPs of the everyday business of the EU. A comprehensive Europeanization of MPs can happen by mainstreaming Europe into their daily parliamentary work. Primarily, this could be done by making parliamentary sectorial committees, not only EU committees, responsible for controlling the EU legislative process within the EWS, as well as streamlining EU debates into the plenaries. Parliamentary EU committees could constitute motors of this process. Intensified, EU-oriented discussions should also be encouraged by more EU-experienced MPs and their counterparts at the EP. The latter should invest more in organizing sectorally oriented joint parliamentary events. In the executive-dominated EU, communication between the two parliamentary levels is essential for the sharing of information, debating policies and reaching a common understanding of how things work in practice, which is something that is lacking in national capitals and in Brussels and Strasbourg. Without a critical mass of comprehensive EU understanding in the national chambers, the EU's democratic legitimacy is just empty words.

One of the basic weaknesses when it comes to assessing the democratic legitimacy aspect of parliamentary involvement in EU affairs is lack of citizens' awareness of the interconnection between the national parliamentary arena and the EU. National parliaments do not inform their voters that they actually keep control over EU legislation via the EWS, or that they communicate with Brussels via the political dialogue, or even that, potentially, they will try to translate citizens' needs and preferences into policy proposals at EU level through a green card. In other words, MPs do not sufficiently account for their European role. This lack of communication does not help to transform the multiple national *demoi* into one European *demos*. Even if the EWS does not produce a desired political effect at EU level, it could play a significant role at the national level as EU legitimacy intermediary by signaling to voters that the parliament takes their interests seriously, and uploads these to the European level, so as to try to change unwanted policies. Moreover, EU policies are often not perceived in line

with popular expectations, because they are sometimes used as a scapegoat by national MPs. That is why there is a need for better communication by national parliaments of the benefits of EU integration. If national parliaments do not start doing this they should not say that they contribute to the good functioning of the EU, let alone to increasing the democratic legitimacy of the EU.

Finally, building a European *demos* through parliamentary engagement requires genuine cooperation between national parliaments and their European counterpart, the EP. These two parliamentary arenas are two sides of the same coin and should positively stimulate each other's evolutions. If national parliaments want to perform a meaningful representative function in the highly complex EU governance structure, they should invest further in complementing the EP's influence in EU policy-making. That is why the green card initiative should not position one parliamentary level against another but be developed jointly by national parliaments and the EP. In this respect, the EP—acting in the capacity of its indirect legislative initiative—could be viewed as a power multiplier for national parliaments by, for example, adding more institutional weight to their own initiatives.[65]

Notes

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3. Thaddeus Kousser, "Retrospective Voting and Strategic Behavior in European Parliament Elections", *Electoral Studies*, Vol. 23, no. 1, 2004, pp. 1–21; Simon Hix and Michael Marsh, *Punishment or Protest? Understanding European Parliament Elections*, Paper presented at the biennial conference of the European Union Studies Association, Austin, Texas, April 2005.
4. Karolina Boronska-Hryniewiecka, "The Black Box of European Legislation: The Motivation (or Lack of It) Behind Transparency in EU Policymaking", *Polish Institute of International Affairs (PISM) Policy Paper*, no. 106, 2015, pp. 1–6.
5. Phillip Kiiver, *The National Parliaments in the European Union. A Critical View on EU Constitution-building*, Kluwer Law International, 2006.
6. Protocol 1 of the Treaty of Lisbon on the role of national parliaments in the European Union.

7. Art. 12 para c TEU and, respectively, art. 88.2 and 85.1 TFEU.
8. Art. 48.7 TEU.
9. Art. 12 b TEU.
10. The principle of subsidiarity, originally enshrined in Article 5(3) TEU, states that "*in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level*". In other words, two conditions should be fulfilled for the EU action to be justified: (1) insufficiency of member states in performing the action at the national level (insufficiency test) and (2) added value of the same action performed at EU level (added value test). For more on the concept of subsidiarity and its application, see K. Borońska-Hryniewiecka, "Regions and Subsidiarity After Lisbon: Overcoming the Regional Blindness?", *LUISS School of Government Working Paper Series*, available at: http://sog.luiss.it/2013/02/06/workingpapers/
11. Art. 7 of Protocol no. 2 on the application of the principle of subsidiarity and proportionality attached to the Treaty of Lisbon.
12. *Ibid*.
13. Karolina Borońska-Hryniewiecka, "Regions and Subsidiarity After Lisbon: Overcoming the Regional Blindness?", in *Democracy and Subsidiarity in the EU. National Parliaments, Regions and Civil Society in the Decision-Making Process*, ed. M. Cartabia, N. Lupo, and A. Simoncini, 'Il Mulino—Percorsi', Series of Nova Universitas, 2013, pp. 341–370.
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17. European Commission's annual report on subsidiarity and proportionality (2014), https://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-315-EN-F1-1.PDF
18. http://ec.europa.eu/atwork/synthesis/aar/index_en.htm
19. COM(2012) 130 final.
20. Reasoned opinions were issued by seven unicameral parliaments (Danish, Swedish, Swedish, Lithuanian, Portuguese, Luxemburgish and Maltese) as well as the Polish *Sejm*, French Senate, Belgian House of Representatives, UK House of Commons and the States General of Netherlands.

21. Compare: Nicklas Bruun and Andreas Bücker, "European Economic, Employment and Social Policy, Critical Assessment of the Proposed Monti II Regulation—More Courage and Strength Needed to Remedy the Social Imbalances", *ETUI Policy Brief*, no. 4/2012; Federico Fabbrini and Katarzyna Granat, "Yellow Card, But No Foul: The Role of the National Parliaments Under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike", *Common Market Law Review*, Issue 1, 2013, pp. 115–143.
22. https://www.etuc.org/documents/etuc-declaration-commission-proposals-monti-ii-regulation-and-enforcement-directive#.VgRTd5eyK8A
23. See, for example, http://euobserver.com/social/116405; http://www.europolitics.info/social/monti-ii-proposal-threatened-with-yellow-card-art335244-25.html; http://www.euractiv.com/socialeurope/ec-drops-regulation-right-strike-news-514793
24. In fact, national parliaments of 14 member states expressed critical concerns regarding the Commission's EPPO proposal but only 11 of them formally submitted a reasoned opinion by the required deadline (the UK, Czech Republic, Cyprus, France, Hungary, Ireland, Malta, Netherlands, Sweden, Romania and Slovenia).
25. http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/pdf/pdfletters/uk_house_of_commons_-_letter_vp_sefcovic_on_monti_ii_-_withdrawal_procedure_com20120130.pdf; Fabrizio Fabbrini and Katarzyna Granat, "Yellow Card, but No Foul: The Role of the National Parliaments Under the Subsidiarity Protocol and the Commission Proposal for an Eu Regulation on the Right to Strike", *Common Market Law Review*, 2013, Issue 1, pp. 115–143.
26. Commission Annual Report 2012 on subsidiarity and proportionality, COM(2013) 566 final.
27. Commission's response to national parliaments, COM(2013) 851 final, at: http://ec.europa.eu/justice/criminal/files/1_en_act_part1_v4.pdf
28. http://www.euinside.eu/en/news/council-froze-work-on-a-major-part-of-the-european-prosecutors-office
29. According to the principle of proportionality, "the content and form of EU action shall not exceed what is necessary to achieve the objectives of the Treaties". Exclusion of proportionality checks from the EWS meets with criticism among lawyers and policy practitioners as the two principles are very much interlinked and therefore difficult to be separated while assessing the efficacy of EU legislation.
30. The Commission is obliged to answer all reasoned opinions of national parliaments even if the card threshold is not reached.
31. Conclusions from the Working Group on the yellow card held on 13 May 2015 in Warsaw; Interview with representatives of the Polish *Sejm* and *Senat* (April 2015).

32. Extract from an interview with Austrian respondent in Ellen Mastenbroek, et al., *Engaging with Europe. Evaluating National Parliamentary Control of EU Decision Making after the Lisbon Treaty*, Part I: Report of Findings, Nijmegen, December 2014, p. 78.
33. Capacity problems were mentioned by respondents from Estonia, Greece, Finland and the Italian *Camera dei Deputati* in Ellen Mastenbroek, et al., *Engaging with Europe. Evaluating National Parliamentary Control of EU Decision Making After the Lisbon Treaty*, Part II: Management Report, Nijmegen, December 2014, p. 22.
34. Cf. Davor Jancic, The Game of Cards, *op.cit.*
35. Ellen Mastenbroek, et al., Part II Management Report, *op.cit.*
36. Karolina Borońska-Hryniewiecka, *The Green Card Opportunity,* Bulletin, April 2015; cf. Agata Gostyńska, *Not in Front of the MPs: Why Can't Parliament Have a Frank Discussion About the EU*, Centre for European Reform, 15 April 2015.
37. Ellen Mastenbroek, et al., *op.cit.*, Part II: Management Report.
38. Interview with the Representative of the European Commission for Contacts with National Parliaments, Brussels, July 2014.
39. Art. 38a of the European Parliament's Rules of Procedure.
40. Interview with Davide Capuano, *Consigliere della Camera del Senato dell Reppublica*, Rome, June 2012.
41. Ian Cooper, "'A Virtual Third Chamber' for the European Union? National Parliaments After the Treaty of Lisbon", *West European Politics*, Vol. 35, no. 3, pp. 441–465; Karolina Borońska-Hryniewiecka, "Democratizing the European Multi-level Polity? A (re-)assessment of the Early Warning System", *Yearbook of Polish European Studies*, Vol. 16, 2013, pp. 167–187.
42. http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/political_dialogue_en.htm
43. State of play on reasoned opinions and contributions submitted by national parliaments under protocol 2 of the Lisbon treaty and annual report 2014 on subsidiarity and proportionality, Brussels, 2.7.2015, COM(2015) 315 final.
44. Tapio Raunio, "Destined for Irrelevance? Subsidiarity Control by National Parliaments", *Real Instituto Elcano Working Paper*, no. 36/2010, p. 6, but compare: Karolina Borońska-Hryniewiecka, *Democratizing the European Multi-level Polity?*, *op.cit.*
45. Ellen Mastenbroek, et al., *op.cit.*, Part I: Report of Findings.
46. Davor Jancic, *op.cit.*, p. 948.
47. Ellen Mastenbroek, et al., *op.cit.*, Part I: Report of Findings; Sonia Piedrafita, *EU Democratic Legitimacy and National Parliaments*, Essay 7, Centre for European Policy Studies, November 2013, p. 7.
48. *Ibid.*

49. The proposal was labeled as a "green card" procedure in the 9th Report of session 2013–2014 of the House of Lords on the role of national parliaments in the EU: http://www.parliament.uk/documents/Role-of-National-Parliaments.pdf. Its scope and nature was subsequently discussed by several other national chambers such as Folketing: http://renginiai.lrs.lt/renginiai/EventDocument/6fa11f98-fc15-4443-8f3f-9a9b26d34c97/Folketing_Twenty-three%20recommendations_EN.pdf and *Tweede Kamer*: http://www.houseofrepresentatives.nl/sites/default/files/news_items/ahead_in_europe_tcm181-238660_0.pdf;
50. The *Tweede Kamer* "green card" discussion paper available at: http://www.tweedekamer.nl/kamerstukken/detail?id=2015D00583&did=2015D00583
51. The authors of the proposal suggested a threshold of one quarter of all the votes, counting one vote per chamber in bicameral parliaments, and a six-month deadline for co-signing the green card counted from the date when the initiating chamber circulates the draft.
52. The green card as a mechanism enabling national parliaments to induce or activate legislation goes beyond the scope of competences granted to parliaments by the treaties. See Sect. 1 of this chapter.
53. See Chap. 2 in Part I of this volume.
54. Letter of Frans Timmermans to the COSAC Chairperson, available at: http://www.cosac.eu/53-latvia-2015/meeting-of-the-chairpersons-of-cosac-1-2-february-2015/
55. 23rd Bi-annual Report of COSAC available at: http://www.cosac.eu/53-latvia-2015/plenary-meeting-of-the-liii-cosac-31-may-2-june-2015/
56. Interview with representative of the European Parliament Directorate for Relations with National Parliaments, DG Presidency, 14 April 2015.
57. Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union.
58. The European Parliament may, acting with a majority of its component MEPs, request that the European Commission submit any appropriate proposal on matters on which it considers that a Union Act is required for the purpose of implementing the Treaties. If the EC does not submit a proposal, it shall inform the European Parliament of the reasons.
59. Compare: Carlo Casini, *Report on Relations Between the European Parliament and National Parliaments*, Brussels, 25 March 2014, (2013/2185(INI)).
60. http://www.parliament.uk/documents/lords-committees/eu-select/green-card/green-card-on-food-waste.pdf
61. Bulgarian National Assembly, Croatian Parliament, House of Representatives of Cyprus, Chamber of Deputies of the Czech Republic, French Senate and National Assembly, Italian Senate, Hungarian National

Assembly, Latvian Parliament, Lithuanian Assembly, Luxemburg Chamber of Deputies, House of Representatives of Malta, *Tweede Kamer*, Portugal Assembly, National Council of the Slovak Republic, House of Lords.

62. https://www.change.org/p/frans-timmermans-stop-food-waste-in-europe-stopfoodwaste
63. European Parliament resolution of 9 July 2015 on resource efficiency: moving towards a circular economy (2014/2208(INI)), P8_TA-PROV(2015)0266, Resource efficiency: moving towards a circular economy.
64. See: https://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-select-committee-/news-parliament-2015/food-waste-green-card-commission-response/ accessed 1 May 2016.
65. Karolina Borońska-Hryniewiecka, "The Best of Both Worlds: The Unexploited Potential of Inter-parliamentary Cooperation in the EU", *PISM Policy Paper*, no. 27 (129), August 2015, pp. 1–6.

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CHAPTER 5

European Civil Society and 'Participatory' Governance Tools: The Impact of the EU Fundamental Rights Agency and Platform

Markus Thiel

1 Introduction

Civil society representatives (CSOs) in Europe have achieved an unprecedented level of visibility nowadays. With the rise of the European Union's (EU) 'democratic deficit' and the issues arising from various crises that the EU polity faces, the interaction between CSOs and the EU institutions has received more scholarly attention as it provides various opportunity structures to civil society groups to make claims, give advisory input, and consult on assessments and legislative proposals. These range from consultations with the Commission to increasingly used civil society platforms that supply auxiliary input into legislative proposals. In the specific case of CSOs participating in the Fundamental Rights Agency (FRA), cooperative practices and processes occur between stakeholders which can be analyzed through actor-centered theories on transnational advocacy.[1] These contrast with structural theories of sociological institutionalism that emphasize the sociological embeddedness of such transnational action in terms of

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institutional opportunity structures and their environment more generally.[2] More recently, a political sociology school of relational social fields posits a theoretical convergence and enrichment of the previous dichotomous conceptions of social arenas,[3] applied here to civil society's deployment of capabilities, identities and organizational change in the larger institutional EU environment. Based on these insights, an input-throughput-output legitimacy analysis of CSOs cooperating with the rights agency lends itself to connecting actor- and environment-centered theories of advocacy politics. Using Scharpf's[4] delineation of "input-output" legitimization by which "input legitimacy refers to the participatory quality of the process leading to laws and rules […] Output legitimacy is instead concerned with the problem-solving quality of the laws and rules",[5] this chapter investigates to what extent input-throughput-output legitimacy exists in the agency. The following sections detail the main hypotheses, provide an overview of actors, and provide evidence from surveys and interviews. Finally, the research assumptions are reconsidered and conclusions for the future of CSO advocacy are drawn.

Combining agency-centered advocacy literature and sociological-institutionalist structural theorizing, three research assumptions are developed. First, I propose that the inclusion of CSOs will have a transformative impact on agenda-setting in the EU agency to the degree that groups can converge on common rights objectives, despite their different thematic foci. This hypothesis evaluates the degree to which input-legitimacy, that is, the meaningful insertion of CSO input through participatory governance opportunities, exists in the FRA. The fact that the agency assembles a large number of CSOs does not automatically translate into more productive input. Yet I postulate that mutual learning through the interaction of CSOs among themselves and with the agency results in an improved, albeit limited, form of participatory governance in the rights policy area to the extent to which CSOs can provide consensus-based, substantive input into the agency's work. A second research assumption focuses on what Schmidt calls "throughput legitimacy", which is "process-oriented, and based on the interactions—institutional and constructive- of all actors engaged in EU government. The point here is the quality of interactions".[6] I propose that the institutional embeddedness of the civil society platform, and of the agency more broadly, determines the capacity-building of transnational human rights advocacy, resulting in a degree of throughput-legitimacy. Spatial differentiation (domestic versus European/EU-level CSOs) as well as a sectoral differentiation in terms

of self-organization (particularistic versus cross-sectoral inclusive) potentially impact the efficacy and legitimacy of civil society-insertion into EU rights governance. But these constitutive aspects have to be carefully calibrated so as to balance organizational needs along with normative considerations regarding the value of human rights promotion and the legitimacy of CSOs' activities in the process. Thirdly, I ask if the overall role of CSOs in the EU's human rights regime as constituted by the agency's civil society platform may lead to a gradual strengthening of accountable human rights policy development within the bloc. Here, questions of output-legitimacy, meaning the perceived performance of the agency and its embedded platform in achieving improvements in policy development, are evaluated. Yet the agency's work is politically sensitive and normative considerations, and constraints external to the work of the agency—largely the EU institutions, the member states and their publics—constrain the outcomes of joint human rights advocacy efforts.

With regard to the EU much of the civil society literature frames such groups as being critical vis-à-vis the EU or the member states. The collaboration of the EU and CSOs as well as public interest groups is, however, more complicated in that the degree of contestation and/or cooperation depends on the issue area and the sort of actors involved.[7] In Europe, CSOs compete with lobbyist groups for the attention of and access to policy-makers, as much as they compete among each other on a national level as well as in Brussels. There are a number of reasons why CSOs play a larger role in the policy-making process today: a rise in patrons and programs providing them with resources, improved institutional access and an emerging pro-CSO norm among states and Intergovernmental Organizations (IGOs).[8] The EU is one of the main equipping sources for such groups, and its stance on civil society involvement has gradually improved over the past few years as a result of the often lamented democratic deficit. Limitations, however, remain in that civil society is given primarily an advisory role, its persuasion strategies remain diffused as a result of having to lobby at various EU bodies, and transnational civil society is constituted heavily corporatist and often, elitist.[9]

The agency's Fundamental Rights Platform (FRP) attempts to constitute a permanent advisory bridge between European human rights organizations, including relevant civil society stakeholders, churches, universities, trade unions and so on, and the EU's civil servants working on behalf of these goals. The acknowledgement of CSOs as part of a vital democracy progressed in the late 1980s and early 1990s as the various IGOs in Europe

defined the role and (mostly advisory) impact of CSOs. The European Commission published a white paper on civil society in 2001[10] and laid out the objectives, avenues and limits of such involvement, thus establishing a restraint framework for civil society involvement. Around the same time, the EU drew up the Charter of Fundamental Rights, which became legally binding only with the ratification of the Lisbon Treaty in 2009.[11] The incorporation of the Rights charter signified a critical juncture for the promotion and maintenance of internal human rights mechanisms, and led to the creation of a Commissioner portfolio, and a functional agency to assess and promote human rights based in Vienna. During the planning period for the new agency, academic and civil society actors transmitted their advice and comments regarding the agency in public hearings.[12] It is certainly beneficial for the attainment and maintenance of rights to involve civil society actors, which in this case not only publicly advocate for policies and monitor the implementation of such in member states, but also relay recommendations on how to best achieve rights protection in the policy process. Yet in many cases in the past and present, CSOs were not involved in major policy decisions devised by the Commission or Council.

The FRA is institutionally embedded in a complex multi-level governance system, and in order to comprehensively assess the opportunities for legitimizing cooperation between CSOs and the EU agency, one needs to consider the structural embeddedness of the agency. In order to preempt suspicions of an economically oriented integration preference, a reconfiguration positioned rights maintenance based on the Charter with the first vice-president of the Commission, currently Frans Timmermans. Before the Lisbon Treaty inclusion of the Charter, there existed no explicit legal basis for the protection of civil rights through the EU, and many member states felt—and still signal—that such action encroaches on their constitutional boundaries.[13] Aware of such ambiguities, CSOs have welcomed the establishment of the Commission's portfolio in order to reinforce questions of rights-based justice. Despite being functionally independent, the FRA director and the Commission vice-president need to collaborate on rights issues, with the vice-president's purview as executive guardian of the EU's Rights Charter having an elevated status. This also means that friction among the upper levels of leadership in both institutions cannot always be avoided. The European Parliament (EP) is closely connected to the activities and the advocacy stance of the FRA as well. Its unique position as transnational legislature advocating more common European policies makes it a potential ally for CSOs and the agency. Its interlocutor role

between citizens and the institutions becomes evident in the number of petitions and public hearings, but one needs to keep in mind the ideological splits among the various parliamentary party groups with respect to rights promotion. By and large, the legislature recognizes the particular responsibility, as representatives of the citizens, to ensure that human and fundamental rights are being upheld. But aside from declaratory statements and amendments in the legislative process, there is little the EP can do against the member states' protective stances in this area. It has also been pointed out that it is heavily reliant on outside information as it does not have the resources to conduct independent assessments,[14] which is where the FRA, relying on data in part collected from participating CSOs, is useful in providing reports and recommendations. Lastly, both the Commission and the Parliament have an ambivalent relationship to civil society: the Commission allows only for controlled and advisory civil society input when preparing legislation, and the Parliament views itself as a representation of European citizens and thus rejects competitive claims by CSOs.

In sum, an analysis of the institutional embeddedness of the CSO platform in the agency, and in turn of the agency in the larger EU-institutional structure, reveals that there exists no simplistic power dichotomy between civil society and governance agents. The built-in duality of competencies of both agency and Commission presents an inter-institutional conflict, and its exchange with the Parliament provides largely ideational legitimacy, just as the agency's contact with national ministries in the Council of Ministers is diplomatically sensitive. This presents a challenging environment for the FRA to stake its own ground in these in-between spaces, and its intermediary role between member states, the EU institutions and CSOs means that its independence and legitimacy may be contested by either side. Using survey data, I next explore the relationship between the agency and platform, and the wider institutional field that these actors are embedded in.

2 Probing Input, Output and Throughput Questions in the CSO–Agency Linkage

To obtain a quantitatively substantiated understanding of the changing socio-political configuration effected by the insertion of civil society actors in the agency, I administered after initial interviews with both CSO representatives and EU officials a survey among the participating platform CSOs. The questionnaire contained 23 questions which inquired about

defining characteristics of the group, the relationship to the various EU institutions, the cooperation with other CSOs in the platform and judgments about the nature and effectiveness of their work. Based on the online-administered survey among CSOs participating in the agency's civil society platform (N=66 out of 225 for a 30 % response rate), the following section presents an overview of relevant research questions, and analyzes the input-output balance in the FRA. Where appropriate, references are made to the results of the preceding interview analysis so as to probe the validity of the research assumptions.[15]

One important contribution of the FRA consists in the promotion of transnational networking of CSOs, which aids the provision of input into agency programming. Yet the level of participation may differ depending on the organizational makeup of the organization. The FRA platform comprises two kinds of actors, predominantly domestic acting ones as well as EU-level umbrella groups. CSOs acting on a national level will have different objectives for domestic policy change that may not be of significance for the transnational EU level. On the other hand, they are more grounded in the actual human rights challenges that emerge in pluralistically structured European societies, and thus exhibit greater legitimacy to voice demands. Hence their constitution influences their standing, as well as their strategies, in the platform. The distribution of groups in the sample is relatively balanced, containing 41 % EU-level umbrella groups and 59 % predominantly domestic CSOs (see Fig. 5.1 below). Coincidentally, 56 % expressed that both levels are important, followed by 33 % who prioritized the EU level over domestic advocacy. Thus even within the

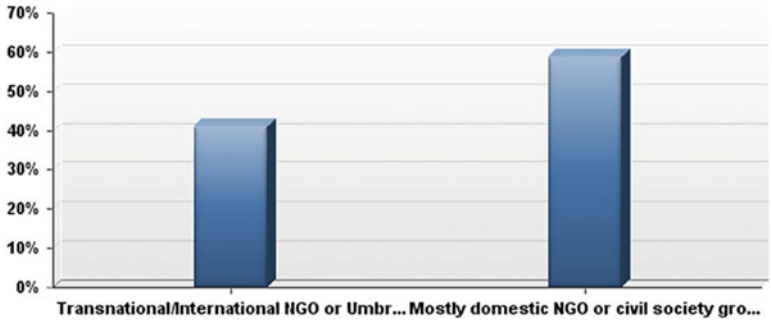

Fig. 5.1 Types of CSO. Originally published in Thiel, Markus. European Civil Society and Human Rights Advocacy, University of Pennsylvania Press, 2016/7

CSO platform, a differentiation occurs according to (trans-)national status and representation, which makes it more difficult to make unified, strong claims vis-à-vis the agency.

How was CSO input initiated? A significant number of CSOs from all EU member states, including from candidate countries, have responded to the agency's calls for participation to provide input and participate in consultative meetings and virtual fora (such as the e-FRP, an online platform to exchange practices and network). In fact, 54 % of the survey respondents acted upon the open call, 29 % were invited by the agency and the remaining ones gained access through national human rights institutions or simply asked to participate—which shows that while one-third was selectively invited (with representativeness in terms of sectors, status and geography in mind), most had an equal opportunity to become part of the platform (see Fig. 5.2 below). There were three calls for participation in the lifetime of the agency so far, and after a vetting process regarding expertise, capabilities and respect for fundamental rights, organizations can become part of the platform. Ninety percent of application requests have been accepted thus far.[16] The fact that more than half joined the platform through their own initiative and that almost all applications are accepted constitutes a positive signal for the inclusive orientation of the FRP.

When considering questions of access, a comparison with access to other EU institutions helps to illuminate the comparative political opportunity structure that may exist for CSOs to press for human rights protection. The agency is a relatively young addition to the EU institutions, and previous

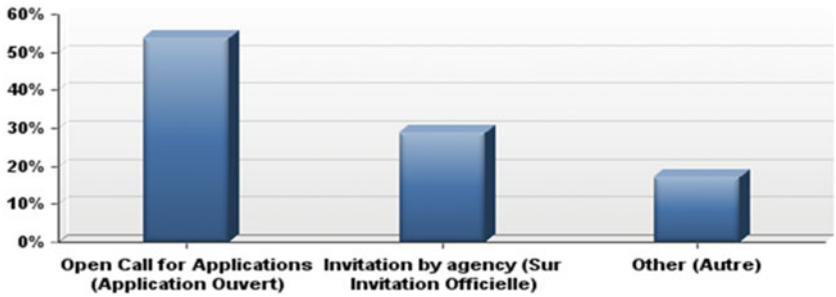

Fig. 5.2 Association with FRA/FRP. Originally published in Thiel, Markus. European Civil Society and Human Rights Advocacy, University of Pennsylvania Press, 2016/7

communication channels of civil society to Commission representatives or Parliament members existed but came with attendant limitations of time, influence or expertise. The FRA is supposed to remedy some of those issues and give voice to platform concerns by CSOs themselves. Thus, it makes sense to gauge the degree to which openness in terms of institutional responsiveness is perceived by CSOs. As can be seen below, the agency fares well, with approximately half (46 %) of respondents claiming that access to the agency is improved over other existing channels such as the Commission, while 50 % profess that access to the agency is comparable, and only 2 % judge FRA openness as worse (Fig. 5.3).

Concluding the input-oriented part, CSOs were asked if they received funding from the EU, and if so, if there were any dependencies as a result of financial assistance. Exactly half of the overall sample stated that they received EU funding directly from sources such as DG Employment, Social Affairs & Inclusion or DG Justice, or indirectly through EU-sponsored project funds. Of the ones who received funding, another half (52 %) professed that a certain dependency in material terms or policy orientation exists. Such funding, while commendable in that the EU actively tries to promote CSOs, also seems to have an impact on the independence of a quarter of CSOs that then may have to adopt a more conciliatory stance toward their funders or re-orient their work so as to fall into (often market-based) funding categories that the EU supports or in which it has competencies to act.[17] This is congruent with interview statements that

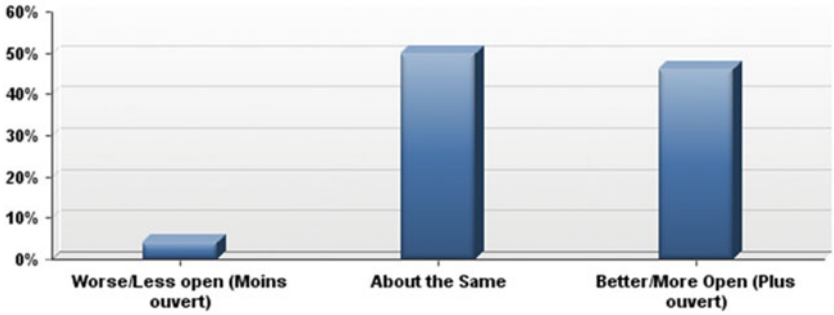

Fig. 5.3 Degree of agency openness to CSOs (in contrast to other EU main institutions). Originally published in Thiel, Markus. European Civil Society and Human Rights Advocacy, University of Pennsylvania Press, 2016/7

highlighted the need to adapt to EU-funding objectives, or to build up independent financial means.

Pertaining to throughput organization, a question inquired if the neutrality or credibility of CSOs would be challenged through the association with the civil society platform. Neutrality in relation to political stakeholders is a significant precondition for advocacy groups so that they may not be coopted by governance institutions, as then their credibility in the public sphere would suffer. However, the agency's proactive inclusionary stance and the incentives for participation in terms of consultative influence make it difficult for CSOs to remain outside. Hence an overwhelming 86 % of respondents had no issues with such affiliation, and only 14 % thought that such collaboration may negatively impact on their organization's independence (Fig. 5.4).

The second part of the survey focused on CSOs' strategic environment and their collaboration with other platform members and the agency, reflecting throughput as well as output considerations. The question of competition with other groups from the same activity area, or cross-sectional from other sectors in the broader human rights area, is central as it highlights the challenge of many different CSOs converging on common objectives in order to represent those vis-à-vis the agency officials. These issues can be of a simply functional nature, when CSOs in the same sector have to apply for the same funds made available by funders, or of a political nature, when organizations with clashing objectives and

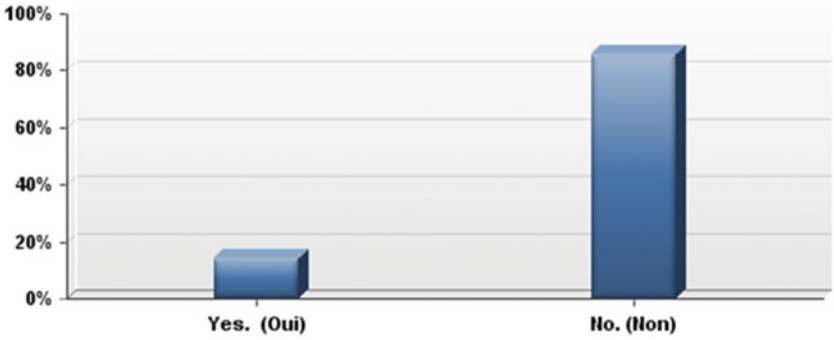

Fig. 5.4 Neutrality/Credibility challenged by affiliation with FRA. Originally published in Thiel, Markus. European Civil Society and Human Rights Advocacy, University of Pennsylvania Press, 2016/7

ideologies aim to advance their positions. Only roughly a quarter (23 %) of respondents felt that competition for attention, funding or values exists in the work of the civil society platform, while 77 % didn't think so. The comments that were added revealed that while it is perceived to be a 'normal' situation in the CSO sector to compete for funds, the question of ideational rivalry seemed to be of concern to some as it not only hinders the focus on common strategic objectives but may also effectively neutralize the pressure exerted by these groups on the agency. A few even speculated that this may be a conscious strategy of the agency/EU to delimit concerted CSO influence. Thus while competition for funds is viewed as normal, platform-internal as well as external competition in ideational terms seems more problematic.

A grand total of 88 % of survey respondents find working with EU-propagated concepts such as 'antidiscrimination', 'intersectionality' or 'social inclusion' helpful, as they seem good umbrella terms for the attainment of equal rights for all. It has to be noted, however, that competition among groups is the norm, sectoral differences and organizational emphases persist, and thus leverage exists only in limited fashion to the degree to which CSOs are able to bridge differences in their collaboration with the agency so as to attain better output in terms of policy recommendations. The large supportive majority stated that these terms are on the one hand broad enough to allow a variety of civil society representatives to unite in an intersectional manner representative of a variety of causes. On the other hand, they were deemed concrete enough to concretize the rather abstract meaning of human rights by hinting at the challenges that individuals encounter for full participation in private and public life. In addition, they are roughly equivalent to the program objectives chosen by the EU, which denotes a rather large congruence of attainable objectives among CSOs and EU institutions. Many added that all three rights concepts are similarly important for their work, as they are cross-cutting each other, but also cross-sectional as well as non-threatening in their meaning for other, related human rights activity sectors. This makes mainstreaming of sector-specific rights, for example regarding gender, easier. The few that disagreed thought that these umbrella terms were too limited, or aimed at too soft or lofty objectives. Given the diversity of organizations assembled in the platform, each with its own objectives, the rather impressive agreement with each other but also with the EU institutions about these overarching human rights goals is indicative of the close affinity of CSO ideas with EU objectives. It shows that such policy terms

are supported and found helpful in organizing and representing human rights promotion in the Union, either because they have been adopted strategically by civil society in an effort to advance throughput efficacy, or because they encompass meaningful content.

Despite such positive assessment of key activity terms, more than two-thirds of civil society representatives (70 %) in the sample would favor a more independently acting political role of the agency, as opposed to the remaining 30 % who seem content with the current status of the agency. This reflects on the question on output-legitimacy, which is perceived in a rather critical manner here. Such critical evaluation may also be related to the raison d'etre of CSOs and their perceived role as critical counterparts to governance agents. Hence it does not necessarily reflect the actual performance of the agency, but could be viewed as much as a normative statement as an actual appraisal of the FRA's work (which is why the input/output question is explicitly covered below in a separate question). Most CSOs are aware of the institutional constraints of the agency, so that this also expresses a call for an enlarged mandate (Fig. 5.5).

From this overall evaluative question I derived a set of questions that focused on the degree to which CSOs can participate in the agency's work through agenda-setting measures (advocating for the inclusion of their program agenda in the agency's Annual Work Program) and effectively consult and give advice to the FRA. With regards to the agenda-setting

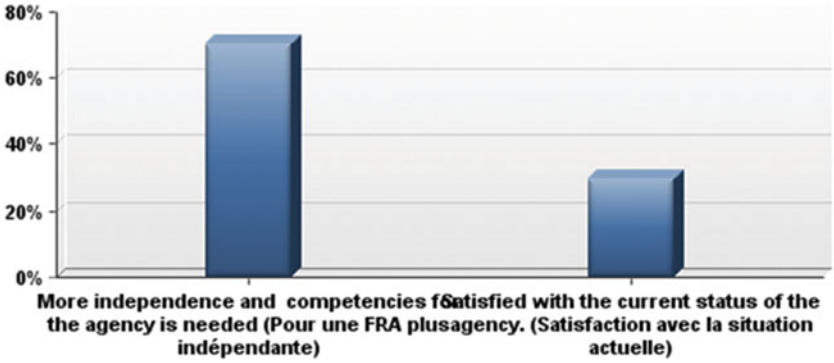

Fig. 5.5 How platform groups see/would like to see the performance of the agency. Originally published in Thiel, Markus. European Civil Society and Human Rights Advocacy, University of Pennsylvania Press, 2016/7

question, 57 % of interviewees felt that they are able to influence or steer the programmatic agenda of the agency, while 43 % disagreed. The ones that were optimistic about their impact stated repeatedly that there are multiple calls for consultations, participation and other input opportunities (e.g. through interviews, the Annual Platform meeting, and so on.) coming from the agency. The few comments that were provided by the ones denying an agenda-setting role for CSOs felt that the work of the agency program was too broad for CSOs to navigate, or that the agency still has too much influence over the content of the platform and its annual meeting. These results are not as clear-cut, and evidence that not all groups perceive their involvement with the agency as relevant for a programmatic agenda-setting, thus delimiting the value of one of the main strategic avenues of human rights advocacy in conjunction with CSOs.

But when asked about the perception of their consultative powers in the agency, another main element of advocacy work, 73 % responded that they indeed feel that they can effectively engage and give advice to the agency, with 27 % disputing such views. Of the large majority that felt that they could effectively insert their opinions and advise into the agency's work, many added that their unique expertise for a specific area makes them important knowledge providers for the agency, and the term 'responsive' was recurrently used to characterize the FRA's elicitation of CSO input. Again, the multiple contact nodes at Annual Platform meetings, individual calls for participation, or contacts with the agency director or project leader were cited as ways to efficiently involve themselves in the agency's operational work. The remaining ones that disagreed complained that they have too little influence over the FRA's research design and implementation of survey projects, or that the agency should support CSOs more (including financially) to fund the consultative work for the agency, or the CSOs more generally. Given that the agency has to answer to the Commission and the Council, and works in a politically sensitive area with a limited budget—there were, for instance, no budget increases in the past few years—it seems to genuinely strive for input provided by CSOs. No matter if in terms of agenda-setting or consultations, the involvement of CSOs in the agency's work through the platform provides both sets of actors with mutual gains (bottom-up information for the agency, and a claim-making venue and political opportunity structure for civil society), which is recognized by the majority of participating organizations.

Moving from input and throughput considerations to central reflections on the FRA's output-legitimacy more generally, the next central

question asked interviewees to rank the attainment of input-legitimacy for the agency (defined as providing input in terms of communication to EU institutions and the public) as opposed to output-legitimacy (providing effective rights promotion policies). The underlying question concerns the evaluation, and weighing, of the perceived need of the agency to serve primarily as a channel for dialogue and participatory democracy, or to alternatively pursue an effective human rights promotion and maintenance through research and legal-political means irrespective of participatory considerations. Not surprisingly, 60 % highlighted the need to balance both aspects of legitimacy, though this may not always be possible given the material and political limitations of the agency. In a distant second came the valuation of "more output- than input-legitimacy" with 14 % highlighting the need to achieve human rights-related policy outcomes ahead of considerations regarding the agency's dialogic-communicative function. This was followed by 12 % of interviewees who selected 'input-legitimacy', whereas pure output-orientation was chosen by only 10 % of respondents. The answers suggest that no consensus over the input/output policy preferences exists, and that a sense that both aspects are necessary for the successful work of the FRA prevails (Fig. 5.6).

The final set of questions revolves around the activities of CSOs themselves, including in the Fundamental Rights Platform. When asked if they deem the platform organization (including the existence of the nine-member advisory panel, annual conference and e-FRP) efficient for

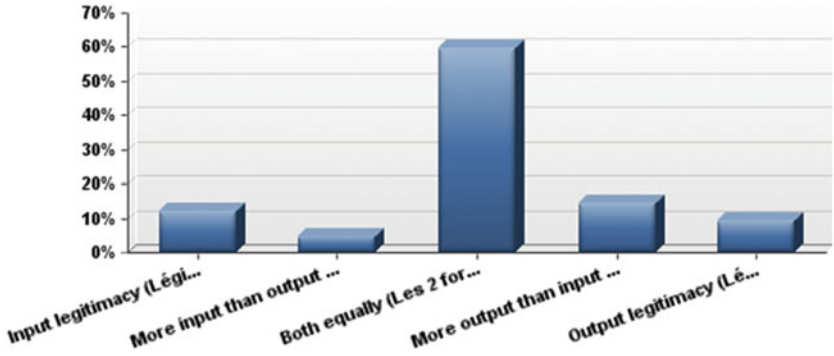

Fig. 5.6 Prioritization of Input- or output-legitimacy of the agency. Originally published in Thiel, Markus. European Civil Society and Human Rights Advocacy, University of Pennsylvania Press, 2016/7

consultative purposes, roughly two-thirds (62 %) of survey participants agreed, while 38 % were not of this opinion. Interestingly, the ones that expressed that there were issues with the platform organization repeatedly mentioned problems with the advisory panel, which was perceived as being too elitist and EU level-based and thus somewhat coopted. Considering that part of the Advisory Panel is selected by the agency director, it becomes evident why some CSOs may have an issue with this platform body, even though it is not dealing with the content of the platform's work but rather with procedural-organizational issues. Secondly, the online e-platform was not perceived as being used sufficiently, which may have to do with the fact that it was created long after the agency and was, as of 2013, still in the testing phase.

When asked to provide an output-oriented evaluation as to whether the FRA has been efficient/successful in its pursuit of human rights so far, most respondents chose a middle category by answering 'somewhat' (72 %), followed by a quarter that judged the work of the agency fruitful (26 %) and a miniscule 2 % that did not. Of the few that found the work unsuccessful, the agency's bureaucratic structure and lack of impact on the ground was cited. Several of the ones that positively evaluated the FRA activities indicated that the FRA reports, aside from being very thorough, also aid in pressing for change on a national level or increase funding for specific projects, for example, for Roma integration. It was also mentioned that the platform is constantly increasing in size, a sign that such forms of transnational networking are deemed attractive for CSOs. The majority of the ones answering that the agency had some, albeit limited, success identified similar achievements but also pointed to a generally perceived shortcoming: that the agency produces comparative substantiated reports on human rights problems as well as recommendations for stakeholders. However, those are neither given the right amount of attention nor heeded in terms of follow-up and so on. The comments reveal that more power should be granted to the FRA to provide feedback to national governments, follow-up with their recommendations with governments and EU bodies, and possibly even to monitor. I view these shortcomings primarily as critiques of the political standing of the agency in the EU governance system, rather than criticism leveled against the FRA's operational work. This means that the majority of assessments that deem the work of the agency 'somewhat' successful actually advocate for more visibility and power for the agency to conduct human rights advocacy work.

An exploration of CSO target venues allows for a determination of the value that these groups place on transnational networking, and there in particular on outcomes on the EU level. In terms of the valuation placed on domestic human rights advocacy work and service provision, as opposed to transnational EU-wide networking, it becomes clear that the EU level has achieved a significant degree of attention and salience: 33 % found the EU level more important, while 56 % expressed the necessity of being active on both levels equally. Among EU-level CSOs, EU lobbying weighs even more heavily: of the 41 % transnational CSOs in the sample, half of those considered Brussels more important, and the other half gave equal weight to domestic and transnational work. Only 12 % stated that the EU level was less important. These results highlight the perceived importance of Brussels as a locus of legislative output, while simultaneously pointing to geo-strategic differences in the appreciation of EU-level networking activities. It appears that most EU-level CSOs tend toward adopting a cross-sectional approach, which further separates and potentially splits national and EU-level CSOs within the platform, raising in turn questions of 'elitist' CSO representation in Brussels (Greenwood 2010) (Fig. 5.7).

Such transnational networking activities, however, are not simply limited to the cooperative exchange among CSOs. They also pertain to the dialogue with institutional stakeholders, chiefly among the Commission, the member-state Council, the Parliament and so on, as well as with agency officials. Aside from the agency (20 %) and Commission (20 %), the other major stakeholders that were rated as generally receptive to the activities of CSOs were the EP and the media, with 18 % of respondents expressing affinities for each of the latter. National governments and other bodies such as the Council of Europe are least frequently mentioned (13 % each). On the other hand, one cannot simply deduce from these numbers that institutional power is vertically exerted upon civil society actors 'top-down' from EU or national actors, as a distinction according to agents—and a differentiation according to roles in the EU-integration process, separating EU institutions from state governments—shows that these have distinct relations with platform CSOs.

If one is to search for constraining actors in the output-oriented collaboration of civil society with other stakeholders, one finds that there seems to be a divide occurring between EU actors cooperating with civil society on one side, and the national governments on the other (which is not surprising, given that national governments are often the ones held

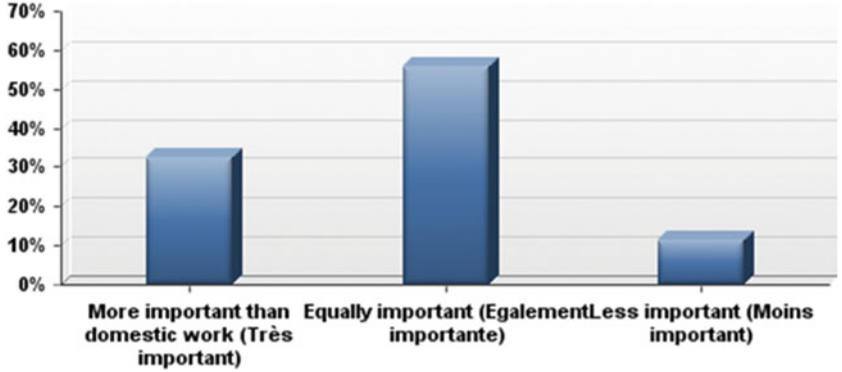

Fig. 5.7 Importance of transnational EU-level networking (in relation to the domestic level). Originally published in Thiel, Markus. European Civil Society and Human Rights Advocacy, University of Pennsylvania Press, 2016/7

primarily responsible for human rights issues within their borders). The respondents of the online survey confirm the existence of those constraints, particularly as they relate to CSO-government relations: a plurality of 34 % express that the national governments are the most difficult cooperation partners, followed by the EU Council, the institution representing the member states (21 %). The ones that marked 'other' (19 %) view all of them as equally problematic partners, or that they do not approach any of the institutional stakeholders. Lastly, in juxtaposition to the aforementioned affinity for cooperation with the Commission, 12 % in fact consider the EU's executive as a hindrance in their human rights advocacy. These responses not only provide a differentiated picture of the various opportunity structures or venues but also reinforce the perceived split between CSOs and supranational EU institutions on the one hand, and the member-state governments that are often in opposition to rights advocacy, or interference in their domestic human rights or justice policies more generally (Fig. 5.8).

The data shows that the inclusion of civil society into the work of the FRA provides mutual legitimacy benefits for both the EU agency and for CSOs. But it also makes the agency more vulnerable to criticism from (state) actors who may aim to delegitimize the agency's findings, particularly if it produces politically sensitive results. Correspondingly, the FRA

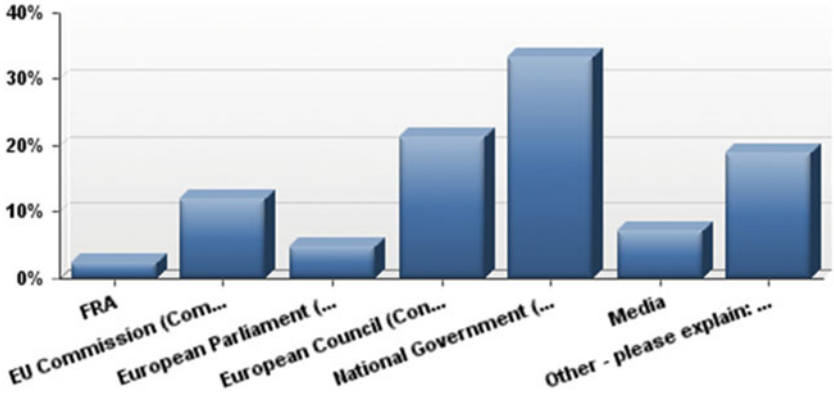

Fig. 5.8 Identification of difficult CSO cooperation partners. Originally published in Thiel, Markus. European Civil Society and Human Rights Advocacy, University of Pennsylvania Press, 2016/7

and its director have to balance the multiple demands of governments, the Union's institutions and CSOs, which at times impairs the agency's own advocacy role.

3 Constructing a New Collaborative Partnership or Reifying EU Power Structures?

An analysis of the actors 'from above and below' in terms of the Europeanization of human rights advocacy discloses the relations between stakeholders, their interactions and the degree to which input-, through-put- and output-legitimacy exists in this area. The insertion of CSOs as desired by EU institutions functions in a fairly measured manner, but the effects of agency-supported networking multiply in that the network-character of the platform CSOs will be strengthened beyond existing auxiliary consultations with the Commission. The strategic action field in which these actors operate is extended by providing each, the agency and CSOs, additional reputational gains (for the EU consulting with civil society, for NGOs becoming 'respectable' stakeholders) as well as access to each other. And it is also horizontally extended among civil society representatives, as these, insofar as they cooperate with Brussels-based umbrella CSOs, can conduct their advocacy work on both the national and supranational level. Hence, despite the limited auxiliary role of CSO input in the agency, and the constrained powers of the FRA in the larger EU-institutional context reflecting on output, legitimacy-enhancing activities manifest in this reconfiguration of previously exclusive political (supra-) national power. In a broader view, one could postulate that the agency's creation of an integrated consultative civil society platform represents an institutional innovation that has the potential to overcome the structure-agency duality through inserting civil society representatives as semi-independent agents, which ultimately transform the institutional as well as policy-field through their organizational as well as collective advocacy-identity.

In their advocacy work, CSOs cooperating with the EU involve a large number of stakeholders, broaden the field of political mobilization and press for policies responsive to their constituencies. But the question remains how far human rights groups and agency officials adhere to the normative governance standards of accountability, representation and, ultimately, legitimacy. Most of these aspects are reflected in the degree to which these civil society groups are able to cultivate a climate of mutual

cooperation in the platform configuration with each other, as well as with other societal and political stakeholders. This will impact the effectiveness of such participatory governance tools and thus contribute to the overall input/output-legitimacy balance. In terms of functional accountability, these groups are almost all linked with or represent EU/Europe-wide members in their organizations, and aim to relay their members' objectives in the civil society platform through consultative input into the agency's work priorities and reports, as well as through a wider interactive information relay process. The added value of the civil society platform is not undisputed, both in terms of accountability to their members and in terms of representation: in the face of increasingly severe resource limitations, CSOs avoid any expense of time and money on pro-forma participation, and wonder about problems related to their organization's representation and legitimacy. They critically evaluate the CSO-external representative role of the platform within the agency, and the position of the agency in between the demands of the member states, the Commission and the Parliament. However, the establishment of a consultative platform for advocacy CSOs provides for an auxiliary mechanism to dissipate the competitive pressures that exist in EU-CSO relations, and, more importantly, provides an interactive network channel for both, the agency and the platform groups. Thus, it ultimately improves accountability and thus, input-, throughput- and output-legitimacy of CSO-FRA cooperation.

A re-evaluation of the three research expectations aids in advancing the knowledge about the mutual interaction of agency and platform. This connection is ever more significant as human rights advocacy is not only an applied regulatory policy area but also of a contested political and normative nature. Hence it is in need of well-founded arguments about institutional support in order to justify such participatory governance tools. Within the sociological-institutionalist analytical framework, I first suggested that the insertion of CSOs in EU rights governance will have a transformative, albeit limited, impact on agenda-setting in the agency to the degree that CSOs can converge on common objectives, despite their different sectoral orientations. Hence this criterion highlights the degree to which input-legitimacy, that is, the ability to provide meaningful input in EU human rights governance as measured by agency responsiveness to civil society and the participatory discourse of CSOs, can be attained for the work of transnationally acting human rights CSOs. As the first semi-institutionalized civil society platform integrated into the work of EU governance institutions, the platform undoubtedly changed the way

human rights CSOs interact with the Union, network with and learn from each other, and coordinate their input in cross-sectoral ways. Both the interviews and surveys attest to the broadening of sector-specific horizons and the expansion of opportunity structures that CSOs experience. The central question remains, however, how far the over 300 platform groups can join together in relatively standardized agenda-setting strategies when they have different constitutive characteristics (domestic or transnational, membership-based, foundation or think-tank) and, particularly important here, varying conceptions of what human rights and the 'common good' constitute. Theoretically the catalogue of rights contained in the charter can sometimes be mutually in conflict, for example, the rights of freedom of expression and the right of privacy, or the perception of what constitutes discrimination. The pursuit of those rights by sectoral CSOs can be similarly antagonistic, when values clash and rights-consciousness is understood in an absolute-exclusive rather than a trans-sectoral or transversal manner. Coincidentally, the EU advances a rather progressive and inclusive rights agenda congruent with a majority of CSOs. The role of the CSO Advisory Panel, while pragmatically important, seems less helpful in representing all CSOs. Yet, it is unlikely that there will be concerted efforts by platform groups to push for agency measures in a strongly consensual or streamlined manner, as experiences with CSOs being overwhelmed or uninformed regarding the requested input have shown. For instance, some platform members at the Annual Meeting suggested conducting targeted consultations with groups based on their expertise, rather than consulting all CSOs on every rights-related matter. Instead of functioning as a tool for streamlined lobbying input, the platform serves as a somewhat competitive CSO forum, in which different civil society voices corresponding to the societal pluralism existing in Europe are being heard. Moreover, it serves as a centralized open arena for mutual learning and best practices. This also best represents the actual diversity and, also, antagonism that exists among transnational European CSOs—though to the detriment of efficient, consensus-based input-legitimacy.

The second proposition stated that the spatial as well as institutional embeddedness of the platform, and of the agency more broadly, determines the efficacy of transnational human rights advocacy. Both factors, spatial differentiation as well as a sectoral separation in terms of CSOs' self-organization, thus potentially contribute to the throughput-legitimacy of CSO-insertion into EU rights governance. In addition, the internal and external institutional value placed on the platform within the agency, and

more broadly the agency within the EU's institutions, provides additional meso-level indicators for the quality of interactions within this new form of participatory governance. The evidence gained in my empirical work has shown that the judgment on the perceived institutional value of the platform and the agency is differentiated according to the stakeholder involved. In regard to the CSOs, the involvement of human rights advocates through network activities between the agency and these groups has led to a transnational identity extension based on border-transcending communication and practice. By doing so the stratification according to rights sector has certainly diminished in that most CSOs agree to a cross-sectoral understanding of human rights promotion. At the same time the survey and the interviews do highlight some tensions between the proportionately large number of EU-level umbrella groups who feel that they have more expertise with lobbying EU institutions, and predominantly domestic acting CSOs that may have a steeper learning curve in contact with the Union. Yet a process-oriented inclusion of CSOs in EU politics, however imperfect, is more important than ever with the EU emphasizing technocratic, democratically removed policies that do not easily resonate with ordinary citizens, and the rights contestation and dismantling that is evident through the Eurocrisis. As for the evaluation of the platform within and outside of the agency, it can be said that the agency leadership and staff values, and indeed needs, the input of the CSO platform, even though the FRA is wary of being too closely associated with civil society. The reason for such advocated distance lies in the fact that neither the Commission nor the EU Council wants to see the agency becoming too politically aggressive, and the FRA itself does not want to be viewed as such either. It becomes clear that the embeddedness of the agency in the complex multi-actor system challenges CSOs and the agency to advance mutual claims, but that it also presents them with various institutional opportunity structures that can be utilized.

The last research proposition considered the macro-level, and suggested that the overall role of CSOs in the EU's human rights regime, as exemplified by the Fundamental Rights Platform's work, will lead to better human rights policy development within the bloc, although the EU overall will continue to remain an ambiguous rights promoter. It thus aims to detect the degree to which output-legitimacy, that is, the accountability of and improvements in human rights policy development, takes place. The survey, observation and interviews point to a mixed picture in this regard: a large majority (in the survey, 72 %) of CSOs expressed that the

agency has been 'somewhat' successful and efficient in the promotion of human rights. But there as well as in the Annual Platform meeting and in the interviews CSOs argued that the FRA should strive to become a stronger political actor, be more visible in member states and should follow up when producing research-based reports. The agency, however, is bound to the other institutions, which view the FRA mainly as a supportive research institution rather than a monitor or politically acting body. This makes it hard for the agency to expand its authority and decisively influence human rights policies. Yet, the agency contributes indirectly, precisely through its linkage with CSOs, to incremental improvements in the reporting of existing human rights issues and the formulation of new human rights policies that are more in line with the needs of EU citizens. No matter if in advocating expanded rights policies (such as the horizontal antidiscrimination directive) with allied institutions such as the EP, or the preparation of reports that then can be used by the Parliament or CSOs to push for adaptive changes in their home states, the agency plays a supportive interlocutor role. But given the institutional-legal agency constraints and the precarious contested nature of rights among CSOs, member-state governments or EU institutions, the extent to which the work of the FRP and FRA contributes to output-legitimacy should not be overstated. In view of these challenges, all three forms of input-, output- as well as throughput-legitimacy are essential parts of participatory human rights governance if EU rights policies are to be deemed consequential.

Independent of how much rights advocacy is emerging under the aegis of the FRA, the austerity measures caused by market-advocated reforms have damaged the credibility of the EU when speaking of rights. The ongoing curtailing of rights of EU citizens unfortunately relativizes the positive impact of such institutional human rights promotion. Beyond the temporary impacts of the Eurocrisis, the fact that social and human rights are subordinated to the market-driven logic of regional integration and economic liberalization is problematic in itself. CSOs have reacted to the EU's programmatic drive for 'social inclusion' and 'inclusive growth' in order to profit from funds made available for these budget posts, but they are increasingly skeptical of the marketization of human rights that occurs, and worried about them becoming coopted allies, rather than critical counterparts. Platform CSOs are aware of these issues and signalize them accordingly to the rights agency. Similarly, the build-up of a securitized EU border regime at the same time that rights provisions within the blocs are strengthened reveals the inconsistencies with which fundamental rights

are considered by the Union institutions. While officially human rights are propagated by the EU as a globally available privilege, the implementation of border policies including repatriations and border control through the EU border agency Frontex, the questioning of the Schengen acquis, and the relations to states in the neighborhood make it clear that security and strategic considerations are preeminent over rights-based approaches. CSOs operating in the (im)migration and refugee sector are aware of these issues and try to engage the Commission, the FRA and Frontex, with the effect that a closer cooperation between the rights and border agencies has been initiated in the hope that border management is being conducted in a rights-protecting manner. If the Union wants to remain a credible human rights-based actor, it needs to address these difficult problems and better balance human rights and socio-economic and security concerns.

Civil society will need to become on the one hand more independent in terms of funding and orientation and, on the other, should highlight their expertise in specific human rights issues more strongly. The first point refers to the concern that CSOs, while professing autonomy from governmental influence, have been significantly influenced by EU funding (which admittedly guarantees them independence from states) and also integrated into the EU's policy planning agenda in a consultative manner. Given the fact that CSOs do not have an electoral mandate to represent EU citizens, their credibility can easily be contested, this even more so when they move too close to the governance instances that they are supposed to contest and monitor. Consequently they have to emphasize their policy-relevant knowledge and capabilities so as to legitimize themselves in relation to the public as well as (supra-)national institutions when it comes to policy development. Such an approach is even more important in the FRA, which highlights its evidence-based research functions.

Overall, the complex interplay of civil society with national and European governance institutions means that human rights promotion is a demanding undertaking for all actors involved. Nor is it essentially desired, based on the normative imperatives as well as the political considerations of governmental stakeholders. In this challenging environment, the opening up of an institutional opportunity structure such as the civil society platform provides an additional venue for CSOs to advance their organizational objectives but also to legitimize their claims. It is to be hoped that such rights pursuit will lead to better human rights protection through participatory governance in this increasingly important public policy area.

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PART II

Legal Formalization of Fundamental Rights in the EU: Toward a More Inclusive and Politically Responsible Europe

Oana Petrescu

1 Introduction

Part II comprises three chapters that address the impact of the "constitutionalisation" of fundamental rights on the EU democratic identity, as follows.

The first chapter discusses the way that the coming into force of the Treaty of Lisbon meant a good opportunity for the Charter of Fundamental Rights (CFR) to become an important legal instrument for the development of EU law in all the policies and areas, contributing thus to furthering European integration and identity. More importantly, the CFR represents a point of reference both for the Court of Justice of the European Union (CJEU), where its role as adjudicator of fundamental rights has been increased, and for the national courts, which turned into an active actor involved in constantly searching for interpretation and guidance from the CJEU through the preliminary rulings procedure.

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The author brings into play the fact that in spite of the effective implementation of the CFR and its practical application beyond the terms and provisions, further improvements concerning certain freedoms and rights still need to be adopted. On the other hand, the citizens' growing activism through direct access to information and remedies underlines that the CFR is instilling a sense of public ownership and European belonging, looking therefore for a better quality of their lives and fundamental rights in the political sphere of the EU.

Finally, the new increasing leading role of the EU in the field of fundamental rights may have in the future a decisive influence on the agenda of the international and regional organizations on fundamental rights.

The second chapter presents in a brief manner, from a historical viewpoint, the context in which the European CFR was adopted, as a human rights European catalogue, bringing together, for the first time, all the main traditional rights, irrespective of the rights under discussion, such as political, civil, economic or social rights.

An important moment in increasing the level of the human rights protection system, as the author underlined, is given by the insertion of an innovative provision in the Treaty of Lisbon concerning the accession of the EU to the European Convention of Human Rights (ECHR) but within the limits of the "*Union's competences, as defined in the Treaties*". The author considers on the one hand that the said insertion is the result of the constant changes that occurred at the Union level in all the sectors of life in recent years, including the human rights protection system, and on the other hand it represents one of the most important innovations brought by the Treaty of Lisbon. Furthermore, these changes would fill significant gaps in the EU's system for protection of human rights.

Lastly, the chapter highlights how the rejection of the Draft Agreement on the EU's accession to the ECHR by the CJEU will affect the possibility to submit the EU's legal system to an independent external control in the field of human rights, respectively the European Court of Human Rights. In such a context, the author considers that the negative opinion of the CJEU represents a step back in providing for enforcement machinery through the European Court of Human Rights, a failure to ensure the same legal protection to all European citizens vis-à-vis the acts issued by the EU institutions, agencies and other bodies that they presently enjoy from Member States.

The third chapter deals with the concepts of democratic legitimacy and judicial activism and their theoretical and practical implications, while a

balance between these two notions can be seen as an option in finding solutions for society and maintaining respect for the rule of law, from the author's point of view.

A special view is given to the review of the jurisprudence of the CJEU in relation to issues that may be deemed to have been only partially settled or not settled by the text of the EU treaties and legislation. This jurisprudence is often referred to as an example of legal activism, and questions have been raised as to the democratic legitimacy of such activism. For the CJEU, the level of activism has varied over time, and responses from the Member State judiciary and legislative authorities have likewise varied. The core issue in the chapter is the extent to which it may be argued that the solutions adopted by the CJEU may be classified as having a satisfactory democratic legitimacy as resting on the directions given directly or indirectly by the constitutional and legislative authorities that have adopted the EU instruments concerned. This includes consideration of the role of the CFR, in relation to the manner in which the CJEU has used the Charter as a basis for defining individual rights for EU citizens as well as other legal and natural persons subject to EU law.

CHAPTER 6

The Charter of Fundamental Rights as a New Element of European Identity and Beyond

Beatriz Pérez de las Heras

The entry into force of the Lisbon Treaty (1 December 2009) marked a major step forward in European political construction. It conferred binding legal force on the Charter of Fundamental Rights (CFR) of the EU, giving it the same rank as the Union's Treaties. Since that time, the fundamental rights protected in the EU have become more visible and more predictable. Potentially, this legal achievement may contribute to strengthening the democratic profile of the EU.

The binding scope of the CFR is limited to the EU's spheres of power. In this regard, Article 51.1 of the CFR provides that it applies primarily to the institutions and bodies of the EU, while Member States are only bound to it when implementing EU law. Paragraph 2 of this provision adds that the CFR does not extend the field of application of EU law beyond the powers of the Union, establish any new power or task for the Union or modify powers and tasks as defined in the Treaties.

However, in this section we wish to argue that the effective implementation of the CFR is furthering European integration, since in practice it is

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being applied beyond the literal textual content of its provisions. Indeed, respect for the rights and freedoms enshrined in the CFR has become a transversal requirement for all new EU legislation, while legal provisions on fundamental rights are growing significantly beyond the core fundamental rights.

Paralleling these developments, the CFR has become a reference point for both national courts and the EU Court of Justice (CJ), whose role as adjudicators of fundamental rights has been considerably extended.

As for the citizens, the CFR is gradually becoming an instrument that allows people to enjoy rights in personal situations governed by EU law. Though there is still much that needs to be improved on within the area of certain freedoms and rights, this process is progressively contributing to an increase in citizens' awareness of the EU dimension of fundamental rights.

1 Furthering European Integration: Fundamental Rights as a Transversal Requirement of EU Law

In recent years, the CFR has become a sort of compass for the development of EU law in all policies and areas under its competence, beyond the specific realm of fundamental rights. Indeed, whenever the European Commission plans to submit a legislative proposal, it now routinely checks its potential effects on the fundamental rights provided for by the CFR. This impact assessment was introduced in 2005,[1] that is, before the CFR came into force, but it has now become a matter of substance for any legislative proposal and implementing acts.[2]

The impact assessment guidelines lay down the steps for taking fundamental rights into account in all stages of the assessment. The systematic development of this procedure involves specific bodies such as the Impact Assessment Steering Group, which encompasses the European Commission departments concerned, and the Impact Assessment Board, which examines and issues opinions on all the Commission's impact assessments.[3]

Once the impact assessment phase is complete, the European Commission checks the validity of the draft legislative proposal and, in particular, its compatibility with the CFR. Proposals that have a particular link to fundamental rights must include specific recitals justifying how the proposal complies with the Charter. In these cases, the insertion of recitals is an in-depth monitoring requirement. In addition, an Explanatory Memorandum must incorporate a summary explaining how fundamental

rights obligations are met and whether terms of limitations on fundamental rights are justified in terms of necessity and proportionality.[4]

Sometimes referred to as the "Fundamental Rights Check List", this methodology aims to promote a fundamental rights culture at all stages of the legislative procedure, from the initial drafting of a proposal within the European Commission to the final text. The "check list" seeks to respond consistently to article 52.2 of the CFR[5]:

1. What fundamental rights are affected?
2. Are the rights in question absolute rights (which may not be subject to limitations, examples being human dignity and the ban on torture)?
3. What is the impact of the various policy options under consideration on fundamental rights? Is the impact beneficial (promotion of fundamental rights) or negative (limitation of fundamental rights)?
4. Do the options have both a beneficial and a negative impact, depending on the fundamental rights concerned (e.g., a negative impact on freedom of expression and beneficial one on intellectual property)?
5. Would any limitation of fundamental rights be formulated in a clear and predictable manner?
6. Would any limitation of fundamental rights:

   – be necessary to achieve an objective of general interest or to protect the rights and freedoms of others? (Which?)
   – be proportionate to the desired aim?
   – preserve the essence of the fundamental rights concerned?

New EU legal acts therefore make explicit reference to the fundamental rights potentially at stake. Yet compliance with the CFR and the requirements flowing from the evolving case law of the CJ require constant improvement in this *ex ante* scrutiny by the European legislature. With this aim in mind, the European Commission committed itself to revising its impact assessment guidelines in 2014.[6] In 2015, the Council updated its "Guidelines on Methodological Steps to be Taken to Check Fundamental Rights Compatibility at the Council Preparatory Bodies". These guidelines, which are considered non-binding advice, are used to make a fundamental rights check at the beginning of the first reading of any proposal, in particular any proposal to amend the original proposal, or any initiative from a group of Member States through a preparatory body.[7] There can

therefore be said to be renewed determination from the EU institutions to ensure consistent application of the CFR in legislative activity.

Apart from becoming a horizontal legal requirement for all EU policies, the fundamental rights provided by the Charter are increasingly being implemented by specific EU legislation. In some areas the same right may be provided by both the CFR and an article of the Treaties. This is the case of data protection, which is covered by Article 16 of the Treaty on the Functioning of the European Union (TFEU) and Article 8 of the CFR. In these cases, the European legislature must take both texts as a reference, for very often they complement each other.[8] Some recent, significant examples of this legal activism include, *inter alia*,[9] the Directive on the right of access to a lawyer in criminal proceedings[10]; the recast Dublin Regulation, which aims to guarantee effective remedy to applicants on appeals against transfer decisions[11]; the Asylum Procedures Directive and the Reception Conditions Directive,[12] which reinforces the right to access asylum procedures; the Regulation on mutual recognition of protection measures in civil matters[13]; and the Directive on attacks against information systems,[14] which seeks to ensure full respect of the right to privacy and the protection of personal data, as well as the right of defense, the presumption of innocence and the principles of legality and proportionality of criminal offences and penalties.[15]

These legal developments determining the extent and protection of specific fundamental rights have, in practice, extended the powers of EU institutions in this field, beyond the literal terms of the CFR and, in particular, Article 51.2. This progressive establishment of a supranational regime of fundamental rights has not gone unchallenged by Member States, some of which have resisted this trend.

State resistance to the development of a fundamental rights dimension in the EU is not new. Indeed, Member States have historically been reluctant to tolerate fundamental rights initiatives proposed by EU institutions. For instance, the European Commission's call for European Community accession to the ECHR and the European Parliament (EP)'s resolutions in favor of a European Charter of Human Rights were long ignored by national governments.[16] Indeed, the promotion of fundamental rights is not provided expressly by the Treaties as a core objective *ad intra*. Rather, it is mentioned as a core objective *ad extra* of EU foreign policy. However, since the late 1990s, human rights requirements, initially intended for partner third countries and candidate states, have also increasingly been extended to Member States themselves, sparking increasing resistance.[17]

Apart from this growing legal body of specific provisions in this field, another cause for state reluctance is the increasing number of internal EU policies—such as asylum and immigration—that consider third-country nationals to be rights bearers under EU law. This extension of the status of rights bearers beyond EU citizens has led to some conflict between EU institutions and Member States. In 2008, the Danish government contested some aspects of the EU Directive on family reunification,[18] and in 2010 the French government challenged the European Commission's authority during a clash over the French expulsion of Roma EU citizens.[19] In May 2015, some Member States opposed immigration and refugee quotas proposed by the European Commission as a fairer way of admitting and distributing asylum seekers in the EU.[20]

Nonetheless, since the Amsterdam Treaty came into force in 1999, fundamental rights have been referenced as a common value for all Member States (current Art. 2 TEU). Through this amendment treaty, Member States also introduced a sort of collective guarantee, that is, a non-judicial procedure allowing national governments to monitor and sanction a Member State convicted of serious violation of fundamental rights (current Art. 7 TEU).[21] This has widely legitimized the EU's role as a gatekeeper of fundamental rights within its own Member States.[22]

In fulfilling this responsibility, it is not only the European Commission[23] and the EP that are actively involved; the CJ of the EU, in interaction with national courts, is notably extending its role as an adjudicator on fundamental rights.

2 Strengthening Interaction Between the Court of Justice and the National Courts

Since the CFR came into force, the CJ has notably increased its role as a human rights adjudicator.[24] This task has largely been fostered by national jurisdictions, which constantly seek interpretation and guidance from the CJ through the preliminary rulings procedure provided by Article 267 of the TFEU.[25] In this context of judicial interaction, the CJ is applying the CFR in regard to both Member States and EU institutions.

As regards Member States, the evolving case law shows that the CJ is applying the CFR in different situations related to Member States' obligations under EU law. For example, one situation refers to the compatibility of certain administrative practices with fundamental rights. In ZZ v. Secretary of State for the Home Department, the CJ held that a

Member State's decision to refuse entry for national security reasons must be motivated under Directive 2004/38/EC on free movement and right of residence.[26] If such a decision does not comply with this requirement, it contravenes the right to a fair hearing and redress provided by article 47 of the CFR.[27]

A second situation in which the CJ is applying the CFR concerns the use of discretion permitted to Member States by virtue of EU law. In this regard, for example, the CJ has held that Member States cannot transfer an asylum seeker to the Member State initially identified as responsible for examining his/her application under Article 17 of Regulation (EC) 343/2003 if there are substantive grounds for believing that the applicant might be subject to inhuman treatment, in violation of Article 4 of the CFR.[28] In the same vein, in December 2014, the CJ ruled that the Asylum Qualification Directive and the Charter impose limits as regards methods used by national authorities to verify the sexual orientation of asylum applicants; such methods cannot undermine fundamental rights to human dignity (Art. 1 CFR) or respect for private and family life (Art. 7 CFR).[29]

Likewise, the CJ has also accepted application of the CFR when the national provision being challenged penalized fiscal fraud, contravening the financial interests of the EU. In the case of Akerberg Fransson, a Swedish court queried the CJ on application of the *ne bis in idem* principle, provided for under Article 50 of the CFR, to a defendant in a criminal proceeding for tax evasion in the context of Value Added Tax (VAT) declarations, after an administrative tax penalty had already been imposed upon him for the same offense. The CJ ruled that under EU law, Member States have the obligation to ensure the collection of VAT revenue, since it is one of the sources of the EU budget. Consequently, the CJ held that national law in this context was designed to penalize an infringement of EU law[30] and to impose effective penalties for conduct detrimental to the financial interests of the EU. After interpreting the situation as one falling within Article 51 of the CFR, the CJ concluded that the *ne bis in idem* principle does not preclude a Member State from imposing, for the same acts, a combination of administrative penalties and criminal penalties, insofar as the administrative penalty is not criminal in nature.[31]

Akerberg Fransson is regarded as a seminal judgment which clarifies the scope of application of the CFR, while preserving the application of national standards in protection of fundamental rights, chiefly in situations where the action of Member States is not entirely determined by EU law.[32] In such cases where EU law is absent, Article 53 of the CFR

must be taken into account. This provision states that "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions". According to the CJ, Article 53 permits national authorities and courts to apply national standards of fundamental rights protection when applying national measures that implement an EU legal act, insofar as the level of protection ensured by the CFR and the primacy, unity and effectiveness of EU law are not jeopardized.[33] Member States therefore play an important role as a key piece in the decentralized administration of the Union whenever they apply or implement a regulation, transpose a directive or execute a decision of the EU or a judgment of the CJ.[34]

As regards EU institutions, most of the CJ's judgments are related to the compatibility of decisions addressed at individuals and EU legislation with the CFR. In this vein, there is a series of judgments in which either the General Court or the CJ has overturned decisions by EU institutions to freeze assets of persons and enterprises identified as being involved in activities linked to international terrorism or nuclear proliferation when no evidence of such had been provided by these institutions.[35] In other cases, the General Court has recognized, for instance, the right of access to EU documents by an applicant who had been refused information on the EU's accession to the European Convention on Human Rights by a decision of the Council. The judgment finally annulled part of the institutional decision that denied the effective exercise of this right, enshrined in Article 42 of the CFR.[36]

The legislative activity of EU institutions is also subject to the scrutiny of the CJ, including legal acts that are supposed to have passed the impact assessment test. In this context, the CJ's judgments have sometimes found that the EU legal provisions challenged are fully compatible with the CFR; examples include the Framework Decision on the European Arrest Warrant[37] and Regulation (EU) 1/2003, empowering the European Commission to inspect undertakings and associations of undertakings suspected of distorting competition.[38] On other occasions, the CJ has declared the EU legal act to be invalid; such cases include the Data Retention Directive, for interfering "in a particularly serious manner with the fundamental rights to respect for private life and the protection

of personal data" (Arts. 7 and 8 CFR).[39] Likewise, the CJ has partially annulled some EU legal provisions over fundamental rights concerns. Thus, in the case of Test-Achats, the CJ ruled that Article 5.2 of Directive 2004/113/EC, which enabled Member States to retain a derogation from the equal treatment of men and women for an unlimited period of time, was incompatible with Articles 21 and 23 of the CFR.[40]

Another relevant indicator of the growing impact of judicial application of the Charter is the gradual incorporation of this case law into EU legislation. This process is especially salient when it comes to migration and asylum issues.[41] Thus, the new Regulation (EU) 656/2014 on the surveillance of the external sea borders in the context of operational cooperation coordinated by FRONTEX was adopted by the EP and the Council in May 2014 in response to the CJ's judgment in European Parliament v. Council of the EU.[42] This regulation now provides that any measure taken during surveillance operations must be in respect of fundamental rights and the principle of *non-refoulement*.[43] Another example of the judicial impact on the European legislator is the recast Dublin Regulation,[44] whose provisions now incorporate the CJ's judgment in the case NS v. UK, whereby an asylum seeker cannot be sent to a Member State where his/her fundamental rights may be at risk of violation, but, instead, another Member State must assume responsibility according to the Dublin criteria, with the shortest delay, in order not to jeopardize his/her quick access to procedure.[45]

Rulings by national courts referring to the Charter are also having a remarkable impact on domestic law and administrative practice. In recent years, the most prevalent substantive areas in which national courts have applied the CFR are asylum and migration. The rights mostly concerned in these cases are the rights to an effective remedy and a fair trial (Art. 47 CFR), together with the right to good administration (Art. 41 CFR).[46] The CFR has thus entered the national courtrooms, on the initiative not only of the parties but also of the national courts themselves, which very often invoke the CFR even in cases where there is no link with EU law. For example, in a judgment of 14 May 2013, the Supreme Court of the Czech Republic invoked the Charter—albeit without applying it directly—to conclude that the right to human dignity is absolute. Consequently, protection of the right to human dignity of a mentally disordered person cannot be any different to that of any other person.[47] Similarly, national courts often use the CFR as a reference for interpreting national law. For instance, in a case before an Italian regional court concerning gender balance in the

executive body of a municipality, the court referred to Articles 21 and 23 of the CFR as an existing "normative corpus" that should become the tool for interpreting the domestic legal order.[48] In the same line, another Italian court, while recognizing that the CFR was not applicable to the case, stated that it was an expression of common principles of European national legal systems, even outside the scope of EU law.[49] These and other cases where national courts refer to the CFR in situations that fall outside the EU's areas of power reflect the emergence of fundamental rights as a common value, beyond EU law.

Finally, judicial activism also encompasses cases where the CJ has found that the CFR is not applicable. Such rulings also contribute to determining the practical scope of its Article 51. Most of the cases declared inadmissible by the CJ relate to the European dimension. Among others, for example, in the Cholakova case, the Court examined the situation of Mrs. Cholakova, who had been arrested by the Bulgarian police because of her refusal to present her identity card during a police check. Because Mrs. Cholakova had shown no intention to leave Bulgarian territory, the situation was purely internal and consequently did not fall within the scope of EU law.[50]

As a driving engine of fundamental rights protection, this role of the CJ, combined with that of the national jurisdictions and the European legislator, is simultaneously fulfilling an identity-building function *vis-à-vis* European citizens.

3 European Identity-building: Increasing Citizen Awareness of an EU Dimension to Fundamental Rights

Since the 1970s, fundamental rights have progressively become a distinctive element of the EU's democratic identity.[51] The entry into force of the CFR, with a preamble that placed the individual at the heart of EU activities, the proposal by the European Commission of legislation to promote fundamental rights and the increasing role of the CJ and national courts as enforcers of the CFR are landmarks in this long and tortuous process toward enhancing the democratic legitimacy of the EU *vis-à-vis* its citizens. Indeed, there can be no doubt that the promotion of fundamental rights by EU institutions can boost their popularity, to the benefit of European integration.

However, emerging EU policy on fundamental rights is currently going beyond technical legal acts and case law. Action programs and informal practices developed by EU institutions also contribute to fostering this policy and, more relevantly, in a way that is closer to citizens. Examples of this institutional activism include the Sakharov Prize for Freedom of Thought, an annual award created by the EP to highlight freedom of expression for activists all over the world[52]; the hearings on human rights issues held within the EP itself[53]; the first colloquium held in October 2015 on the promotion of tolerance and respect in order to prevent and combat anti-Semitic and anti-Muslim hatred[54]; the European Ombudsman's investigation into respect for fundamental rights in the EU's cohesion policy[55]; and the Court of Auditors' assessment confirming violation of fundamental rights in a Member State's detention center for irregular migrants.[56] The European Commission also makes significant efforts to reach out to citizens by providing them with information on when it can take action on issues of fundamental rights. In this regard, since 2011, the European Commission has published an annual report on application of the CFR, assessing the progress made and identifying challenges and difficulties.[57] Via the European e-Justice portal, the institution also provides information on fundamental rights and where people can go for help if their rights are being infringed.[58]

One of the latest report, published in 2015, shows that there is a growing interest and improved awareness of fundamental rights issues among citizens, evidence of which can be seen in the approximately 3000 letters received by the Commission from the general public through the Europe Direct Contact Centres. Most enquiries from citizens concerned issues on free movement and residence (48 %), consumer rights (12 %) and judicial cooperation (11 %). In addition, the Commission also received over 600 questions from the EP and around 200 petitions.[59] Nevertheless, there is still much work to be done to raise citizens' awareness of fundamental rights issues. A Eurobarometer Survey, published in February 2015, showed that 51 % of respondents had heard of the CFR but did not know exactly what it was.[60] The Fundamental Rights Agency (FRA) is also involved in addressing this need to foster awareness on the CFR. With this specific aim, the FRA has launched the "CLARITY" project,[61] which provides guidance on which body to turn to when fundamental rights are at stake, and the initiative "Don't knock on the wrong door: CharterClick! A user-friendly tool to detect violations falling within the scope of the EU Charter of Fundamental Rights".[62]

Moreover, this increasing awareness does not mean that in practice citizens' rights are fully assured. A gap can still be observed between the applicable legal rules and the real situation facing citizens, particularly in cross-border situations. Many of the deficiencies observed are related to fundamental rights, such as obstacles to free movement, insufficient assistance and protection for disabled and vulnerable persons, difficulties in access to information on their fundamental rights at local administration level or costly formalities and difficult cross-border access to justice, among others. These and other barriers were identified by the European Commission in its Communication of 2010 on "EU Citizenship Report 2010. Dismantling the Obstacles to EU Citizens' Rights". The document also includes an ambitious program of actions that will run until 2020, whose main objective is to improve the effective application of the fundamental rights of EU citizens.[63] The annual reports on the application of the CFR provide information on the measures being taken and progress made to ensure the effective enjoyment of fundamental rights by citizens.[64] Some recent examples of these efforts are the Commission Directive 2013/9/EU laying down essential accessibility requirements for the rail network for passengers with disabilities or reduced mobility,[65] the Directive proposal on gender balance of non-executive directors of companies listed on stock exchanges,[66] the Council Recommendation on effective Roma integration measures in the Member States[67] and the Regulation (EU) 2016/679 and Directive 2016/680/EU on the protection of natural persons with regard to the processing of personal data.[68]

This growing emphasis on fundamental rights is therefore expected to continue in coming years. This process has the potential to reinforce gradually the feeling of identity and community uniting the peoples of Europe, while strengthening the Union's political legitimacy. The culture of rights pervades all EU policies, bringing EU institutions closer to citizens and contributing to the creation of a European public sphere.

4 Conclusion

The protection of fundamental rights is a founding element of the European Union. The CFR is contributing to furthering European integration and identity. Fundamental rights have become an inescapable horizontal reference for any new legislation in all EU policies and areas. Substantive legal acts are being adopted to implement the CFR, and the interaction between national courts and the CJ is paving the way to the

emergence of an EU judicial system of fundamental rights protection. By focusing on the rights of the individual, the CR can be said to be bringing a new "soul" to EU policies.

Citizens are becoming increasingly aware of these developments, and as they become more knowledgeable, they become more demanding with regard to the quality of their lives and fundamental rights in the political sphere of the EU. This growing activism among citizens, through direct access to information and remedies, highlights the fact that the CFR—albeit slowly—is instilling a sense of public ownership and European belonging. This process contributes to reinforcing a sense of identity and community, while strengthening the EU's political legitimacy.

Consequently, even if its legal competences in the field of fundamental rights remain incomplete and dispersed and despite frequent denunciations of a lack of consistency between its internal and external dimensions, the EU is developing a remarkably advanced fundamental rights regime compared to other regional organizations elsewhere in the world, such as the African Union or the Inter-American system of human rights. This ever-increasing leadership role, if consistently consolidated, may influence the agenda of international organizations on fundamental rights.

Notes

1. European Commission, "Compliance with the Charter of Fundamental Rights in Commission Legislative Proposals. Methodology for Systematic and Rigorous Monitoring", COM(2005) 172 final of 27 April 2005.
2. European Commission, "Report on the Practical Operation of the Methodology for a Systematic and Rigorous Monitoring of Compliance with the Charter of Fundamental Rights", COM(2009) 205 final of 29 April 2009.
3. European Commission, "Impact Assessment Guidelines", SEC(2009) 92 of 15 January 2009, and "Operational Guidance on Taking Account of Fundamental Rights in Commission Impact Assessment", SEC(2011) 567 final of 6 May 2011.
4. European Commission, "Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union", COM(2010) 573 final of 19 October 2010, pp. 7–8.
5. *Ibid.*, p. 5.
6. See Commission Staff Working Document on "Better Regulation Guidelines", SWD(2015) 111 final of 19 May 2015.

7. For more details, see Council of the European Union, "Fundamental Rights Compatibility. Guidelines for Council Preparatory Bodies", Publications Office of the European Union, 2015, pp. 1–9. In this regard, see also Lorenza Violini, "The Impact of the Charter of Fundamental Rights on European Union Policies and Legislation", in *Making the Charter of Fundamental Rights a Living Instrument*, ed. Giuseppe Palmisano, Brill/Nijhoff, 2015, pp. 60–61, Chapter doi:101163/9789004291850_001.
8. It is also the case of access to documents (Art. 15 TFEU and Art. 42 CFR) and the EU citizenship rights laid down by Articles 20–24 TFEU and Title V of the CFR. See Francesca Ferraro and Jesús Carmona, *Fundamental Rights in the European Union. The Role of the Charter After the Lisbon Treaty*, European Parliamentary Research Service, March 2015, p. 11.
9. Legal developments of the CFR are fully detailed in the annual report on its application submitted by the European Commission. The most recent report refers to legal achievements in 2015. See European Commission, "2015 Report on the Application of the EU Charter of Fundamental Rights", COM(2016) 265 final of 19 May 2016.
10. It is also applicable in European Arrest Warrant proceedings and on the right to have a third party national informed upon deprivation of liberty and to communicate with third persons and with consular authorities when deprived of liberty. Directive 2013/48/EU of 22 October 2013, OJ L294 of 6 October 2013.
11. Regulation (EU) 604/2013 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 180 of 29 June 2013, p. 31.
12. Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ L180 of 29 June 2013, p. 96.
13. Regulation (EU) 606/2013 of 12 June 2013 on mutual recognition of protection measures in civil matters, OJ L181 of 29 June 2013.
14. Directive 2013/40/EU of 12 August 2013, OJ L218 of 14 August 2013, p. 8.
15. Recitals 29 and 30 of Directive 2013/40.
16. See Cecile Leconte and Elise Nuir, "Understanding Resistance to the EU Fundamental Rights Policy", *Human Rights Review*, no. 15, 2004, pp. 13–24, doi:10.1007/s12142-014-0311-9.
17. Thus, human rights vigorously promoted and monitored under the Copenhagen criteria during the accession process have not turned out to be an effective remedy for preventing conflicts and problems in this area.

This circumstance also reveals that the EU does not have the powerful transformative leverage *vis-à-vis* its Member States that it yields in relation to accession candidates. See Christophe Hillion, "Enlarging the European Union and Deepening its Fundamental Rights Protection", Swedish Institute for European Policy Studies, *European Policy Analysis*, no. 11, 2013, pp. 7–9.

18. Cecile Leconte, *op.cit.* (n 16), p. 21.
19. Kristi Severance, "France's Expulsion of Roma Migrants: A Test Case for Europe", *Migration Policy Institute*, 21 October 2010, available at: http://www.migrationpolicy.org/article/frances-expulsion-roma-migrants-test-case-europe
20. Lucie Bednárová, Fernando Heller, Andrei Schwartz, et al., "Many EU Countries Say 'No' to Immigration Quotas", *EuroActiv*, 30 June 2015, available at: http://www.euractiv.com/sections/justice-home-affairs/many-eu-countries-say-no-immigration-quotas-315184. The European Commission found the same reluctance from some Member States when, in September 2015, it proposed an increase in these quotas to address the exodus of refugees toward the EU. In this regard, see Gregor Aishc and Sarah Almukhtar, "Seeking a Fair Distribution of Refugees in Europe", available at: http://www.nytimes.com/interactive/2015/09/04/world/europe/europe-refugee-distribution.html
21. Article 7.1 of TEU provides that 'On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure'.
22. Cecile Leconte, *op.cit.* (n 16), p. 19.
23. In 2014, the European Commission instituted 11 infringement proceedings concerning the Charter in cases where Member States implemented EU Law. Almost half of these proceedings related to asylum and migration. See more details in "Commission Staff Working Document on the Application of the EU Charter of Fundamental Rights in 2014", SWD(2015) 99 final of 8 May 2015, pp. 116–117.
24. This extension in the CJ's role on human rights protection is also due to the continuous expansion of EU law. Thus, as a result of the amendments to the Lisbon Treaty, the EU's legislative powers are currently applicable to issues related to the area of freedom, security and justice, security and privacy. See Gráinne de Búrca, "After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?", *Maastricht*

Journal, no. 2, 2013, pp. 169–170. Besides the CJ, the General Court and the Civil Service Tribunal are also increasingly referring to the Charter. In 2014, 210 decisions in these EU Courts quoted the Charter, as compared to 114 in 2013, 97 in 2012 and 43 in 2011. See European Commission, "EU Charter Places Fundamental Rights at the Heart of EU Policies", Press Release of 8 May 2015.

25. Gunner Beck, "The Role of the National Court and the Court of Justice of the European Union", in *The Application of the EU Charter of Fundamental Rights to Asylum Procedural Law*, European Council on Refugees and Exiles/Dutch Council for Refugees, 2014, pp. 25–30. In order to promote cooperation among national judges, a new tool, the 'European Case Law Identifier' provides data and interpretation to the highest national courts in order to facilitate the application of EU instruments in national courts. See https://e-justice.europa.eu/content_european_case_law_identifier_ecli-175-en.do. Likewise, the project 'European Judicial Cooperation in Fundamental Rights Practice in National Courts' provides a handbook for judges on judicial interaction techniques and a database of national judgments by Charter provision. Available at: http://www.eui.eu/Projects/CentreForJudicialCooperation/Projects/EuropeanJudicialCooperationinFR/EuropeanJudicialCooperationinthefundamentalrightspractice.aspx
26. Article 27 of Directive 2004/38/EC provides that the freedom of movement of EU citizens may be restricted on grounds of public policy, public security or public health. In this eventuality, the national authorities must notify the person concerned of the decision taken under this article, explaining the reasons on which it is based. The person concerned will then have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of the decision taken on the grounds of public policy, public security and public health (Articles 30 and 31 of Directive 2004/38/EC).
27. C-300/11, ZZ v. Secretary of State for the Home Department, Judgment of 4 June 2013, ECLI:EU:C:2013:363, paragraphs 65–69.
28. In this case, the CJ found that article 3.2 of Regulation EC 343/2003 (Dublin Regulation) grants Member States a discretionary power which forms part of the Common European Asylum System provided by the TFEU. Therefore, a Member State which exercises that power must be considered to be implementing Union law within the meaning of Article 51.1 of the CFR. Consequently, the decision taken by a Member State on the basis of Article 3.2 of Regulation EC 343/2003 as to whether or not to examine an asylum application implements Union law for the purposes of Article 6 TEU and/or Article 51 of the CFR. C-411/10 and C-493/10,

NS v. Secretary of State for the Home Department, Judgment of 21 December 2011, ECLI:EU:C:2011:865, paragraphs 65–66, 68–69.

29. C-148/13, C-140/13 and C-150/13, A,B,C v. Staatssecretaris van Veiligheid en Justitie, Judgment of 2 December 2014, ECLI:EU:C:2014:2406.
30. Specifically, Article 22 of Sixth VAT Directive 77/388/ECC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes-Common system of value added tax: uniform basis of assessment, OJ L145 of 13 June 1977.
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41. Fundamental Rights Agency (FRA), *Asylum, Immigration and Integration. Border Control and Visa Policy. Information Society, Respect for Private Life and Data Protection*, 2014, in particular, Section 1.2 "CJEU Provides Authoritative Interpretation of EU Asylum Law", pp. 39–44.
42. C-355/10, Parliament v. Council, Judgment of 5 September 2012, ECLI:EU:C:2012:516.
43. See Article 4 of Regulation (EU) 656/2014 of 15 May 2014. OJ L189 of 27 June 2014.
44. Regulation (EU) 604/2013, *op.cit.* (n 11).
45. Joined cases C-411/10 and C-493/10, *op.cit.*, (n 28), paragraphs 106–108, 115.
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2013. A summary is available at: http://fra.europa.eu/en/caselaw-reference/italy-regional-administrative-tribunal-tar-rome-second-section-633

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50. C-14/13, Gena Ivanova Cholakova, Judgment of 6 June 2013, OJ C225 of 3 August 2013, ECLI:EU:C:2013:374.
51. Relevant formal steps were the 1973 Declaration on European Identity, which defined human rights as 'key elements of European identity' and the Joint Declaration by European Community Institutions on Human Rights. Later, following the end of the Cold War, the promotion of human rights was legally introduced as one of the key goals of the Common Foreign and Security Policy by the Treaty of Maastricht (1993). This task soon turned into the principle of conditionality for the EU's trade and development cooperation policies, while EU membership became explicitly linked to respect for fundamental rights. See, among others, Armin von Bogdandy, "The European Union as a Human Rights Organization?", *Common Market Law Review*, no. 37, 2000, pp. 1307–1338; Konstantinos Margaritis, "The Evolution of Fundamental Rights Protection within the EU Legal Order", *AGORA International Journal of Juridical Sciences*, no. 3, 2013, pp. 93–98; Francesca Ferraro and Jesús Carmona, *op.cit.* (n 8), pp. 6–10.
52. See European Parliament/Sakharov Prize, available at: http://www.europarl.europa.eu/sakharovprize/en/home/the-prize.html
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CHAPTER 7

Accession to the European Convention on Human Rights: EU Integration into a Legal and Judicial System Reserved to States

Oana Petrescu

1 General Considerations

The principle of human rights protection was not initially stipulated in the Treaties[1] establishing the former European Communities (now the European Union), since the primary goal was to achieve better economic, rather than political, integration,[2] given that at the time, the European continent was still recovering from the severe political, economic and social impact of the Second World War. Two other factors hampered the achievement of this objective: the existence of an organization already in charge of ensuring the protection of human rights in Europe, namely the Council of Europe (CoE);[3] and the futility of trying to find a way whereby the European Communities could join the European Convention on Human Rights (ECHR)[4] as a multilateral international agreement or of

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adopting a European Economic Community bill of rights providing for the integration of the substantive provisions of the ECHR.[5]

However, the 1957 treaties did contain several provisions referring in general terms to the principle of non-discrimination on the basis of nationality and certain workers' rights, albeit specific provisions on protection of human rights ensuring real legal protection at European level were still lacking.

This did not mean that human rights protection was entirely absent from the Community's legal order. In an attempt to answer to the concerns expressed by several national courts from 1964 onwards, the former European Court of Justice (ECJ)[6] took a stance, holding in several judgments[7] that human rights formed an integral part of the general principles of law[8] whose observance the Court ensured and adding that *"the general principles exist on a national level in the common European juridical patrimony"*,[9] while the protection of such rights *"must be ensured within the framework of the structures and objectives of the Community"*.[10] On the same occasion, the ECJ underlined the "special significance" of the ECHR among the international treaties on protection of human rights.[11]

Nonetheless, a bill of fundamental rights was lacking at the level of the European Communities, even though the main sources for respecting these rights were the constitutional principles common to all Member States and the interpretations and reviews of the validity of European human rights measures issued by the ECJ.

The constant increase in legal relations between the European Community and its citizens led many to argue that human rights protection needed to be reinforced. In a memorandum adopted in 1979,[12] the European Commission recommended that the European Community should seek a viable means of joining the ECHR through "[a] *formal adherence*", specifically through accession, considering that this step would represent a fundamental constitutional change, without "*disregard*[ing] *the fact that, in the longer term, the Community should endeavour to complete the Treaties by a catalogue of fundamental rights specially adapted to the exercise of its powers*".[13]

Nevertheless, this memorandum was considered unrealistic,[14] on the one hand because at that time the European Community was unable to design and adopt its own catalogue of rights since it was more concerned with economic and social matters and, on the other, because the rights guaranteed under the ECHR represent only general—and not specific—civil rights and freedoms.

After years of trying to modify and complete the Treaties, all the legislative gaps were finally filled when the leaders consolidated the human rights normative framework by adopting the Charter of Fundamental Rights of the European Union (the CFR) at the Nice European Council (2000). In 2009, with the coming into force of the Lisbon Treaty, the charter acquired the same legal force as the Treaties.

The following sections will analyze the evolution of human rights regulation in primary and secondary European legislation from a historical perspective, identifying the most relevant moments of which the most important by far are the insertion of the provision on the possibility of the EU's accession to the ECHR and the ultimate rejection of the Draft Agreement on EU accession, the main consequence of which has been to make it impossible to submit the EU's legal system to independent external control in the field of human rights.

2 From the Inexistence of Provisions on Human Rights Protection to the Enshrinement of this Protection in Primary and Secondary European Legislation

Although no *expressis verbis* mention to human rights protection was made in the 1957 Communities treaties or in the secondary legislation, the European Community has rooted its human rights obligations in its own legal order. In 1977, the European Parliament, the European Commission and the Council adopted a joint declaration,[15] reaffirming their commitment to continue respecting fundamental rights as derived from the Members States' constitutions and the ECHR. A further step was taken with the insertion into the Preamble of the Single European Act (SEA)[16] of a reference to the promotion of democracy based on fundamental rights, including a clear reference to the concept of "human rights", without stipulating the competence of the European Court of Justice in this field.

More recently, the Treaty of Maastricht[17] and the Amsterdam Treaty[18] consecrated the assurance and protection of human rights within the European legal system, including "*compliance of human rights with the* [European Union] *legal framework*",[19] while the Treaty of Nice[20] also incorporated general provisions on human rights.

The need to guarantee an increased level of human rights protection at European level led to the adoption of the European Charter on Fundamental Rights (CFR). Although this catalogue of fundamental rights was not an integral part of primary European law, it applied throughout EU territory and for the first time brought together in a single text the main traditional rights (political, civil, economic, social, cultural, etc.) for ressortissants, giving them greater visibility and highlighting their importance. In addition, by way of this document, the European Union (EU) confirms its commitment to one of its basic principles, the protection and respecting of human rights.

The Conference of Berlin (2007) subsequently adopted the "*Berlin Declaration*",[21] a non-binding EU text, signed by all 27 Member States of the EU on the fiftieth anniversary of the signing of the Treaties of Rome by the initial six Member States.[22] Although this declaration was made at a difficult juncture for the process of European integration, following rejection of the Constitutional Treaty in referendums in France and the Netherlands in 2005, it did serve to reaffirm the shared principles and values considered particularly significant both for the Member States and for the EU, as a whole—*inter alia*, freedom, democracy, rule of law, mutual respect, human rights, tolerance, justice and so on and to restate the EU's commitment to ensure, respect and protect such rights, prohibiting their infringement by any individual or Member State.

Moving forward, the Lisbon Treaty (2009) marked an important moment in the evolution of the EU in general, and in the field of human rights protection in particular. It represented an increase in democracy in the EU from at least two perspectives: the Treaty substantially revises Article 6 TEU and gives the CFR the same legal value as the Treaties, becoming an integral part of the Treaty and having legally binding status (art. 6 para. 1 TEU).[23] Analyzing these two elements, it is worth highlighting the following points:

- Article 6 clarifies that *"the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties"* and shall be interpreted in accordance with the "horizontal" provisions[24] of the CFR, taking also into account the explanations drawn up by the Bureau of the Charter Convention[25];
- The CFR also includes so-called *third generation* fundamental rights, such as the right to data protection[26] and the right to good administration[27];

- Finally, the EU *"shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties"* (art. 6 para. 2 TEU).[28] We consider that this provision represented an opportunity to fill the existing gaps in the European human rights protection system by providing for a minimum standard and an external check.[29]

The importance of this issue is also taken as a benchmark when any country seeks to join the EU. This is a long and complex process, in which candidate countries are required to meet the conditions for membership and to ensure respect for the EU's core values of human rights, democracy and the rule of law.[30]

Bearing in mind all of the above, it may be concluded that the EU must respect the fundamental rights guaranteed under the 1950 ECHR, those resulting from constitutional traditions common to the Member States, and the general principles of Union law,[31] deriving from the case law of the Court of Justice of the European Union (CJEU, the Court) and from other European[32] or international[33] treaties and conventions on protection of human rights on which the Member States have collaborated or to which they are signatories.

3 Failure to Integrate the European Union into a Common Legal and Judicial Human Rights Protection System

A constant increase in the number of new applications (by almost 2000 applications per month), the impossibility of ruling on 120,000 pending applications before the European Court of Human Rights (ECtHR) within a reasonable period and the urgent need to adjust the control mechanism of the ECHR all posed serious threats to the effectiveness of the Council of Europe's judicial body.[34] As a result, in May 2004, the Committee of Ministers of the Council of Europe adopted a series of measures aimed at ensuring the effective implementation of the ECHR at national and European level,[35] including Protocol no. 14[36] to the Convention which *inter alia* modified Article 59 Para. 2 of the Convention stating that *"the European Union may accede to this Convention"*.

At the same time, at a Union level, the issue of possible accession by the EU to the ECHR, as *"a major step in the development of human rights"*,[37] has been debated extensively for the last 30 years.[38] Much more significantly, this goal was considered "*historically impossible* [to achieve] *until the"*[39] signing of the Lisbon Treaty[40] due to the absence of any previous provision in the EU Treaties regarding such accession. This was viewed as a major deficiency that could be remedied only by the Union's becoming a Contracting Party to the ECHR, thereby rendering it formally binding on the EU's institutions,[41] due to the fact that the ECtHR, as an organ of the Council of Europe, was considered to offer better judicial protection of fundamental rights and enforcement machinery than the CJEU, while application of the judgments of the ECtHR is strictly monitored by the Council of Ministers.

The new circumstances in the field of human rights made it necessary to rethink the possibility of the EU's acceding to the ECHR. In this regard, the Treaty of Lisbon appeared to offer a perfect opportunity, and Article 6 Para. 2 TEU and Protocol no. 8 relating to Article 6 Para. 2 TEU[42] on the accession of the Union to the ECHR, annexed to the Treaty on European Union provided that *"the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.*[43] *Such accession shall not affect the Union's competences"* […] *"or the powers of its institutions"*, bodies, offices and agencies. Moreover, the accession "[…] *shall ensure that nothing therein affects the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto* […]". In this regard "[…] *the Council shall* […] *act unanimously for the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; the decision concluding this agreement shall enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements*" (Article 218 TFEU).[44]

It is our opinion that Protocol no. 14[45] and the aforementioned new provision of the Lisbon Treaty have, at least in theory, opened the gates to the EU's future accession to the ECHR, leading European officials to argue that *"EU accession will further strengthen the protection of human rights in Europe by submitting the EU's legal system to independent external control with regard to the rights protected by the Convention, as interpreted by the Court in its case law"*.[46] Furthermore, "[…] *the Lisbon Treaty makes it clear that accession is not only an option, it is the destination*".[47]

Given that the EU's accession to the ECHR is of key importance and will reinforce the obligation of the Union (including its institutions) to ensure that fundamental rights and freedoms are actively respected and promoted in all its areas of activity, and bearing in mind the continuous expansion of the EU's powers to fields which traditionally belonged to Member States, the Stockholm Programme[48] requested rapid accession to the ECHR, inviting the European Commission to submit a proposal to the Council *"as a matter of urgency"*.[49]

With the political inducement of the Stockholm Programme, the accession process began in January 2010, when the Spanish Presidency[50] together with the European Commission and representatives of the EU Member States and the Council of Europe opened negotiations on a package of texts, all equally necessary for EU accession to the ECHR. These comprise a draft agreement on accession; a draft explanatory report; a draft declaration by the EU; a draft rule to be added to the Rules of the Committee of Ministers for supervision of the execution of judgments and the terms of friendly settlements in cases to which the EU would be a party and a draft model of a memorandum of understanding,[51] including the agreement on the mandate given by the Council to the European Commission to sign the treaty on accession.

A few months later, in March 2010, the European Commission tabled its recommendation for a negotiating mandate,[52] adopted by the Justice and Home Affairs Council held in Luxembourg on June 3 and 4, 2010.[53]

During the long and difficult negotiation process,[54] both the EU—through the European Commission and the working party on Fundamental Rights, Citizens Rights and Free Movement of Persons (FREMP)[55]—and the Council of Europe through the Committee of Ministers, the Steering Committee for Human Rights (CDDH)[56] and the informal working-group CDDH-UE[57] were actively involved. Finally, in April 2013, the draft agreement on accession was agreed by the Council of Europe and the European Commission,[58] who stated that they would seek an opinion from the CJEU on the compatibility of this draft with the European Treaties. The Council of the EU would then have to adopt a unanimous decision authorizing the signature of the Accession Agreement.

The draft agreement contained two main categories of provisions: (a) relevant modifications brought to the ECHR itself, including a possible amendment of the convention should the draft agreement be favorably received by the CJEU and (b) provisions governing the status of the EU as a High Contracting Party to the convention, which would remain valid

alongside the ECHR after accession, especially given that the EU is not a sovereign nation state, and certain amendments (e.g. the co-respondent mechanism, the prior involvement of the ECJ, aspects of application of Protocol no. 8 to the Lisbon Treaty and the EU judge) which would be required to enable future functioning of the convention system.[59]

On July 4, 2013, the European Commission received the Draft Agreement from the Council of Europe and asked the CJEU to issue its opinion on the compatibility of the Draft Agreement with EU Law, pursuant to Article 218 TFEU. On December 18, 2014, after analyzing all aspects, the CJEU delivered its long-awaited Opinion 2/13[60] concluding that the Accession Agreement was not compatible with EU law and identifying many obstacles to the agreement which will make future accession to the ECHR difficult, if not impossible.[61]

In our view, the CJEU's negative opinion[62] will have a long-term impact[63] on the possibility of submitting the EU's legal system to independent external control in the field of human rights of the kind offered by the ECtHR, for the following reasons:

- Under present circumstances, accession cannot be achieved in a field which is usually reserved to States, since the Court considers that due to its particular characteristics, the EU is not a state under the rules of Public International Law, including a legal order with its own constitutional framework and a sophisticated institutional structure, using the principles of supremacy and direct effect. However, the original obstacle, namely the lack of any legal basis for the EU's accession to the ECHR, as covered in Opinion 2/94,[64] was eventually removed by way of Article 6 Para. 2 TEU, which creates the specific legal basis for accession;
- Accession could change or affect the current division of competences between the EU and its Member States, which are linked to each other through mutual trust and interdependent legal relations, ensuring that the common values and fundamental rights are protected. In this regard, the CJEU argued that such protection could only be guaranteed within the framework of the structure and objectives of the EU, whose legal autonomy was maintained by the interlocking judicial system of the Court itself and the national courts;
- Accession to the ECHR, like any other international agreement concluded by the EU, would be binding on the European institutions and its Member States and would form an integral part of EU law.

> In this case, the Court noted that, like any other Contracting Party, the EU and its institutions would be subject to external control mechanisms provided for by the ECHR to ensure the observance of the human rights and freedoms stipulated by the Convention and observance of the ECtHR's decisions and judgments. The Court also stated that while the ECHR's interpretation provided for by the ECtHR would be binding on the EU and its institutions, the interpretation made by the European Court of Justice of a right recognized by the ECHR would not be binding on the ECtHR. We believe that a discriminatory situation would be created with regard to the judgments delivered by the two Courts. However, the CJEU has ruled that no such situation may exist with regard to the interpretation of EU law (including the CFR).

As for the steps to be adopted in the future, we believe that several options might be considered:

- Firstly, to relinquish EU accession to the ECHR for a period of time, albeit this would be a clear breach of both EU law itself (since Article 6 Para. 2 TEU states that *"the Union shall accede to the* [ECHR]", clearly constituting a mandatory requirement to accede)[65] and Protocol no. 14 amending Article 59 Para. 2 of ECHR, which also enshrines EU accession to the ECHR;
- Secondly, to amend the Treaty of Lisbon by adopting an additional protocol rather than revising the Treaty. The protocol would state that the EU shall accede to the Convention without breaching Article 6 Para. 2 TEU, Protocol no. 8 to the Treaties. This would fulfill all the requirements of the Court as indicated in Opinion 2/13 and address all the CJEU's objections to accession.

4 Conclusions

In this chapter we have briefly analyzed the historical evolution of human rights at an EU level. Decisive steps have been taken, including the adoption of a unique European catalogue of fundamental rights—the Charter of Fundamental Rights—and the insertion into the Lisbon Treaty of a new provision on EU accession to the ECHR.

The negative opinion delivered by the CJEU in December 2014 marked a difficult moment in ensuring coherence and legal certainty among the

different sources of fundamental rights that coexist on the European territory and represented a huge backward step in the harmonious construction of a European Fundamental Rights area where all national and European dimensions can be fulfilled.

In order to accomplish the original goal of Article 6 TEU, one of the most widely accepted solutions would be to amend the EU Treaties so as to clarify the status of the ECHR within EU law and its internal mechanisms for fundamental rights protection, in particular those based on the Charter of Fundamental Rights.

Notes

1. The Treaty creating the European Coal and Steel Community of April 18, 1951, signed in Paris, which came into effect on January 1, 1952, and the Treaties of Rome creating the European Atomic Energy Community, and the European Economic Community, respectively, signed on March 25, 1957, which came into effect on January 1, 1958.
2. Available at: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-DI%282003%29001-e (accessed 9 September 2015).
3. The Council of Europe was founded in 1949 and is a regional intergovernmental organization which promotes human rights, democracy and the rule of law. It has 47 member states, of which 28 are European Union members. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. More information available at: http://www.coe.int/en/web/about-us/who-we-are (accessed 9 September 2015).
4. Available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf (accessed 3 September 2015).
5. Xavier Groussot, et al., "EU Accession to the European Convention on Human Rights: A Legal Assessment of the Draft Accession Agreement of 14 October 2011", *European Issues*, no. 218, November 2011, p. 1.
6. Now the Court of Justice of the European Union (CJEU). Art. 1 Paragraph 1 of the TEU (formerly Art. 1 TEU) states that "[…] *The HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION* […]", which *"substitutes the European Community and succeeds it"* (Art. 1 Para. 3 TFEU). In its ruling on Case C-345/08 Krzysztof Peśla / Justizministerium Mecklenburg-Vorpommern (published in OJEU, C series no. 260 of 11.10.2008), the Court of Justice of the European Union first used the phrase *"Union law"*, in substitution of *"Community law"*. Taking into account that no statement has yet been issued in respect of the

courts of the CJEU, we believe that by extrapolation the phrase *"community courts"* may be replaced by *"European Union courts"*.

7. Case 6/64, *Flaminio Costa vs. E.N.E.L.*, Judgment of the Court of 15 July 1964; Case 36/75, *Roland Rutili v Ministre de l'intérieur*, Judgment of the Court of 28 October 1975; Case 130/75, *Vivien Prais v Council of the European Communities*, Judgment of the Court of 27 October 1976. In issuing this judgment, the ECJ explicitly referred for the first time to specific provisions of the European Convention on Human Rights. Case 44/79, *Liselotte Hauer v Land Rheinland-Pfalz*, Judgment of the Court of 13 December 1979. In this case, the ECJ recognized the special significance of the European Convention on Human Rights among international treaties on human rights protection.
8. Available at: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-DI%282003%29001-e (accessed9 September 2015); Case 29/1969, *Stauder vs. Stadt Ulm*, Judgment of the Court of 12 November 1969.
9. Gyula Fabian, *Drept institutional comunitar (Communitarian Institutional Law)*, 2nd ed., Sfera Juridica Publishing House, 2006, p. 86; Damian Chalmers, et al., *European Union Law, Texts and Materials*, Cambridge University Press, 2006, p. 232 and following.
10. Available at: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-DI%282003%29001-e (accessed 9 September 9, 2015).
11. Xavier Groussot, et al., *op.cit.*, p. 1.
12. Bulletin of the European Communities, "Memorandum on the accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms", Commission Memorandum 2/79 COM (1979), available at: http://aei.pitt.edu/6356/4/6356.pdf (accessed 3 September 2015).
13. *Ibid*.
14. *Ibid*.
15. Available at: http://www.europarl.europa.eu/charter/docs/pdf/joint-decl_04_77_en_en.pdf (accessed 27 September 2015).
16. This document marked the first major revision of the Treaties of Rome. It was signed in Luxembourg on February 17, 1986, and at The Hague on February 28, 1986. It was published in OJ L 169, June 29,1987, and came into effect on July 1, 1987. The Preamble states that the Member States are "*determined to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice*". See http://www.consilium.europa.eu/uedocs/cmsUpload/SingleEuropeanAct_Crest.pdf (accessed 29 September 2015).

17. Article 6 of the Treaty of Maastricht. It was signed on February 7, 1992, and published in OJ C 191 July 29, 1992. The Maastricht Treaty introduced Article 6 para. 2 which states that *"The Union shall respect fundamental rights, as guaranteed by the European Convention for the protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950… as general principles of Community law"*.
18. Articles 2 and 6 para. 1 of the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed on 2 October 1997 and published in OJ C 340 of November 10, 1997, which came into force on May 1, 1999.
19. Paul Craig and Grainne de Burga, *EU Law, Text, Cases and Materials*, 3rd ed., Oxford University Press, 2003, p. 317.
20. Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, was signed by European leaders on February 26, 2001, and came into force on February 1, 2003 (OJ C 80 of 10 March 2001).
21. The Conference was organized in Berlin by the German presidency, held between January 1 and 30 June 2007. For further information see, Oana Petrescu, "The Principle of Human Rights Protection in View of Berlin Declaration", *Romanian Journal of European Affairs*, Vol. 7, no. 3, Bucharest, 2007, p. 62.
22. France, Germany, Italy, Belgium, Luxembourg and the Netherlands.
23. Paul Graig, Grainne de Burca, "Chapter 11—Human Rights in the EU", *EU Law: Text, Cases and Materials*, 4th ed., Oxford University Press, 2007, p. 15.
24. Articles 51 to 54 of the Charter clarifying the Charter's scope and applicability.
25. Available at: http://www.europarl.europa.eu/charter/pdf/04473_en.pdf (accessed 21 September 2015).
26. This right has been recognized through Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995, on the protection of individuals with regard to the processing of personal data and on the free movement of such data, published in OJEC L 281/23.11.1995; Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, published in OJEC L 350/30.12.2008 and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, published in OJEC L 201/31.07.2002.
27. Article 41 of the Charter of Fundamental Rights is based on the existence of the Union as subject to the rule of law, available at: http://fra.europa.

eu/en/charterpedia/article/41-right-good-administration# (accessed 27 September 2015).

28. Former art. 6, TEU.
29. Xavier Groussot, et al., *op.cit.*, p. 1.
30. For example, Croatia, which joined the EU on July 1, 2013, has ratified a number of international agreements regarding the protection of these rights, while the Constitution and the Criminal Code provide for measures against racism and xenophobia. More significantly, Croatia's Constitution provides for the protection of fundamental rights. For more information see Screening report Croatia, Chapter 23—Judiciary and fundamental rights; available at: http://ec.europa.eu/enlargement/pdf/croatia/screening_reports/screening_report_23_hr_internet_en.pdf (accessed 13 September 2015).
31. Article 6 Para. 2 TEU.
32. For example: European Social Charter; European Convention on the Legal Status of Migrant Workers; European Charter for Regional or Minority Languages; Convention of Council of Europe on Action against Trafficking in Human Beings and so on.
33. For example: Universal Declaration of Human Rights; International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Convention on the Elimination of all Forms of Discrimination Against Women; Convention on the Elimination of all Forms of Racial Discrimination and so on.
34. The ECtHR represents a cornerstone of human rights protection in Europe and can *"enforce the European Convention on Human Rights in those countries that have ratified the treaty"*. See Mary L. Volcansek, "Appointing Judges the European Way", *Fordham Urban Law Journal Fordham University School of Law*, Vol. XXXIV, United States, 2007 p. 381.
35. Available at: http://www.coe.int/t/dghl/standardsetting/cddh/Publications/osloseminar_e.pdf (accessed 13 September 2015).
36. Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention was signed on May 13, 2004, and came into force on June 1, 2010, available at: http://conventions.coe.int/Treaty/EN/Treaties/Html/194.htm (accessed 22 September 2015).
37. Available at: http://www.coe.int/en/web/portal/eu-s-accession-to-the-echr-faq (accessed 15 September 2015).
38. Available at: http://aei.pitt.edu/6356/4/6356.pdf (accessed 3 September 2015).
39. Simone White, "The EU's Accession to the Convention on Human Rights", *New Journal of Criminal Law*, Vol. 1, issue 4, 2010, p. 433.

40. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed in Lisbon, December 13, 2007 (unconsolidated version), OJ C 306 of 17.12.2007.
41. Paul Gragl, "The Reasonableness of Jealousy: Opinion 2/13 and EU Accession to the ECHR", in *European Yearbook on Human Rights*, ed. W. Benedek, F. Benoit-Rohmer, W. Karl, and M. Nowak, July 2015, p. 30.
42. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012E/PRO/08&from=EN (accessed 13 September 2015).
43. The Treaty was signed onNovember 4,1950, in Rome, Italy.
44. Ex—article 300 TEC.
45. The entry into force took place on June 1, 2010, three months after its ratification by Russia.
46. In a joint statement, Thorbjørn Jagland, Secretary General of the Council of Europe, and Jean-Paul Costa, President of the European Court of Human Rights, available at: https://wcd.coe.int/ViewDoc.jsp?id=1628875&Site=CM (accessed 13 September 2015).
47. Statement given by Viviane Reding, the Vice-President of the European Commission responsible for Justice, Fundamental Rights and Citizenship during the Ministerial Conference held at Interlaken (Switzerland), available at: http://europa.eu/rapid/press-release_SPEECH-10-33_en.htm?locale=EN (accessed 13 September 2015).
48. The Stockholm Programme, called "*An Open and Secure Europe Serving and Protecting Citizens*", has been published in the Official Journal of European Union C 115/04.05.2010; available at: http://www.eurojust.europa.eu/doclibrary/EU-framework/EUframeworkgeneral/The%20Stockholm%20Programme%202010/Stockholm-Programme-2010-EN.pdf (accessed 15 September 2015).
49. Simone White, *op.cit.*, p. 437.
50. Spain held the rotating presidency of the European Union from January 1 to July 31, 2010.
51. Available at: http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/default_en.asp (accessed 13 September 2015).
52. Available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/291&format=HTML&aged=0&language=EN&guiLanguage=en (accessed 13 September 2015).
53. Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/114900.pdf (accessed 13 September 2015).
54. The negotiation process on the Draft Agreement lasted from January 2010 to April 2013.
55. This group is made up of counselors of justice and home affairs and is a special committee appointed by the Council in accordance with Article 218 Para. 4 TFEU (ex-article 300 of TEC) *"the Council may address*

directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted."

56. The Steering Committee for Human Rights (CDDH) is made up of representatives from all 47 Member States and a number of observers (from other countries, international organizations and non-governmental organizations).
57. It was made up of 14 experts from Council of Europe member states (7 from EU member states and 7 from non-EU member states) and it held eight meetings between July 2010 and June 2011.
58. Available at: http://www.verfassungsblog.de/en/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice/#.VfWwq32Depk (accessed 13 September 2015).
59. Paul Gragl, "A giant leap for European Human Rights? The Final Agreement on the European Union's Accession to the European Convention on Human Rights", *Common Market Law Review*, no. 51, 2014, p. 14.
60. CJEU, Opinion 2/13, as yet unpublished, available at: http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d528649ee762544a8eac14c0cf03f5244b.e34KaxiLc3eQc40LaxqMbN4ObNmPe0?text=&docid=160929&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=596259 (accessed 16 September 2015).
61. Available at: http://www.verfassungsblog.de/en/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice/#.VfWwq32Depk (accessed 13 September 2015).
62. Press release No. 180/14, Court of Justice of the European Union, 18 December 2014, available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-12/cp140180en.pdf (accessed 15 September 2015).
63. Paul Gragl, "The Reasonableness of Jealousy: Opinion 2/13 and EU Accession to the ECHR", *op.cit.*, p. 32.
64. CJEU, Opinion 2/94, Accession by the Community to the ECHR (1996), ECR I-1759, para 35.
65. Paul Gragl, "The Reasonableness of Jealousy: Opinion 2/13 and EU Accession to the ECHR", *op.cit.,* p. 46.

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CHAPTER 8

Democratic Legitimacy and the Court of Justice of the European Union

Peter Gjørtler

1 Introduction

The concept of democratic legitimacy does not as such refer to any formal definition, but in line with a normal understanding of the language used, it may be claimed that democratic legitimacy is to be found where public authorities act within the powers allocated to them under the constitutional provisions through which they have been created.

This raises an issue when such provisions are unclear or lacking in detail, as this will force the public authorities concerned either to adopt a passive role, for lack of instructions, or to adopt an activist role, based on an assumed understanding of the intentions of the drafters of the provisions concerned or, in an expanded form of activism, on an assumed understanding of the needs of society.[1]

This choice between passivity and activism becomes very direct for courts, which cannot normally seek the advice or consent of other parties on which route to follow. It is for this reason that national systems frequently designate a special constitutional court to provide answers on the powers allocated under the constitutional provisions.[2]

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However, the problem of democratic legitimacy remains, even if it is removed to the jurisdiction of a constitutional court, and the issue can be seen of one of balance between benefits of judicial activism, in finding solutions for society, set against the need for democratic legitimacy, so as to maintain the respect for the rule of law.[3]

This need for balance is especially required for an international court, faced not only with the question of democratic legitimacy in relation to constitutional aspects of international agreements but also with the question of respect for national sovereignty within the international cooperation.[4] It is on this background that the Court of Justice of the European Union (CJEU)[5] and its case law has been selected as the focus area for this chapter.

When the European Union (EU) was originally set up as a European Community in 1951, the Treaty on the European Coal and Steel Community (ECSCT)[6] included the following provision as its Article 31 concerning what has become the CJEU:

- The Court shall ensure that in the interpretation and application of this Treaty, and of the rules laid down for the interpretation thereof, the law is observed.

The remaining part of Chapter IV, of which Article 31 forms part, sets out the judicial competence of the CJEU in relation to the issues that may be addressed and the format in which this may be done, but the chapter does not as such set out any conditions for activism on the part of the CJEU in relation to lacunae or contradictions in the law of the EU. Likewise, this issue is not addressed in the Statutes of the CJEU, included as a Protocol to the ECSCT.[7]

The only additional provision on the competence of the CJEU as such was Article 87 ECSCT, which granted a judicial monopoly to the CJEU:

- The High Contracting Parties undertake not to avail themselves of any treaties, conventions or declarations made between them for the purpose of submitting a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein.

Finally, the manner in which the EU could regulate was set out in Article 14 ECSCT, which provided:

- In order to carry out the tasks assigned to it the High Authority shall, in accordance with the provisions of this Treaty, take decisions, make recommendations or deliver opinions.
- Decisions shall be binding in their entirety.
- Recommendations shall be binding as to the aim to be pursued but shall leave the choice of the appropriate methods for achieving these aims to those to whom the recommendations are addressed.
- Opinions shall have no binding force.

Essentially, these provisions have remained unchanged and are currently reproduced in the treaties on the European Union (TEU)[8] and on the Functioning of the European Union (TFEU),[9] as well as the treaty on the European Atomic Energy Community (EACT),[10] although with the original Treaty on the European Economic Treaty (EECT),[11] the competence moved from the former High Authority to the Council of Ministers, with a only a limited competence for the European Commission that replaced the High Authority. Subsequently, the Council of Ministers' competence was to become shared with the European Parliament, and directed by the policy decisions of the European Council, as set out in the succession of treaties including the Single European Act (ESA),[12] and for the European Union those signed in Maastricht,[13] Amsterdam,[14] Nice,[15] Athens[16] and Lisbon.[17]

Also the terminology was changed by the Article 189 EECT, with the new concept of directives replacing the former use of recommendations, while the concept of recommendations was made equivalent to opinions, and most importantly with the introduction of regulations as a truly supranational legal measure, having effect not only for but also within the EU Member States. During the intervening period of the Maastricht system of pillars, various forms were added such as framework decisions and joint actions, but with the Lisbon Treaty a unified catalogue of legal acts, as renamed by the EECT, was re-introduced in Article 289.1 TFEU:

- To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

The only added complication has been the addition of the distinction between legislative and non-legislative measures, as well as the concept of delegated and implementing acts of the European Commission in Article 290 and 291 TFEU. Despite the confusing name, non-legislative acts may also be legislative measures of either general or individual application.

Essentially, this concerns only the choice of legislative procedure and does not directly impact on the competence of the CJEU. However, in the Lisbon format of the judicial procedure for annulation, an extended right was included for individuals to challenge regulatory acts according to Article 263.4 TFEU, as quoted below. As this latter concept was left undefined, as a residue from the non-adopted Constitutional Treaty,[18] it required the CJEU to define regulatory acts as non-legislative acts of general application.[19]

Thus it may be concluded that apart from issues of terminology as well as the introduction and subsequent part removal of additional forms of EU legislation, the definition of the legislative competence of the EU and the judicial competence of the CJEU have remained consistent throughout the 63 years of its existence. This provides a neutral platform for evaluating any development relative to the democratic legitimacy of the case law of the CJEU.[20]

As a background, it may be mentioned that upon entry to the EU, and its predecessor in the form of the European Communities (EC), many Member States had an expectation of entering a trade regime, which although it had a supranational rhetoric with references to unification, was in fact equipped with only a relatively limited supranational competence in the form of the power to adopt regulations.[21]

This view was set out explicitly in the preparatory works for the change of the Danish constitution, adopted in 1953, which introduced the legal basis for joining the EU. The preparatory works underlined that apart from the issue of regulations, joining the EU would be no different from assuming any other international obligations, as Denmark adheres to the dualist principle, which limits any direct effect of international law.[22]

2 Democratic Legitimacy

In 1971, the Supreme Court of the Northern Territory of Australia passed a landmark judgment,[23] which rejected that the notion of aboriginal rights could be seen to form part of Australian law. In an *obiter dictum*, the Supreme Court explicitly stated that any recognition of such rights should be regarded as a legislative issue and not a judicial issue.

Subsequently, the Parliament of Australia adopted the Aboriginal Land Rights Act 1976, which to a certain extent allowed for land claims based on aboriginal rights. In this manner, the 1971 judgment may be argued to have carefully maintained the respect for democratic legitimacy by passing

on to the legislative body a matter that could not be seen to fall within the scope of judicial powers.[24]

A strong similarity appears in the case C-50/00-P[25] of the CJEU, where the question was dealt with on appeal as to whether individuals should have an extended right of standing in cases where they had not been able to obtain EU rights through procedures available in the national courts. This was refused by the CJEU, based on the legality principle, whereby treaty amendment falls within the exclusive competence of the Member States acting together (ground 45, underlining added):

- While it is, admittedly, possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the founding Treaty and never amended as to its principles, it is for the Member States, if necessary, in accordance with Article 48 EU, to reform the system currently in force.

By this formulation, the Court may be seen to have passed on a message to the legislative bodies in the same manner as the Supreme Court in Australia, thus as an *obiter dictum* suggesting that legislative action should be taken.

Indeed the analogy may be regarded as reinforced, since just like the Australian Parliament, the Member States of the EU did follow the suggestion and, with the Lisbon Treaty, inserted the following in Article 263.4 TFEU (underlining added):

- Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

However, it should be noted that the additional phrase in Article 263.4 TFEU would not have solved the issue of Case C-50/00-P, as the concept regulatory acts only includes non-legislative acts of general application, as referred to above,[26] which does not include the main legislative acts of the Council and Parliament, such as the Council regulation at stake in that case.

As for what should have taken place in national courts, the CJEU refers to the principle of loyal cooperation (ground 42, underlining added):

- In that context, in accordance with the principle of sincere cooperation laid down in Article 5 of the Treaty, national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act.

However, with the careful wording of the underlined text, not imposing an absolute achievement obligation on the national courts, as might have been deduced from the Marleasing case,[27] the CJEU acknowledges that an individual might not obtain satisfaction in a national court, as the obligation to interpret national law stretches only "so far as possible".

In fact, this was exactly the argument of the applicants, that under Spanish procedural law they were barred from challenging the application of an EU regulation in a Spanish court. Thus, while one might hope that either the Spanish courts or the Spanish legislation might take appropriate action in future cases, the question remained whether a reserve access to the CJEU should be held open when all national remedies have been exhausted.

However, the CJEU explicitly refused this option, in order to arrive at the above quote from ground 45, as it found (ground 44, underlining added):

- As the Advocate General has pointed out in paragraphs 50 to 53 of his Opinion, it is not acceptable to adopt an interpretation of the system of remedies, such as that favored by the appellant, to the effect that a direct action for annulment before the Community Court will be available where it can be shown, following an examination by that Court of the particular national procedural rules, that those rules do not allow the individual to bring proceedings to contest the validity of the Community measure at issue. Such an interpretation would require the Community Court, in each individual case, to examine and interpret national procedural law. That would go beyond its jurisdiction when reviewing the legality of Community measures.

It is important to note that this is not just an application of the Foto-Frost principle,[28] whereby the CJEU has jurisdiction over EU law, and the national courts have jurisdiction over national law. In cases brought by the Commission against Member States under Article 258 TFEU, the CJEU

is obliged to take a direct position on whether national law complies with EU law, and in preliminary reference cases under Article 267 TFEU, the CJEU goes very far in assessing the content of the national law so as to be able to give a relevant answer on the interpretation of the EU law regarding which the national court has referred a question.

Accordingly, it is a very selective statement at the end of the above quote, by which it would go beyond the jurisdiction of the CJEU to examine and interpret national procedural law specifically in cases concerning review of "the legality of Community measures". This distinction of jurisdiction in relation to the specific type of procedure is found in many other instances, such as the termination of the power to review an Article 258 application when the treaty violation has been terminated prior to the deadline set in the reasoned opinion.[29]

This sectional limitation of own jurisdiction becomes confusing when the same issues may be addressed under several provisions, and this has required the CJEU to establish further principles regulating such overlaps, such as the TWD[30] principle, under which exhaustion of the deadline for bringing cases under Article 263 TFEU must also entail that preliminary references challenging the validity under Article 267 TFEU are no longer possible, at least when the legal standing under Article 263 was clear.[31]

In this manner judicial restraint may be argued to have led to a need for judicial activism in order for the restraint to be maintained. A different critique may be raised against another example of judicial restraint, based on democratic legitimacy, as set out in first opinion of the CJEU of EU accession to the European Convention on Human Rights (ECHR).[32]

In this case, the CJEU acknowledges that respect for human rights has been introduced by the CJEU as a fundamental principle of law, as established in case law such as Hauer[33] and ERT.[34] It further acknowledges that the respect for the ECHR has been codified in the EU treaties, as presently stated in Article 6.3 TEU:

- Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

Yet despite this clear recognition of the ECHR as fundamental to the interpretation and application of EU law, the CJEU concludes (ground 34–35, underlining added):

- Respect for human rights is therefore a condition of the lawfulness of Community acts. Accession to the Convention would, however, entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order.
- Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235. It could be brought about only by way of Treaty amendment.

This opinion came at a very opportune moment for the Danish Supreme Court, hearing a challenge to the constitutionality of the Danish accession to the Maastricht treaty.[35] The case concerned, among other, the application of Article 235 of the Treaty on the European Community (TEC),[36] now replaced by Article 308 TFEU, as to whether the application by the EU violated the requirement in the Article 20 of the Danish Constitution, whereby any transfer of sovereignty must be of a delimitated nature.

The Supreme Court found (operative part 9.2, underling added):

- It appears from the wording of Article 235 that the fact that action by the Community is considered necessary in order to attain one of the objectives of the Community does not in itself constitute sufficient background for applying the provision. It is a further condition that the intended action is "in the course of the operation of the common market". This compared with Article 2 under which the tasks of the Community shall be promoted "by establishing a common market and an economic and monetary union and through implementation of common policies or action as stated in articles 3 and 3a" is to be understood so that the intended action shall lie within the scope of the operation of the common market that appears from the other provisions of the Treaty, including in particular Part Three on the policy of the Community and the listing in Articles 3 and 3a of the individual fields of operation. This interpretation is in accordance with the Government's memo of 21 January 1997, to the Parliament's European Committee (mentioned above in paragraph

> 4) and is confirmed by opinion 2/94 of 28th March 1996 of the EC Court of Justice in plenary session, (mentioned above in the same paragraph) where it is stated in paragraphs 29 and 30 (E.C.R. 1996 I, page 1788).

However, opinion 2/94 may also be seen as a clear communication to the legislative powers to ensure the necessary legal basis for an accession, that is viewed as important, but for which the CJEU is not prepared to go beyond the scope of democratic legitimacy. As in in case C-50/00-P,[37] the communication was well received by the legislative powers, who inserted the following provision in Article 6.2 TEU:

- The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

It would seem that the major concern of the Member States was that the CJEU should not use this provision as a basis for claiming additional EU powers, as it essentially replicates Article 52.2 of the Charter of Fundamental Rights of the European Union[38]:

- The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

However, it may be argued that the Member States thereby missed another concern of the CJEU, which is the claimed special nature of EU law. This was originally proposed by the CJEU, without any support in the treaty texts, as the operative reason for the supremacy of EU law as claimed in Costa v E.N.E.L.[39] Subsequently, the Court has frequently referred to the special nature of EU law and also did so in the opinion on accession to the original version of the Treaty on the European Economic Area (EEAT).[40]

As part of the EEAT, it was proposed to establish an EEA Court (EEAC) with jurisdiction over the EEAT, which was to contain essentially provision equivalent to large parts of the EU treaties. In reviewing the competence of the EEAC, the CJEU found (summary point 2, underlining added):

- As the Court of the European Economic Area has jurisdiction in relation to the interpretation and application of the agreement, it may be called upon to interpret the expression "Contracting Parties". As far as the Community is concerned, that expression covers the Community and the Member States, or the Community, or the Member States. Consequently, that court will have to rule on the respective competences of the Community and the Member States as regards the matters governed by the provisions of the agreement. To confer that jurisdiction on that court is incompatible with Community law, since it is likely adversely to affect the allocation of responsibilities defined in the Treaties and the autonomy of the Community legal order, respect for which must be assured exclusively by the Court of Justice pursuant to Article 164 of the EEC Treaty. Under Article 87 of the ECSC Treaty and Article 219 of the EEC Treaty, the Member States have undertaken not to submit a dispute concerning the interpretation or application of the treaties to any method of settlement other than those provided for in therein.

Thus, the argument of the CJEU is essentially that in order to assess the EEAT, the EEAC will have to take position on the understanding of EU concepts, and that this violates the monopoly reserved for the CJEU in the EU treaties. The argument is difficult to accept, as all courts will be called upon to take an interpretative stance on foreign law in cases involving elements outside their own legislation, and over which they have no direct jurisdiction, so as to be able to resolve the aspects of the case that do fall within their own jurisdiction.

This applies also where a national court in a Member State is called upon to interpret and apply EU law in a situation where that national court does not find that there is sufficient doubt about the understanding of the EU law in question so as to warrant a preliminary reference to the CJEU, and accordingly proceeds on the basis of its own interpretation of EU law, although it has no direct jurisdiction over EU law. Thus, the wish of the CJEU to preserve the homogeneity of EU law by safeguarding its jurisdiction monopoly would appear somewhat excessive in view of the basic principles of the EU treaties.

However, it may be argued that irrespective of how Opinion 1/91 may be evaluated, the position of the CJEU was very clear. Accordingly, the Member States inserted a special Protocol No. 8 to the Lisbon Treaty, concerning accession to the ECHR, which provided in Article 3:

- Nothing in the agreement referred to in Article 1 shall affect Article 344 of the Treaty on the Functioning of the European Union.

Article 344 TFEU is the current version of the obligation of Member States to respect the exclusive competence of the CJEU:

- Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.

A draft agreement on accession to the ECHR was submitted to the CJEU, which gave its Opinion 2/13[41] on that agreement. Among other arguments, the Court found that Article 3 of the Protocol constituted an insufficient protection of the obligations imposed by Article 344 TFEU (grounds 206–208):

- 206. In that regard, contrary to what is maintained in some of the observations submitted to the Court of Justice in the present procedure, the fact that Article 5 of the draft agreement provides that proceedings before the Court of Justice are not to be regarded as a means of dispute settlement which the Contracting Parties have agreed to forgo in accordance with Article 55 of the ECHR is not sufficient to preserve the exclusive jurisdiction of the Court of Justice.
- 207. Article 5 of the draft agreement merely reduces the scope of the obligation laid down by Article 55 of the ECHR, but still allows for the possibility that the EU or Member States might submit an application to the ECtHR, under Article 33 of the ECHR, concerning an alleged violation thereof by a Member State or the EU, respectively, in conjunction with EU law.
- 208. The very existence of such a possibility undermines the requirement set out in Article 344 TFEU.
- 209. This is particularly so since, if the EU or Member States did in fact have to bring a dispute between them before the ECtHR, the latter would, pursuant to Article 33 of the ECHR, find itself seized of such a dispute.

The argument seems to be that Article 344 TFEU precludes Member States from suing each other or the EU at the European Court of Human Rights (ECtHR) but that if such a violation were to occur, the ECtHR

would be bound by the application submitted and that this leaves Article 344 TFEU with an insufficient level of protection.

This does not appear to be a very strong argument, in view of the fact that Article 3 of the Protocol and article 5 of the draft agreement both explicitly acknowledge Article 344 TFEU.

As a further argument, the CJEU refers to Article 24.1 TEU on the Common Foreign and Security Policy (CFSP), which provides:

- The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union.

This provision was inserted into the EU treaties by the Maastricht treaty, and originally a similar mechanism applied to the so-called pillar for Home and Justice Affairs. It reflected a compromise whereby the Member States accepted to submit these areas to EU competence only on the condition that any legislation would remain inter-governmental, as opposed to supranational, and not subject to CJEU jurisdiction.[42]

As such, this compromise may be regarded as contrary to the principle whereby the EU is subject to the rule of law. Accordingly, it has been removed from Home and Justice Affairs, which have been integrated into the TFEU, and even for CFSP the current text of Article 24 TEU respects that the CJEU must have jurisdiction where the rights of individuals are concerned.[43]

The argument of the CJEU in Opinion 2/13 is that the exclusion of other aspects of CFSP is not guaranteed by the draft agreement (grounds 252–257, underlining added):

- 252. However, for the purpose of adopting a position on the present request for an Opinion, it is sufficient to declare that, as EU law now stands, certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice.
- 253. That situation is inherent to the way in which the Court's powers are structured by the Treaties, and, as such, can only be explained by reference to EU law alone.

- 254. Nevertheless, on the basis of accession as provided for by the agreement envisaged, the ECtHR would be empowered to rule on the compatibility with the ECHR of certain acts, actions or omissions performed in the context of the CFSP, and notably of those whose legality the Court of Justice cannot, for want of jurisdiction, review in the light of fundamental rights.
- 255. Such a situation would effectively entrust the judicial review of those acts, actions or omissions on the part of the EU exclusively to a non-EU body, albeit that any such review would be limited to compliance with the rights guaranteed by the ECHR.
- 256. The Court has already had occasion to find that jurisdiction to carry out a judicial review of acts, actions or omissions on the part of the EU, including in the light of fundamental rights, cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU (see, to that effect, Opinion 1/09, EU:C:2011:123, paragraphs 78, 80 and 89).
- 257. Therefore, although that is a consequence of the way in which the Court's powers are structured at present, the fact remains that the agreement envisaged fails to have regard to the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in CFSP matters.

From a purely technical point of view, the argument of the CJEU has a logical element, but it does pose an interesting question. Does the fact that the EU has decided to set aside the rule of law, by excluding the CFSP from judicial review, have the effect of precluding review by the ECtHR. Might not the CJEU instead have seen Article 6.2 TEU as the legal basis for allowing such a review, thereby setting aside the limitation in Article 24 TEU specifically for the ECtHR, whereas this would not be possible in relation to other courts, as set out in Opinion 1/09.[44]

There are further aspects of Opinion 2/13 that deserve review, but the above is sufficient for the general conclusion that the respect for democratic legitimacy appears to be especially prevalent in the case law of the CJEU where its own competences and prerogatives are concerned. This presents a distinct difference to the judicial activism presented in other case law.[45]

3 Judicial Activism

It would be difficult to imagine the current status of the EU had the CJEU chosen in general to follow the position of the Supreme Court of the Northern Territory of Australia.[46] This would have left all initiative with mainly the European Commission and to a more limited extent the other EU Institutions and the Member States. On the one hand, this would have signaled full respect for democratic legitimacy, but on the other hand this would most likely not have led to any substantial progress in the market integration, until the drive for the completion of the Internal Market was set off by the 1986 SEA.[47]

It may even be argued that both the EU institutions and the Member States came to rely on the judicial activism of the CJEU so as to avoid making difficult or unpleasant decisions, which could be safely left to the CJEU.[48] It became a not uncommon phenomenon for the Council working groups to adopt compromise texts that were deliberately opaque and which left each of the negotiating parties to estimate the chances of their personal interpretation becoming that of the CJEU.

As an example, amendments to Council Directive 69/169 on imports in international travel[49] contained several inconsistencies, which might have led to an expectation that the provisions concerned would have to be set aside as inapplicable. Instead the CJEU found in case C-100/90 (ground 11, underlining added)[50]:

- In the absence of any factor allowing the specific purpose of the provision at issue to be determined, it seems that the measures laid down by the Directive constitute, as is apparent from the third recital in the preamble thereto, a further step towards the reciprocal opening of the markets of the Member States and the creation of conditions similar to those of a domestic market and that, accordingly, the Directive, being intended to achieve a fundamental freedom, must, in case of doubt, be interpreted in the manner most conducive to that freedom.

Likewise, during protracted Council negotiations for harmonization of insurance services, the European Commission decided on a judicial remedy by suing several Member States based on the direct effect of the provision on the freedom to provide services, currently Article 56 TFEU. In four parallel cases,[51] the Commission obtained much of what it had been impossible to obtain in the Council negotiations.

Especially in the field of individual rights of persons, the CJEU has shown judicial activism in the face of passivity on the part of the legislative EU authorities and the Member States. As an example, in the Defrenne case[52] the CJEU addressed the issue that the principle of equal pay for men and women, at the time Article 119 EECT and presently in a revised form Article 157.1 TFEU, should have been implemented by the Member States by the end of the first transitional period of the EU, which ended in 1962. However, Directive 75/117[53] granted a further one-year extension for the implementation that had not yet taken place at the time of the adoption of the directive.

In addressing the validity of this extension, the Court drew on its famous judgment in Van Gend en Loos,[54] finding that the EU treaty articles may have direct effect for persons to whom they are addressed. The operative question became whether the private company Sabena was addressed as an obligated party by Article 119 EECT and thus was to respect the principle of equal payment.

The argumentation of the CJEU was as follows (grounds 31 and 39, underlining added):

- 31. Indeed, as the court has already found in other contexts, the fact that certain provisions of the treaty are formally addressed to the member states does not prevent rights from being conferred at the same time on any individual who has an interest in the performance of the duties thus laid down.
- 39. In fact, since article 119 is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labor collectively, as well as to contracts between individuals.

Concerning the purpose of equal pay, the CJEU found (grounds 9 and 10, underlining added):

- 9. First, in the light of the different stages of the development of social legislation in the various member states, the aim of article 119 is to avoid a situation in which undertakings established in states which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-community competition as

compared with undertakings established in states which have not yet eliminated discrimination against women workers as regards pay.

- 10. Secondly, this provision forms part of the social objectives of the community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples, as is emphasized by the preamble to the treaty.

This text would seem to support a very broad understanding of direct effect so that horizontal direct effect would occur wherever a provision is mandatory, and also a very broad understanding of indirect discrimination so that any difference in operating conditions between Member States could be classified as indirect discrimination.

In subsequent case law, the CJEU has adopted a variable approach to these conclusions from the Defrenne judgment, thus sacrificing legal certainty for a flexible approach and not always giving very clear reasons for the choices made.[55] As an example, the Defrenne approach to direct horizontal effect was upheld in the Angonese case,[56] where the provision at stake was the free movement of workers, presently Article 45 TFEU, where the argumentation of the CJEU was as follows (grounds 34 and 35, underlining added):

- 34. The Court has also ruled that the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus laid down (see Case 43/75 Defrenne v Sabena [1976] ECR 455, paragraph 31). The Court accordingly held, in relation to a provision of the Treaty which was mandatory in nature, that the prohibition of discrimination applied equally to all agreements intended to regulate paid labor collectively, as well as to contracts between individuals (see Defrenne, paragraph 39).
- 35. Such considerations must, a fortiori, be applicable to Article 48 of the Treaty, which lays down a fundamental freedom and which constitutes a specific application of the general prohibition of discrimination contained in Article 6 of the EC Treaty (now, after amendment, Article 12 EC). In that respect, like Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC), it is designed to ensure that there is no discrimination on the labor market.

Thus, the judgment effectively upholds the argument of horizontal direct effect for mandatory provisions and further underpins this by the fundamental character of the provision in question. However, the identification of treaty articles with direct horizontal effect has remained episodic and has not been broadened into a general statement as to the direct effect of the treaty provisions.[57]

The other aspect of the Defrenne judgment, with a very broad understanding of indirect discrimination, was applied extensively in the field of free movement of goods, leading to the fundamental case of Cassis de Dijon[58] introducing a presumption for violation of the free movement of goods whenever national legislation differs, which on the one hand developed into a general principle applied in all sectors of free movement and, on the other hand, was subsequently limited by the Keck and Mithouard case.[59]

On this background it appears slightly surprising that the Member States managed first to introduce the concept of an EU citizen, assuming that this would have no legal effect, and subsequently managed to introduce the Charter as legally binding but appeared not to fully comprehend the implications thereof.

The original Article 8 of the ECT in the Maastricht version provided (underlining added):

- Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union.
- Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.

Thus by making the concept of citizens a reference concept, pointing to the rights held elsewhere in the EU treaties, the Member States apparently were of the opinion that there would be no independent legal effect resulting from citizenship. Likewise, the general debate was focused on whether the new EU citizenship might have a negative impact on national citizenship.

This latter issue was clarified in the Edinburgh Agreement in 1992, whereby the Member States agreed on conditions for the Danish accession to the Maastricht Agreement. Although the agreement was restricted to regulating the use of choices available to Denmark in the Maastricht Treaty, the fact that this was regulated in a non-EU instrument might have caused concern in view of the above-mentioned attitude of the CJEU toward Article 344 TFEU.[60]

The clarification of the relations between the EU and national citizenship was subsequently codified in the Amsterdam version of Article 17 ECT:

- Citizenship of the Union shall complement and not replace national citizenship.

However, as for the legal implications of the EU citizenship, no changes were made in the Amsterdam Treaty, and in several cases, including the Grzelcyk case,[61] the CJEU established that citizenship of the Union is intended to be the fundamental status of nationals of the Member States, which clearly indicated an independent scope for the rights of EU citizens.[62]

In response, the Member States in the Lisbon Treaty added a qualification to what is now Article 20.2 TFEU (underlining added):

- Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

  (a) the right to move and reside freely within the territory of the Member States;
  (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;
  (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;
  (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

- These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

This position is reiterated in Article 21.1 TFEU (underlining added):

- Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and

> conditions laid down in the Treaties and by the measures adopted to give them effect.

This would seem to constitute a new attempt to limit the scope of rights for EU citizens, despite the now existing case law of the CJEU on this issue, and at the same time to constitute an attempt to codify that secondary legislation might limit the treaty rights of EU citizens.[63]

In this connection it may be noted that Article 45 of the Charter appears to uphold the unqualified version of the right of free movement (underlining added):

- Every citizen of the Union has the right to move and reside freely within the territory of the Member States.

Originally, citizens that were not economically active were not seen to have any Treaty based right of free movement. It was discussed whether the EU had any legislative competence to grant them free movement at all, but it was accepted that this could be done by adopting directives that required a medical insurance from the home state and sufficient own funds. The reference to secondary law in the present Treaty text, also present in Article 8a ECT, confirms this approach, and the discrepancy between the Treaty and Charter text has not been addressed by the CJEU.

In addition to codifying the legal basis for such limitations, the Treaty text would appear also to codify the legal basis for the established and legislated practice of granting various degrees of access to social rights for different groups of foreign residents.

This would seem necessary, as with the recognition by the CJEU of the EU citizenship entailing in itself a right of free movement, it had become questionable whether this right could still be subject to limitations in secondary legislation. However, the CJEU did not have occasion to take specific position on this issue, and with the introduction of the legal basis in the new Articles 20.2 and 21.1 TFEU, a continuation of these conditions seemed possible.

It was therefore a great surprise for most Member States when the CJEU rendered judgment in the Zambrano case,[64] which concerned the rights of children born in Belgium by asylum seekers that did not have a right of residence. Under Belgian law, the children automatically obtained Belgian citizenship, and this presented an issue when subsequently the parents were to be expelled after being denied asylum.

Therefore, the case did not have any element of free movement between Member States, and thus any rights for the persons concerned to remain in Belgium could not be based on the TFEU provisions on free movement. An argument could have been constructed whereby the persons concerned could have an interest in movement to other EU Member States so as to activate the free movement provisions, as was the case in the Bosman case.[65]

However, the CJEU took a different approach and established (grounds 42–44, underlining added):

- 42. In those circumstances, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union (see, to that effect, Rottmann, paragraph 42).
- 43. A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect.
- 44. It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.

The surprise effect of the Zambrano case may be explained by the fact that the CJEU previously had decided the Chen case,[66] which established a similar right for a non-EU parent of a minor child that had obtained the citizenship of a Member State by being born there, but subsequently had seemed to revert on the principle in the McCarthy case.[67]

The legal uncertainty created by the different stances in the Chen, McCarthy and Zambrano cases meant that the field was wide open when the CJEU came to decide the Dano case,[68] which concerned a Romanian

citizen who was not and had never been economically active but who resided with her sister in Germany.

The Dano judgment may be viewed as a further reversal of the activist approach, by applying the qualification in Articles 20.2 and 21.1 TFEU, whereby rights of EU citizens will depend on the secondary legislation, unless they are covered by other treaty provisions as economically active persons (ground 60, underlining added):

- In this connection, it is to be noted that Article 18(1) TFEU prohibits any discrimination on grounds of nationality "[w]ithin the scope of application of the Treaties, and without prejudice to any special provisions contained therein". The second subparagraph of Article 20(2) TFEU expressly states that the rights conferred on Union citizens by that article are to be exercised "in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder". Furthermore, under Article 21(1) TFEU the right of Union citizens to move and reside freely within the territory of the Member States is subject to compliance with the "'limitations and conditions laid down in the Treaties and by the measures adopted to give them effect" (see judgment in Brey, C-140/12, EU:C:2013:565, paragraph 46 and the case law cited).

On this background, the CJEU noted (ground 64, underling added):

- That having been said, it must be pointed out that, while Article 24(1) of Directive 2004/38 and Article 4 of Regulation No 883/2004 reiterate the prohibition of discrimination on grounds of nationality, Article 24(2) of that directive contains a derogation from the principle of non-discrimination.

Also the economic reasoning behind the differentiated access to social assistance is accepted by the CJEU (ground 74, underlining added):

- To accept that persons who do not have a right of residence under Directive 2004/38 may claim entitlement to social benefits under the same conditions as those applicable to nationals of the host Member State would run counter to an objective of the directive, set out in recital 10 in its preamble, namely preventing Union citizens who are

> nationals of other Member States from becoming an unreasonable burden on the social assistance system of the host Member State.

Thus not only is the principle of discrimination explicit accepted, but also the reasons are based on purely economic concerns, which in other aspects of the CJEU case law would have been refused, as the economic concerns of a Member State would be regarded as an insufficient basis for setting aside fundamental EU rights.

However, the point made in the Dano case is exactly that the reversal of position in relation to the rights of EU citizens is extensive, irrespective of the EU Charter, which did not appear to warrant such a reversal, although a legal basis could be found in the Treaty text.

As a comparison, in the Association Belge case,[69] the CJEU more positively explored the implications of the gender discrimination prohibition in Articles 21 and 23 of the Charter. When adopting Directive 2004/113,[70] the Council in principle prescribed equal treatment in Article 5.1 but inserted an exemption in Article 5.2 (underlining added):

- 1. Member States shall ensure that in all new contracts concluded after 21 December 2007 at the latest, the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits.
- 2. Notwithstanding paragraph 1, Member States may decide before 21 December 2007 to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. The Member States concerned shall inform the Commission and ensure that accurate data relevant to the use of sex as a determining actuarial factor are compiled, published and regularly updated. These Member States shall review their decision five years after 21 December 2007, taking into account the Commission report referred to in Article 16, and shall forward the results of this review to the Commission.

In evaluating these provisions, the CJEU found (grounds 30–32, underlining added):

- 30. It is not disputed that the purpose of Directive 2004/113 in the insurance services sector is, as is reflected in Article 5(1) of that directive, the application of unisex rules on premiums and benefits. Recital 18 to Directive 2004/113 expressly states that, in order to guarantee equal treatment between men and women, the use of sex as an actuarial factor must not result in differences in premiums and benefits for insured individuals. Recital 19 to that directive describes the option granted to Member States not to apply the rule of unisex premiums and benefits as an option to permit "exemptions". Accordingly, Directive 2004/113 is based on the premise that, for the purposes of applying the principle of equal treatment for men and women, enshrined in Articles 21 and 23 of the Charter, the respective situations of men and women with regard to insurance premiums and benefits contracted by them are comparable.
- 31. Accordingly, there is a risk that EU law may permit the derogation from the equal treatment of men and women, provided for in Article 5(2) of Directive 2004/113, to persist indefinitely.
- 32. Such a provision, which enables the Member States in question to maintain without temporal limitation an exemption from the rule of unisex premiums and benefits, works against the achievement of the objective of equal treatment between men and women, which is the purpose of Directive 2004/113, and is incompatible with Articles 21 and 23 of the Charter.

Thus, in relation to gender discrimination, the CJEU found that the prohibition in the Charter was absolute and did not leave room for any limitations similar to those imposed on the free movement and social rights of persons.

4 Conclusions

The balance between democratic legitimacy and judicial activism is most clearly demonstrated by the CJEU in its case law concerning the limits to EU competences.[71] However, this case law also to a large degree is concerned with the prerogatives of the CJEU, and it therefore remains open to interpretation whether the driving factor has as such been democratic legitimacy or rather the consideration of own interests by the CJEU as an institution of the EU.

A more expansive judicial activism may be traced in other fields, such as the rights of individuals, both under the Treaty texts and the Charter, which was made legally binding with the Lisbon Treaty. Here the CJEU appears to have considered also political viability as to the level of activism that would be accepted by the Member States.[72]

This has entailed a variable practice in the degree of activism at the cost of legal certainty, with the rights of the free movement and access to social services as a clear example. However, despite the issue of lacking consistency, it may be argued that the end result of the case law analyzed in this paper does show compliance with democratic legitimacy.

Thus in relation to gender equality, it may be argued that the Member States had created an impossible situation by introducing a Charter prohibition on gender discrimination, while retaining a directive access to maintain discrimination. The CJEU could accordingly do little other than annulling the directive provisions concerned, although it did accord the Council a grace period to adopt replacement legislation.

Different in the field of free movement, it may be argued that while the Member States originally introduced the concept of EU citizenship without due consideration of the legal consequences, which left a wide space for judicial activism on the part of the CJEU, the addition of a specific legal basis for discrimination in secondary legislation has with some delay caused the CJEU to revert to a jurisprudence in line with the Treaty text, and thus with democratic legitimacy, although inconsistencies persist between the Treaty and Charter texts.

This may call for further development of CJEU jurisprudence, as it would seem that any amendment of the current Treaty and Charter texts is not likely in the near or medium future.

Notes

1. See Martii Koskenniemi, *From Apologia to Utopia—The Structure of International Legal Argument*, Finnish Lawyers' Publishing Company, 1989, p. 291: "The conflict between consensualism and non-consensualism and the ultimately unsatisfactory nature of both is clearly visible in two competing understandings of why treaties bind. According to a subjective approach treaties bind because they express consent. An objective approach assumes that they bind because of considerations of teleology, utility, reciprocity, good faith or justice requires this. The history of the doctrine of

treaty interpretation is the history of the contrast between these two approaches".

2. See Duke E. Pollard, *The Caribbean Court of Justice—Closing the Circle of Independence*, The Caribbean Law Publishing Company, Kingston, 2004, p. 216:"The objective of uniformity in the application and interpretation of the constituent instrument of any integration movement would appear to be axiomatic for its successful development as it would be for the efficient functioning of the CARICOM Single Market and Economy".
3. See Suvi Sankari, *European Court of Justice Legal Reasoning in Context*, Europa Law Publishing, 2013, p. 51: "The activism-criticism must be diluted, or specified, just to be fair. Rasmussen, as the forerunner of the discussion, condemns activism that has lost popular legitimacy, where a court has gone too far. Yet the discussion on activism is best summarised not perhaps by Judge Edward calling it a myth revealing only the underlying assumptions of those presenting the accusation but by Renaud Dehousse stating that although much ink has been spilled on judicial activism, no commonly shared definition of this phenomenon exists".
4. See Miguel Poiares Maduro, *We the Court*, Hart publishing, 1998, p. 3: "In its early days the European Court of Justice was faced with two main challenges: to ensure its own effectiveness and the effectiveness of Community law in general while, at the same time, avoiding involvement in national and political conflicts that might undermine both its own judicial credibility and the credibility of Community law".
5. The CJEU was previously referred to as the European Court of Justice (ECJ), as in endnote 4. The CJEU is the officially adopted acronym for the institution, while the following acronyms may be suggested for its jurisdictions: COJ (Court of Justice), GCT (General Court) and CST (Civil Service Tribunal).
6. Treaty on the European Coal and Steel Community (ECSCT), signed in Paris on 18 April 1951, entered into force on 23 July 1951, and expired on 23 July 2002 in accordance with Article 97, not published in the OJEU.
7. According to Article 84, the Annexes and Protocols have the same legal value as the main text of the ECSCT.
8. As amended by the Lisbon Treaty, see endnote 17.
9. As introduced by the Lisbon Treaty, see endnote 17.
10. European Atomic Energy Community (EACT), signed in Rome 25 March 1957 and entered into force on 1 January 1958, not published in the OJEU.
11. Treaty on the European Economic Treaty (EECT), signed in Rome 25 March 1957 and entered into force on 1 January 1958, not published in the OJEU.

12. Single European Act (ESA), signed in Luxembourg on 28 February 1986 and entered into force on 1 July 1987, published in OJEU L 169 of 29 June 1987, p. 1.
13. Treaty on the European Union (Maastricht), signed on 7 February 1992 and entered into force on 1 November 1993, published in OJEU C 191 of 29 July 1992, p. 1.
14. Treaty of Amsterdam, amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed on 2 October 1997 and entered into force on 1 May 1999, published in OJEU C 340 of 10 November 1997, p. 1.
15. Treaty of Nice, amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed on 26 February 2001 and entered into force on 1 February 2003, published in OJEU C 80 of 10 March 2001, p. 1.
16. Treaty of Athens, between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, signed on 16 April 2003 and entered into force on 1 May 2004, published in OJEU L 236 of 23 September 2003, p. 1.
17. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed on 13 December 2007 and entered into force on 1 December 2009, published in OJEU C 306 of 17 December 2007, p. 1.
18. Treaty establishing a Constitution for Europe, signed 29 October 2004 in Rome, but not ratified after rejection in referenda held in France and the Netherlands, published in OJEU C 310 of 16 December 2004, p. 1.
19. Judgment of the Court (Grand Chamber) of 3 October 2013, Case C-583/11 P, Inuit Tapiriit Kanatami, published under ECLI:EU:C:2013:625, ground 60.
20. See Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice*, Cambridge University Press, 2012, p. 15: "Kelsen appeared to

use the term interpretation to describe both the derivative sense of drawing meaning as contained in a legal provision, which he described as ascertaining meaning scientifically, and the determination of the content of the law by going beyond what is scientifically ascertainable to fill ostensible gaps in the law, filling out the frame of the law".

21. See Alec Sweet Stone, *The Judicial Construction of Europe*, Oxford University Press, 2004, p. 66: "The Member States neither provided for the supremacy of the Rome Treaty in national legal orders, nor for the direct effect of Treaty provisions and EC directives".
22. Legal opinion submitted to the Danish Constitutional Commission (Forfatningskommissionen) on 18 May 1952 by Professor Max Sørensen, published in the Commission Report (Betænkningen), p. 113.
23. Judgement of the Supreme Court of the Northern Territory of Australia in case Milirrpum v Nabalco Pty Ltd., published in 1971 in 17 FLR 141.
24. The 1971 judgment was subsequently overruled, and the concept of aboriginal rights was recognized in the judgment of the High Court of Australia Mabo and Others v Queensland, published 1992 in 175 CLR 1.
25. Judgment of the Court of 25 July 2002, Unión de Pequeños Agricultores, published under ECLI:EU:C:2002:462.
26. See endnote 19.
27. Judgment of the Court (Sixth Chamber) of 13 November 1990, Case C-106/89, Marleasing, published under ECLI:EU:C:1990:395.
28. Judgment of the Court of 22 October 1987, Case 314/85, Foto-Frost, published under ECLI:EU:C:1987:452, ground 17.
29. Judgment of the Court of 31 March 1992, Case C-362/90, Italy, published under ECLI:EU:C:1992:158, ground 13.
30. Judgment of the Court of 9 March 1994, Case C-188/92, TWD, published under ECLI:EU:C:1994:90, operative part.
31. Judgment of the Court (First Chamber) of 12 December 1996, Case C-241/95, Accrington Beef, published under ECLI:EU:C:1996:496, ground 15.
32. Opinion of the Court of 28 March 1996, Opinion 2/94, ECHR, published under ECLI:EU:C:1996:140, ground 235.
33. Judgment of the Court of 13 December 1979, Case 44/79, Hauer, published under ECLI:EU:C:1979:290, ground 15.
34. Judgment of the Court of 18 June 1991, Case C-260/89, ERT, published under ECLI:EU:C:1991:254, ground 41.
35. Judgment of Supreme Court of the Kingdom of Denmark of 6 April 1998 in Case No. 1361/1997, Carlsen et.al. v the Prime Minister, published in U.1998.800H.
36. Introduced by the Maastricht treaty, *op.cit.*
37. *Op.cit.*

38. Introduced with the Nice Treaty, *op.cit.*, and made legally binding as part of the Lisbon Treaty, *op.cit.*
39. Judgment of the Court of 15 July 1964, Case 6-64, Costa v E.N.E.L., published under ECLI:EU:C:1964:66, unnumbered ground.
40. Opinion of the Court of 14 December 1991, Opinion 1/91, EEA, published under ECLI:EU:C:1991:490.
41. Opinion of the Court (Full Court) of 18 December 2014, Opinion 2/13, ECHR, published under ECLI:EU:C:2014:2454.
42. See Stone, *op.cit.*, p. 17: "The fatal flaw in strong intergovernmentalism was its failure to consider the institutional bases of the powers of the EU's institutions, not least, vis-à-vis the governments themselves".
43. See Conway, *op.cit.*, p. 223: "On the question of its own jurisdiction, the ECJ [in Kadi] declared that UN Rules could not have any priority over the principles that form part of the very foundations of the Community legal order, including human rights, rather than the much narrower category of jus cogens, on which grounds it had jurisdiction to exercise judicial review".
44. Opinion of the Court (Full Court) of 8 March 2011, Opinion 1/09, European and Community Patents Court, published under ECLI:EU:C:2011:123.
45. See Jules L. Coleman, *Markets, Morals and Law*, Cambridge University Press, 1988, p. 133: "Philosophers distinguish between arguments advanced to justify undertaking a particular action or policy and those offered in support of adopting institutions. Because institutions are generally thought of in terms of the set of rules that defines them, the distinction philosophers draw is usually put in terms of the difference between justifying rules and the actions that fall under them".
46. *Op.cit.*
47. See Anthony Arnull, *The European Union and its Court of Justice*, Oxford University Press, 2006, p. 161: "The absence of a provision in the Treaty regulating a particular matter should not be taken to reflect agreement by the Member states that the matter should be left outside the Treaty's ambit, but simply a lack of consensus between the member States at the time the Treaty was drafted on whether, and if so how, that matter should be dealt with. Given the duty imposed on the Court by Article 220 [now Article 19 TEU] of the Treaty to ensure the observance of the law, it is not unreasonable to infer that the authors of the Treaty intended the Court to bear responsibility for finding solutions in keeping with the Treaty's underlying philosophy for controversies for which no express provision has been made".
48. See Maduro *op.cit.*, p. 17: "At the same time, the incapacity to reach decisions in the political forum has left judicial institutions with the responsibility for solving political conflicts".

49. Council Directive 69/169/EEC of 28 May 1969 on the harmonization of provisions laid down by law, regulation or administrative action relating to exemption from turnover tax and excise duty on imports in international travel, published in OJEU English Special Edition 1969 (I), p. 232, as amended by the Fourth Council Directive (78/1033/EEC) of 19 December 1978, published in the OJEU L 366 of 19 December 1978, p. 31.
50. Judgment of the Court of 17 October 1991, Case C-100/90, Denmark, published under ECLI:EU:C:1991:395, ground 11.
51. Judgments of the Court of 4 December 1986: Case 220/83, France, published under ECLI:EU:C:1986:461; Case 252/83, Denmark, published under ECLI:EU:C:1986:462; Case 205/84 Germany, published under ECLI:EU:C:1986:463; Case 206/84, Ireland, published under ECLI:EU:C:1986:464.
52. Judgment of the Court of 8 April 1976, Case 43/75, Defrenne, published under ECLI:EU:C:1976:56.
53. Council Directive 75/117 of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, published in the OJEU L 45 of 119 February 1975, p. 19.
54. Judgment of the Court of 5 February 1963, Case 26/62, Van Gend en Loos, published under ECLI:EU:C:1963:1.
55. See Conway, *op.cit.*, p. 63: "Rasmussen identified a number of inconsistencies in the case law of the Court that undermined legal certainty, including inconsistencies between the general doctrine of supremacy in Costa v. ENEL and the Treaty text, which did not seem to imply supremacy."
56. Judgment of the Court of 6 June 2000, Case C-281/98, Angonese, published under ECLI:EU:C:2000:296.
57. See Stone, *op.cit.*, p. 156: "The determination of the direct effect of a Treaty provision is invariably an exercise in judicial law making, one that follows from prior acts of law making, traceable back to Van Gend en Loos".
58. Judgment of the Court of 20 February 1979, Rewe-Zentral, Case 120/78, published under ECLI:EU:C:1979:42.
59. Judgment of the Court of 24 November 1993, Joined cases C-267/91 and C-268/91, published under ECLI:EU:C:1993:905. See Conway, *op. cit.*, p. 41: "The Court rowed back on the expansive effect of Dassonville in Keck where it held that trading arrangements did not fall within the scope of the Community free movement rules, although Keck could possibly be construed as creative in that there was no textual basis for singling out trading arrangements in this way".
60. See endnote 40.

61. Judgment of the Court of 20 September 2001, Case C-184/99, Keck and Mithouard, published under ECLI:EU:C:2001:458.
62. See Arnull, *op.cit.*, p. 521: "In describing citizenship as destined to be the fundamental status of nationals of the Member States, the Court [in Grzelcyk] seemed to endorse the contention of the Portuguese Government that the entry into force of the TEU meant that nationals of the Member States were no longer to be regarded as primarily economic factors in an essentially economic community".
63. See Sankari, *op.cit.*, p. 172: "An approach based more firmly on recognising Article 21 TFEU as the completed general free movement of persons provision (fourth market freedom) could have done more to effectively deflate the conditionality and/or contingency criticism against the direct effect of the article".
64. Judgment of the Court (Grand Chamber) of 8 March 2011, Case C-34/09, Zambrano, published under ECLI:EU:C:2011:124.
65. Judgment of the Court of 15 December 1995, Case C-415/93, Bosman, published under ECLI:EU:C:1995:463.
66. Judgment of the Court (Full Court) of 19 October 2004, Case C-200/02, Chen, published under ECLI:EU:C:2004:639.
67. Judgment of the Court (Third Chamber) of 5 May 2011, Case C-434/09, McCarthy, published under ECLI:EU:C:2011:277.
68. Judgment of the Court (Grand Chamber) of 11 November 2014, Case C-333/13, Dano, published under ECLI:EU:C:2014:2358.
69. Judgment of the Court (Grand Chamber) of 1 March 2011, Case C-236/09, Association Belge, published under ECLI:EU:C:2011:100.
70. Council Directive 2004/113 of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, published in OJEU L 373 of 21 December 2004, p. 37.
71. See Ronald van Ooik, "The European Court of Justice and the Division of Competence in the European Union", in *Interface between EU Law and National Law*, ed. D. Obranovic and N. Lavranos, Europa Law Publishing, 2007, p. 26): "The Court has already very often been asked to deal with disputes on the division of competence within those which the [treaty on the] Constitution considers to be areas of shared competence. If the EU Constitution were to come into force, this important role for the Court would probably remain the same".
72. See Karen J. Alter, *Establishing the Supremacy of European Law*, Oxford University Press, 2001, p. 63: "While the ECJ can be less concerned about the responses by national governments than many other international courts, it also has a larger and more diverse constituency to please. National court restraints are multiplied many times because each country has its own constitution and its own domestic political concerns".

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PART III

Supranational Options to Reinforce the Political Legitimacy of the EU

Steffen Bay Rasmussen and Ainhoa Lasa López

1 Introduction

The third Part of this book focuses on the options available for constructing the European *demos* in terms of a possible European cultural identity, a European economic government, improved positive integration and improved consular assistance to EU citizens.

These very diverse aspects of European integration are all characterized by the continuous evolution of the equilibrium between the supranational and intergovernmental forms of organizing the Union legally and politically. Since the beginning of the integration process in the aftermath of the Second World War, these two models have co-existed in the European construction. In general terms, the treaties of the European Communities defined a supranational core surrounding the Common Market but left other issue areas governed by intergovernmental modes of interaction, with Member States firmly in control, or even outside the scope of community cooperation. With time, gradually more issue areas have been included within the supranational sphere, but some of those important for the democratic legitimacy of the EU are still located firmly within the

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Member States' sovereign spheres of governance, most notoriously social and foreign policy. This fact constitutes an important obstacle for the EU's ability to move toward a more politically and socially responsible polity that is capable of delivering real added value to the EU citizen.

In times of economic and refugee crises, citizens' disaffection with the European project is on the rise, as reflected in the latest elections to the European Parliament and the increased support for eurosceptic and nationalist parties in the EU Member States. The contributions in this part of the book starts from the premise that for the European integration process to be able to continue its evolution to the benefit of people across Europe, it is necessary to have a political vision that goes beyond union based only on the convergence of Member State interests, but rather generates a true public support for the EU as a political project, recovering the spirit of the early days of European integration when Jean Monnet made clear what was at stake on the European continent: "We unite people, not states". The emergence of a European *demos* is thus indispensable for the EU to become a full-fledged and well-functioning, legitimate and politically and socially responsible European polity.

To this end, European culture is examined as a factor capable of countering the influence of eurosceptic movements by focusing not on the, in global terms, small differences between Member States but on the common cultural heritage of the EU polity. The construction of a European cultural identity becomes more than a question of fundamental legal principles of Member States regarding democracy, the rule of law and good governance, but also about the communication surrounding cultural life across the continent in all its manifestations and indeed about the very content of the social relations among Europeans. As a counterweight to the generalized reluctance of Member States to transfer competences to the EU and further extend the supranational model, a (re)vitalization of European culture in the spirit of the EU slogan "United in Diversity", but with the stress on *United*, is seen as key to increased citizens' identification with the EU, cornerstone of the European *demos*.

The second proposal is of a new European economic government that is capable of addressing the real demands of EU citizens: a common employment policy as the basis for true socio-economic cohesion and economic and monetary policies that configure the EU as a space for redistribution of wealth among individual citizens. In essence, to overcome the sterile debate of net contributor Member States and net recipient Member States and recuperate the basic EU economic and social policies

as *political* spheres where citizens through their involvement in the policy process determine its outcome, as opposed to private and public stakeholders interacting in opaque circles to formulate functional imperatives of ever increasing liberalization.

The third proposal is the creation of a European social model where the political objectives of equality and non-discrimination, as well as the fight against poverty and social exclusion, are not mere words in policy documents or legislative acts with little legal usefulness and doubtful effect on the real inequalities among EU citizens. Equality is thus seen as a Simple Paraconstitutional European value that implies a true legal and political commitment to eradicate the obstacles that impede EU citizens from achieving the true *leitmotiv* of the European *demos*: a feeling of belonging to a polity and a project that is vital for the economic and social well-being of all Europeans.

The fourth dimension analyzed in Part III is how the EU could provide real added value to its citizens in the field of consular assistance. Recent developments have seen a further consolidation of the intergovernmental model of European integration in the field of external relations, where EU Delegations play only a minor role. Particularly the 2015 Directive on consular assistance shows the lack of legal and political ambition of the EU in this respect. To make citizens identify with the EU polity to a greater extent, the Delegations must find ways to maximize their role within the legal constraints of the Directive and the political restraints of Member State attitudes. To the same end, they must also assume the communicative challenge of making clear that being an EU citizen, in addition to being a citizen of a Member State, has distinct concrete advantages. Both aspects are essential for making the field of consular assistance contribute to the formation of a European-wide consciousness of belonging to an incipient, but distinctly *European demos.*

CHAPTER 9

The Role of Culture in the Construction of European Identity

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1 European Identity and Identification with Europe

The concept of European identity has given rise to a significant body of scientific literature, especially since the year 2000, as a result of the Eurobarometer surveys introducing a section called "European identity" to draw conclusions on the number of European Union's (EU) citizens who qualify themselves as European.[1] On the one hand, scholars approach the concept from a historical or philosophical point of view, dealing with the so-called European values which find their expression in public discourses and in the functioning of the legal system.[2] On the other hand, scholars deal with the term "European identity" from a psycho-social or socio-political perspective, studying, often from a quantitative theoretical viewpoint, the attachment of citizens to the evolving European project.[3] In more recent years, studies were also prompted by the financial crisis which reopened many of the debates on European identity and, therefore, on the evolution of the EU. The adverse economic climate of the financial crisis, threatening the social welfare system with severe austerity measures

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and shattering the already fragile consciousness of belonging to a community of values, revealed that the elements such as the rule of law and human rights defining the so-called emerging European identity were not sufficient to generate affection and loyalty toward the EU. Many studies question the problematic nature of European identity, or even its validity.[4]

The problematic nature of European identity became even more salient after the enlargement of 2004 with ten new countries becoming part of the EU, seven of which being part of the former Eastern bloc. The EU needed to adjust its ideas of European development, as well as its ideas of the position in a changing global order. The relationship between Eastern Europe and Western Europe became much more complex, Eastern countries having always existed in the shadow of the Cold War. With the enlargement toward the East, the EU, as Delanty points out, is "at the decisive point of moving beyond postnationality to an encounter with multiple civilizational forms",[5] with multiple histories and competing visions of European integration, turning the unity-in-diversity paradigm into a huge challenge. Opposing the passive perspective of Europeanization, Delanty states that the enlargement involves "new processes of social and system integration beyond the Western modernist project launched by Jean Monnet",[6] his assumption being that the idea of culture based on shared European values is wrong and that social integration does not stand for cultural cohesion. While for some scholars, the changing context of European integration has brought about the necessity of addressing cultural integration, for others cultural integration is an impossible dream.

If European identity is a polemical term, European *cultural*[7] identity is even more controversial, culture remaining an undefined term in most debates on European identity. As Jörg Michel Schlindler points out, "the fact that the relationship of the European Union (EU), as a supranational organization, to culture is not synonymous with the relationship of Europe to culture is one of the most irritating and at the same time historically understandable symbolic and functional anomalies of the EU".[8] Scholars dealing with the cultural dimension tend to stress the insignificant role played by culture in the process of European integration, pointing out that, from the start, (1) culture as a field has been marginalized by who had the responsibility to determine priorities at the European level[9] and (2) the EU's role in the cultural sector has been characterized by ambiguity[10] due to the lack of legal framework on the one hand and, on the other, to the fact that the idea of a European cultural policy is a highly

controversial issue, the competence to define and implement cultural policies remaining within the state.

However, as will be shown in this chapter, in spite of the self-imposed political distance from culture, and in spite of the ambiguities in their statements, the Community institutions started introducing measures with cultural impact already in the late 1970s in order to counteract the rising wave of Euro-skepticism and gain public support for the political project. Indeed, the Heads of State became gradually aware that the economic, social and political goals of the Treaty of Rome would not by themselves bring about the creation of the desired European Polity. Therefore, while they insisted that their cultural actions did not amount to intervention in the States' cultural policies, at the same time they made significant efforts to secure a proper European cultural market through the elimination of obstacles for the free circulation of cultural goods and services. In more recent years, especially within the framework of the "Creative Europe 2014–2020" program, developments indicate that the promotion of culture is increasingly considered within the EU as a means to promote growth and employment.

The application of the European Economic Community Treaty to the cultural sector led the institutions to engage in the preservation of the Community's cultural richness and the development of cultural exchanges. A two-fold approach was encouraged toward the cultural sector: first, a socio-economic interest was stressed on the basis of the EEC treaty provisions, the cultural sector being a great resource for social and economic development; and secondly the implementation of a series of cultural actions, especially after the introduction in the Treaty of Maastricht, of the so-called article on culture (Article 128), which, viewed through the unity-in-diversity paradigm, focused primarily on heritage protection and cultural interaction. Our argument in this chapter is that, though small, steps toward the construction of an incipient European identity have been made at the supranational level, that is, through top-down strategies, and that these steps, in turn, may have resulted in some kind of bottom-up identification, if not with the political project as such, at least with Europe in a wider sense, the European Community first and then the EU having set in motion mechanisms allowing not only the circulation of cultural goods and services but also encouraging the cooperation and interaction between citizens from various places throughout Europe. Top-down strategies lead to bottom-up benefits in the medium and long term.

2 The Meaning of Culture in European Integration: The Cultural Sector

Recent debates among scholars of European integration suggest that culture and European integration might have little in common.[11] Being achieved primarily in the economic, political and legal field, the concept of integration itself has multiple competing meanings,[12] depending on the theoretical lens used to approach it (federalism versus intergovernmentalism, functionalism versus constructivism, etc.), and is most often used in relation with the EU institutions and its treaties. The term "cultural integration" in which culture plays a central role is, however, highly controversial and needs to be used with caution.[13] It deals with the societal level and, unlike systemic integration, "it is neither an end in itself nor an intentional process."[14] Some critics moving beyond formal integration approaches (political, economic and legal), understand the term "cultural integration" as focusing "on the way Europe has reorganized itself to integrate the 'East'".[15]

The concept of culture was introduced in EU documents in the 1970s as an important dimension of the process of European integration. The cultural factor was seen as an essential tool to bring the European project closer to the citizens, and therefore it was considered to have an inestimable potential to generate a sense of belonging to a Union of the European peoples. However, the different meanings of culture are problematic for the notion of integration, and therefore it is important to clarify the uses made of culture by European institutions.

Culture can be defined as a normative model focusing on universal norms of democracy, freedom and human rights, but while culture defined in this way is a fundamental feature of the EU, this normative model is not necessarily unique to the EU. Culture can also be understood as communication,[16] culture being what we communicate through language and symbols whose meanings are learned and inherited from one generation to the other. The problem of culture understood in this way is that culture is not communicated in the same way, and with the process of enlargement, the EU is faced with multiple cultures in transformation and therefore with a multiplicity of meanings and symbols communicated in multiple ways. Culture understood as communication becomes, rather, the scenario of multiple forms of conflict. Culture is also defined as social construction, or constructed reality.[17] In this sense culture is not separated from the social; it includes the content of social relations as well as the construction of

those relations. The question is, can social European agents engage in the construction of a new order on the basis of a new vision of European society when culture is a dynamic process, societies themselves being cultures in transformation, always subject to change? This process of construction can hardly be envisaged.

If we consider these three definitions, European integration seems to have much to do with the first definition of culture as a normative model but little with the second and the third, culture as communication and culture as social construction. However, there is another dimension of culture which has been the target of a number of supranational initiatives in a number of selected areas. This is the area of cultural or artistic production, the cultural sector, defined by the European Commission in 1977 as "the socio-economic whole formed by persons and undertakings dedicated to the production and distribution of cultural goods and services".[18] This dimension of culture includes "high culture" and "intellectual artifact" but also popular culture, such as pop music, jazz and so on. In this sense the term "culture" often refers to the culture industries or institutions, such as museums or theaters, which protect and promote cultural activities and disseminate the fine arts, such as opera and poetry. All these actions represent efforts made by the EC/EU toward the making of a cultural policy, which remains, however is a very controversial business.

3 The Role of Culture As a Key Element of European Identity

3.1 Pre-Maastricht Supranational Discourse on Culture

While there is no doubt that the EU has a full-fledged media/audio-visual policy, the first attempts going back to the early 1980s,[19] the treatment of culture has been very controversial from the start, leading the EC/EU to distinguish between the two aspects of culture.[20] Indeed, though the development of a "European cultural policy" has recently been encouraged by the European Parliament, stressing the need for clear political goals,[21] a number of critics disagree with the notion, considering that what is indeed needed is "European cooperation", "policies for culture in Europe", rather than a "European cultural policy".[22] All these debates actually reflect the traditional reticent attitude of Member States to the intervention of the Community in cultural affairs, which explains why

the EC/EU role in the field of culture has, as already suggested, been from the very beginning, characterized by ambiguity. The EC/EU had to wait until 1992 to introduce the so-called article on culture in the Treaty of Maastricht, now article 167 of the Treaty on the Functioning of the European Union,[23] thereby acquiring some legal basis that allowed the institutions to develop cultural action at supranational level.

Before the 1990s, however, a series of initiatives had already been taken by the institutions in a number of areas of cultural activity, following a soft low approach,[24] which consisted in the allocation of funds for the preservation of architectural and archaeological sites, conservation of works of art and artifacts, sponsorship of cultural activities and translation of books, among others. The Parliament from the very beginning has played a key role in stressing the importance of the unity-in-diversity paradigm, and the Council, though skeptical about any attempt to foster a European cultural identity, was favorable to the idea of supporting national authorities in maintaining cultural sites and institutions, underlining the social and economic development and avoiding any reference to harmonization in the field of culture.

The Treaty of Rome did not include any provisions regarding the field of culture, but in the decade following its signature, increasing awareness that the economic, social and political goals were insufficient to bring about the creation of a European Polity led to the publication of resolutions and declarations by the institutions, pointing to the potential of culture as a factor capable of uniting people, as well as of promoting social and economic development. In the 1973 meeting, at the Copenhagen Summit, the European Council approved a declaration on European identity highlighting the importance of culture and cultural identity for further integration at the European level. Emphasizing both the "common heritage" and "the "diversity of cultures", the 1973 declaration represents an early attempt to define the elements of European Identity: "the diversity of cultures within the framework of a common European civilization, the attachment to common values and principles, the increasing convergence of attitudes to life, the awareness of having specific interests in common and the determination to take part in the construction of a United Europe, all give the European Identity its originality and its own dynamism." Other elements mentioned as shaping the European identity are "democracy", "the rule of law", "social justice", "respect for human rights" and the willingness "to play an active role in world affairs."[25]

The unity-in-diversity paradigm led the European Parliament in 1974 to adopt a broad resolution[26] calling for the protection of Europe's cultural heritage, but including other areas of action such as harmonization of copyright legislation and harmonization in the field and of tax laws relating to culture. It also advanced action in the fight against theft and illicit trafficking of works of art. A year later, in 1975 Leo Tindemans' Report on the European Union[27] encouraged greater Community involvement in people's everyday life. Statements were cautious: from the beginning the institutions felt the need to achieve a difficult balance between the objectives deriving from the application of the EEC Treaty and those relating to the protection of national heritage, but as Member States resented the institutions' involvement in matters of culture, the Commission was led to limit the scope of their involvement in culture to "the socio-economic whole formed by persons and undertakings dedicated to the production and distribution of cultural goods and services", the objective being to create "a more propitious economic and social environment in support of cultural activities at the European level".[28]

The European Parliament was the institution which mostly advocated measures at the supranational level, inviting the Commission in 1976 and 1979[29] to formally submit proposals for the treatment of culture. In January 1976 the European Commission submitted to the Parliament for the first time a document articulating the need for coordination of cultural activities. At the end of 1977, the Commission published a communication explaining the already existing measures affecting the cultural sector, and making suggestions for future action, particularly in the field of protection of architectural heritage and promotion of cultural exchange.

As Evangelia Psychogiopoulou states, "the legal basis of this second facet of the Community's cultural role was barely discussed."[30] The Parliament exercised its budgetary powers and the Commission insisted on the Community's economic and social responsibilities toward the cultural sector as a socio-economic whole, facilitating the free movement of cultural goods, and the improvement of the living and working conditions of cultural operators. In the same way, the activities on heritage protection were also justified on an economic basis, culture being a great potential capable of generating economic activity in fields such as tourism, art publishing, monument maintenance and scientific research. As for cultural exchanges, a "natural area" to the Community's action, they were legally justified on the basis of the last the objective set in Article 2 of the EEC Treaty, which is to "quicken the will to unite the nations of Europe."[31]

This is how the unity-in-diversity paradigm was again advanced as crucial for integration, and the concept of national heritage gradually culminated in a new concept of "Community heritage," expanding to new domains.

If the 1970s opened the path to resolutions and declarations, the 1980s represented a turning point in the adoption of measures with cultural impact. In 1982, at their first conference, the ministers of culture of the EC adopted a Solemn Declaration on the EU, signed by the Heads of State or Government in June 1983,[32] inviting the ministers responsible for culture to explore possibilities for the promotion of cultural cooperation in the areas of cultural heritage, cooperation between artists and writers from the Member States, as well as promotion of their activities within the Community and beyond, and integration of cultural activities within the framework of cooperation with third countries. For the first time, a special emphasis was laid on audio-visual media. Advocating greater Community engagement in Cultural Cooperation, the Solemn Declaration advanced the possibility of introducing a legal framework facilitating the Community's intervention in the cultural field. More and more cultural related issues were being discussed in the Council, and the Ministers responsible for Cultural Affairs adopted a series of resolutions within the Council in order to support ad hoc cultural and artistic actions. This context favorable to culture finally led to the creation of the European Council of Culture.

In spite of the resolutions and declarations leading to development in cultural action, the 1984 European Parliament elections stressed the lack of strong public commitment to the construction of a European polity. A stronger public attachment to the political project was needed. The 1985 Second Adonino Report for a People's Europe[33] suggested symbolic measures such as the promotion of European sport competitions and literary awards, the creation of a European Youth Orchestra, the selection of an emblem and flag, the organization of a Euro-lottery and circulation of stamps with designs inspired by the Community. The launch of programs in education and the establishment of a common audio-visual area with a European multilingual television channel were also suggested.

As to the Single European Act, it did not assign any cultural powers to the Community, and a cultural amendment was dropped due to political turmoil. To give the process new impetus, the Commission, in a communication entitled *A fresh boost for culture in the European Community*,[34] tried to convince national authorities that increased Community cultural activity was both a political and economic necessity in order to complete

the market by 1992 and to progress from a people's Europe to European Union. For the Commission the key to European construction was unity of European culture revealed by the history of regional and national diversity, whereas for the Parliament, the aim was to concentrate on diversity and make the necessary efforts to move toward the creation of a European Culture or, in other words, a culture of cultures.[35]

From 1984 to 1986 the European Council adopted a number of resolutions on several matters including piracy fighting, European films distribution, audio-visual products treatment, the establishment of the European cultural capital, networking of libraries, youth participation in cultural activities, the creation of international cultural itineraries, protection and conservation of heritage, and the promotion of literary works translation. Likewise, the year 1987 represented another turning point: the European ministers of culture officially established the Council of Ministers of Culture and the ad hoc Commission for Cultural Issues. The European Parliament also adopted another important document, "Initiating cultural activities in the EC."[36]

3.2 Post-Maastricht Supranational Discourse on Culture

In 1992, the Treaty of Maastricht introduced the so-called culture article, Article 128 (known as Art. 128 TEC until 1999, and Art. 151 EC[37] from 1999 to 2009), which now became article 167 of the TFEU. This article was the most important step in the field of culture as it brought culture fully into the action scope of the EC/EU. Being the first real attempt at defining common cultural policy, it does not aim at any harmonization of the cultural identities of the Member States, but rather at the protection of their diversity. Article 167 of the TFEU is formulated in the following way:

1. The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.
2. Action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:

   – improvement of the knowledge and dissemination of the culture and history of the European peoples,

– conservation and safeguarding of cultural heritage of European significance,—non-commercial cultural exchanges,
– artistic and literary creation, including in the audiovisual sector.

3. The Union and the Member States shall foster cooperation with third countries and the competent international organizations in the sphere of culture, in particular the Council of Europe.
4. The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.
5. In order to contribute to the achievement of the objectives referred to in this Article:

– the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Committee of the Regions, shall adopt incentive measures, excluding any harmonization of the laws and regulations of the Member States,
– the Council, on a proposal from the Commission, shall adopt recommendations.[38]

Interestingly, this Article also stipulated that the Community should take cultural aspects into account in all its actions under other provisions of the Treaty and that all decisions about culture should be adopted unanimously. It is also the only Article of the Treaty that makes specific reference to the audio-visual sector, thus confirming that it is difficult to separate the audio-visual dimension from the cultural one, and suggesting that the plurality and rights of Member States in the mass media must be safeguarded with a view to fulfilling their democratic, social and cultural needs.

The response to the inclusion of this article on culture was generally positive. First it led the Commission in 1996 to publish a document presenting all existing instruments and activities of the Community in the field of culture; second, European cultural networks and professional organizations as well as cultural communities saw it as strengthening the role of culture and contributing to fostering cultural cooperation; and third, it encouraged greater involvement of legal and economic experts in the role that culture should play not only in the context of EC policy itself but also in society in general.

The years after 1992 saw the publication of a number of papers and studies analyzing the importance of the inclusion of Article 128 in the Maastricht Treaty.[39] Ellmeier related it to the theoretical debates on the

definition and the role of culture, which were mostly being encouraged by UNESCO and the Council of Europe. The cultural sector was becoming increasingly important, as the new international reality was favoring a new economy based on intense trade of cultural goods and services. Some other scholars like Niedobitek stated that the advance meant by the inclusion of Article 128 toward extending the scope of European institutions on cultural matters had been overestimated, suggesting that the most relevant innovation was point number 4, extending the competences of the Community beyond legal measures,[40] that is, the call to the Union to "take cultural aspects into account in its action under the other provisions of the Treaties". According Schlinder, clause 4 of the Article came to replace "the historically-determined cultural blindness of the EU's institutions by the obligation to take into account cultural-political motives" but that the clause's "protective function has receded into the background of the discussion" and that therefore "the practice of the EU institutions continues to lag far behind both the long-standing and current expectations of European citizens, particularly those of persons engaged in the cultural sector".[41] Crawfurd Smith mainly analyzed the jurisprudence of the European Court of Justice, assessing the legal value of the Article from different perspectives, stressing the lack of a clear definition of culture, leading to different interpretations on behalf of the courts in individual cases.[42]

Ruffolo Report,[43] encouraging the EU to replace the numerous declarations about the importance of culture with concrete actions, represented an important moment in the debates about the role of culture and cultural policies in the EU after the inclusion of the Article on culture in the Maastricht Treaty. He argued in favor of a clear political goal, stressing that if the Union wished to become a real union, it needed to go beyond economic interests and enable Member States to also share some common cultural values. According to Ruffolo, the Union needed to design a cultural policy model that would enable all Member States to have the same equal opportunities for the promotion of cultural diversity; only by doing so, would the paradigm unity-in-diversity become a factor of cohesion rather than a ground for division.

Notwithstanding all the debates at various levels, in Spring 2005 the Constitutional Treaty proposal, though it did not add radical changes to the treatment on culture, was rejected by two of the founding members, France and the Netherlands, thus making it evident that the EU, as Ruffolo feared, was not ready to become a real union. The Draft Constitution actually confirmed the exclusion of culture from the other rules. As Nina

Obuljen suggests, "culture was not conceived as an integral part of the European Union's policies, nor was it part of the EU's formal agenda during the enlargement",[44] but enlargement influenced the position of culture in the process. Culture remains only marginally present in the EU Treaty and the acquis communautaire, Article 151 meaning an advance but yet not providing a real legal framework in which declarations about culture can be translated into concrete language.

4 Action in the Cultural Sector: Programs, Projects and Events

As shown in the previous sections of this chapter, since the early 1970s, the EC/EU has been concerned with the cultural field, publishing a series of declarations and resolutions in an attempt to define the role of culture in the process of European construction. Though the Maastricht Treaty meant an important step forward, it did not provide a full-fledged cultural policy, a solid legal framework, with clear rights and obligations for the EU and for the Member States in the culture domain. The EC's initial intervention in the cultural sector came as a consequence of the application of the Treaty rules to cultural goods and services. Since the 1980s European institutions have taken measures to foster creativity and promote dissemination of cultural content by providing financial resources to projects carried out by cultural institutions and cultural operators throughout Europe, the design and subsequent elaboration of support instruments being carried out by the European Commission's Directorate General Education, Audiovisual and Culture (DG EAC).

Whereas the European Parliament, particularly through its Committee on Culture, Youth, Education, the Media and Sport, has been one of the main advocates of cultural programs regarding the protection of the less diffused cultures and the less widely spoken languages, as can be seen in the "Culture 2000 Programme", as well as programs encouraging cooperation between cultural operators in order to improve access to, and participation in, cultural activities for as many citizens as possible, the Council and the Commission tend to favor the creation of major cultural networks and cultural events on a large scale, the Council always having the last word based on the unanimity principle.

The first large-scale cultural projects supported by European funding to give concrete visibility to the contents of the article on culture in the Maastricht Treaty were adopted between 1996 and 1999: Kaleidoscope,[45]

Ariane[46] and Raphaël,[47] all three concentrating on tangible aspects of culture. With a total budget of ECU 36.7 million, Kaleidoscope aimed at promoting awareness and dissemination of European culture, particularly in the fields of the performing arts, visual arts and applied arts by means of cooperation at European level between Member States. This project included actions such as support for events and cultural projects carried out in partnership or through network: large-scale cooperation actions; involvement of third countries; the European city of culture and European cultural month; and actions aiming at improving cultural cooperation between professionals in the cultural sector. Ariane, with a total budget of ECU 11.3 million, aimed at increasing knowledge and dissemination of literary works and European history, as well as improving the citizens' access to these. It included support for the following actions: translation of literary works, cooperative projects, on-going training for professionals, particularly translators, and European literary and translation prizes. Raphael, with a budget of ECU 30 million, concentrated on European cultural heritage protection, comprising events and dissemination initiatives of a European dimension in favor of the preservation and increased awareness of a European cultural heritage, cooperation in developing thematic networks between European museums, further training and mobility of professionals in the field of European cultural heritage preservation, cooperation in research, preservation and enhancement of decorated façades in Europe, and cooperation proposals to study, preserve and enhance the European pre-industrial heritage. Raphael "supported nearly 360 projects involving more than 1,500 operators from throughout Europe. European heritage laboratories were also supported".[48]

Apart from the cross-border element, that is, the implication of operators and organizations from several Member States, other important eligibility criteria for all three projects included the innovative nature of the activities, their capacity to spread Member States' cultures and the creation of economically sustainable cultural resources. The financial focus of these projects continued with the "Culture 2000" program,[49] which supported cooperation projects in all artistic and cultural sectors (performing arts, visual and plastic arts, literature, heritage, cultural history, etc.) between cultural institutions in the EU states and accession candidates. With a budget of €236.5 million for a 5-year period, it aimed at promoting a common cultural area characterized by both cultural diversity and a common cultural heritage. In doing so, it also aimed at promoting social integration through arts. From 2000 to 2006, funding also addressed special cultural events with a European or international dimension.

After the "Culture 2000" program, the "Culture 2007–2013" program[50] represented a more coordinated approach to cultural cooperation. With a budget of € 400 million, it aimed at encouraging and supporting cultural cooperation at a European level with a view to encouraging the emergence of European citizenship. The program mainly promoted "transnational mobility of cultural players, transnational circulation of artistic and cultural works and products and intercultural dialogue and exchanges",[51] and co-financing around 300 different cultural actions per year.

Although the Culture program ended in 2013, many activities are meant to continue under the "2014–2020 Creative Europe" program.[52] Seen by some as a new attempt at policy-making,[53] the "Creative Europe" program is economic in nature, aiming at supporting the European cultural and creative sectors and positioning itself within the framework of the goals of the Europe 2020 Strategy. Based on the concept of "cultural and creative industries", the new program is meant to promote "smart, sustainable and inclusive growth", and to contribute to "high employment, high productivity, and high social cohesion".[54]

Creative Europe comprises ten wide-scale projects: "Should I stay or should I go?—A collective storytelling project" is a two-year interdisciplinary program drawing together five theater companies from Germany, Sweden, France, Austria and Slovenia to establish collective storytelling as a model of international cooperation and cultural exchange. The "European Citizen Campus" (EEC) aims at promoting student art projects carried out by ten universities and student service organizations from six different countries. This project highlights the vital role of these student organizations in the development of a European identity among young people through art projects. "The Uses of Art—on the legacy of 1848 and 1989" is a 5-year project aiming at developing a new European model for content-driven, sustainable collaboration in the field of museums. "Frontiers in Retreat", co-organized by eight art organizations working across eight European countries, encourages a multidisciplinary approach with a view to broadening the understanding of global ecological changes and their local impacts on European natural environments. In the project "Visualize the Invisible" organizations aim at implementing participatory art projects in Sweden, Croatia, Albania and Former Yugoslav Republic of Macedonia. Artists rely on different art techniques and forms to encourage cooperation with people in residential areas and places such as prisons and schools in order to provoke wider discussions on the role of arts in

societal change. All participants, the artists and people they interact with, become part of an integrative artistic creative process. Another project within the "Creative Europe" program is "LOCIS, an Artist-in-Residence Programme"[55] involving a rural local authority in Ireland, an arts center in a large provincial town in Poland and an arts organization in a suburb of a capital city in Sweden. "LOCIS" is based on the principles that high-quality arts projects can be based anywhere, that networking across borders can occur anywhere in Europe and that the integration of artists from different countries into a different society will entail a greater appreciation of European artists by the general public. The project "CUNE Comics-in-Residence (CiR)" is an exchange program for European comic artists. In 2013–2014, CUNE CiR arranged 16 residencies in Helsinki, Malmö, Riga and Tallinn and held six international seminars on new cross-cultural cooperation measures at important European comics festivals. "Promoting Cultural Network see and connecting local projects in South-East Europe" aims at continuing and expanding the work of the project started in May 2012. With a wide participation of students, mentors and media, the first international music workshop was organized in August 2012 in Brežice, Slovenia, and a foundation for Accordion Orchestra of South-East Europe was established. The project "Outreach Europe" aims at encouraging social inclusion through cultural participation mapping and researching the way museums, galleries and cultural institutions across Europe engage with an audience beyond the traditional means of outreach: how the marginalized are reached, what links are established between cultural/social participation and health and how volunteers are included from non-traditional groups and so on. Finally, "European Prospects" is a 24-month project involving collaboration between key arts organizations in Wales, Germany, Lithuania and France to create new platforms for photographers and lens-based artists from across Europe where they can produce and exhibit their work, articulating the idea of diversity of identity and experience in an enlarged EU.

These ongoing ten wide-scale projects encourage the development of two main objectives: (a) to protect, develop and promote European cultural and linguistic diversity while promoting Europe's cultural heritage, and (b) to encourage the competitiveness of the European cultural and creative sectors, in particular of the audio-visual sector. In its turn, the Culture Sub-programme is based on a number of priorities such as (a) supporting actions providing cultural and creative actors with skills, competences and know-how with a view to strengthening the cultural

and creative sectors, and actions aimed at encouraging adaptation to digital technologies, testing innovative approaches to audience development and testing new business and management models; (b) supporting actions encouraging cultural and creative players to cooperate internationally, where possible on the basis of long-term strategies, which in turn will contribute to internationalizing their careers and activities within the Union and beyond; and (c) providing support in order to strengthen European cultural and creative organizations and encourage international networking in order to facilitate access to professional opportunities.

These objectives also reveal that the "Creative Europe" program, unlike previous programs, is fundamentally economic in nature, though in the definition of the regulation it is stated that "cultural and creative sectors" means all sectors "whose activities are based on cultural values and/or artistic and creative expressions, whether these activities are market- or non-market oriented".[56] The promotion of cultural diversity and intercultural dialogue is still an important idea but now "culture" is seen as "a catalyser for creativity" which should lead to growth and employment. Even the language has changed: the former cultural sector is now called the "cultural and creative sector". There is an emphasis on competitiveness, on growth, on artists as producers of works which must be distributed as widely as possible, on international trade and increased revenues for the sector, and on reaching wider audiences in Europe and beyond.

5 Conclusion

This chapter has shown that despite the problematic nature of culture for European identity and European integration, significant steps have been taken to bring culture into the scope of the European institutions. Though the cultural dimension had already been introduced in the supranational discourse in the early 1970s, it was only with the Treaty of Maastricht in 1992 that the EC/EU was provided with the legal framework that would enable the institutions to address culture through a two-fold approach: first, through the application of the EEC Treaty rules to the cultural sector, that is, the elimination of obstacles for the free circulation of cultural goods and services, and second through the implementation of a series of cultural actions, especially after the introduction in the Treaty of Maastricht of the so-called article on culture (Article 128), which, viewed through the unity-in-diversity

paradigm, focused primarily on heritage protection and cultural interaction, encouraging support for architectural and archaeological preservation, conservation of works of art and artifacts, sponsorship of cultural activities and translation of books, educational projects developed by the EU in Central, Eastern and Southern Europe as well as the Balkans since the 1990s.

The financial focus of the promotion of culture, however, developed in the late 1990s with the first wide-scale programs, "Kaleidoscope", "Ariane" and "Raphael", which merged with the "Culture 2000", a program to support cooperation projects between cultural institutions in the EU states and accession candidates. From 2007 to 2013, the focus in cultural support was on fostering the development of a European citizenship. Cultural undertakings encouraged cross-border mobility of people and works of art as well as intercultural dialogue. Funding was also allocated to literary translation, culture festivals and cooperation projects with third countries. In the 2014–2020 "Creative Europe" program, though the promotion of culture is still important, the emphasis is on culture as a catalyst for creativity and culture's potential for growth and employment within the 2020 strategy. Current developments show that the emphasis of the EU on cultural programs is moving toward integrating the regions around the cities.

Thus, on the one hand, the mechanisms set in motion, especially since 1992, allowing not only the circulation of cultural goods and services but also the cooperation and interaction between citizens from various places throughout Europe have directly supported the development of a European identity which is still in its incipient stages. This is a model of identity formation in which "an orientation to Europe derives fundamentally from core, established European values and their expression in public practices, most notably in governance and the operation of the legal system".[57] On the other hand, in more recent years, especially starting with the "2007–2013 Culture", the EU has, though with little visibility, begun sponsoring activities such as art festivals (art exhibitions, film, theatrical and music performances), where artists and audiences come together, and where increasing interaction and exchange of ideas among Europeans contribute to bottom-up identity formation. A stronger presence of the EU at these increasingly frequent cultural gatherings would bring the EU great benefits in terms of European identity formation.

Notes

1. Céline Belot, "Le tournant identitaire des études consacrées aux attitudes à l'égard de l'Europe. Genèse, apports, limites", *Politique européenne*, Le Harmattan, Paris, no. 30, 2010, pp. 17–43.
2. Sophie Duchesne, ed., "L'identité européenne, entre science politique et science-fiction", in *Politique européenne*, Le Harmattan, Paris, no. 30, 2010.
3. Charles Tilly, "Political Identities in Changing Polities", *Social Research*, Vol. 70, no. 2, 2003. See also, for example, Juan Diez Medrano, *Framing Europe. Attitudes to European Integration in Germany, Spain and the United Kingdom*, Princeton University Press, Princeton/Oxford, 2003; Michael Bruter, *Citizens of Europe? The Emergence of a Mass European Identity*, Palgrave-McMillan, London, 2005; Richard Robyn, *The Changing Face of European Identity: A Seven-Nation Study of (Supra-) National Attachments*, Routledge, New York, 2005.
4. Rogers Brubaker and Frederick Cooper point out that frequent reformulations have made the concept of European identity less and less operational. Rogers Brubaker and Frederic Cooper, "Beyond Identity", *Theory and Society*, Vol. 29, 2000, pp. 1–47; See also Gerard Delanty, "Is There a European Identity?", *Global Dialogue*, Vol. 5, nos. 3–4, 2003, pp. 76–86.
5. Gerard Delanty, "The Making of a Post-Western Europe: A Civilizational Analysis", *Thesis Eleven*, Vol. 72, no. 1, 2003, p. 10.
6. Gerard Delanty, *op. cit.*, p. 10.
7. Emphasis mine.
8. Jörg M. Schlinder, *Culture, Politics and Europe: En Route to Culture-Related Impact Assessment*, 2012, p. 3, available at: http://www.cultural-policies.net/web/files/222/en/Culture,_Politics_and_Europe(1).pdf (accessed 16 October 2015).
9. Nina Obuljen, *Why We Need European Cultural Policies*, European Cultural Foundation, 2004, p. 11, available at: http://www.culturenet.cz/res/data/004/000564.pdf; Evangelia Psychogiopoulou, *Integration of Cultural Considerations in European Union Law and Policies*, Martinus nijhoff publishers, Leiden, 2008, p. 16.
10. Nina Obuljen, *op. cit.*, pp. 12–13.
11. Delanty, "Integration through Culture? The Paradox of the Search for a European Identity", in *European Citizenship: National Legacies and Transnational Projects*, ed. Klaus Eder and Bernhard Giesen, Oxford University Press, Oxford, 2001.
12. Thomas Diez indicates that there is a number of competing meanings of integration, due to the "proliferation of names, and conceptualizations of what the name 'EU' means". Thomas Diez, "Speaking 'Europe': The

Politics of Integration Discourse", in *The Social Construction of Europe*, ed. Thomas Christiansen, Knud Erik Jørgensen, and Antje Wiener, Sage, London, p. 289; see also Thomas Diez, "Europe as a Discursive Battleground: Discourse Analysis and European Integration Studies", *Cooperation and Conflict*, Vol. 36, no.1, pp. 5–38. Interesting is also Vogt's idea according to which "different conceptualizations of European integration find support only through the national domain of discourse. Support for the integration process is formulated in terms of advancing the national interest and not in European categories of thought". Carlos R. Vogt, "Reconsidering the Normative Implications of European Integration: Questioning the Optimism about Post-National Communities in Critical International Theory", Conference Paper, Danish Network on Political Theory, Aarhus, May 22–24, 2003, p. 13.

13. G. Delanty, "Social Integration and Europeanization: The Myth of Cultural Cohesion", in *Europeanization: Institutions, Identities and Citizenship*, ed. Robert Harmsen and Thomas M. Wilson, Atlanta, Amsterdam, 2000.
14. Ramona Samson, *The Cultural Integration Model and European Transformation. The Case of Romania*, PhD thesis, Centre for the Study of Europe Department of International Culture and Communication Studies, Copenhagen Business School, 2006, p. 28, available at: http://openarchive.cbs.dk/bitstream/handle/10398/7732/ramona_samson.pdf?sequence=1
15. Ramona Samson, *op. cit.*, p. 2.
16. Klaus Eder, *op. cit.*; G. Delanty, *op. cit.*, pp. 76–86.
17. See Clifford Geertz, *Interpretations of Culture*, Basic Books, New York, 1973.
18. "Community Action in the Cultural Sector", Commission Communication to the Council, Bull. EC, supplement 6/77, 1977, p. 5.
19. The first attempts to shape an EU audio-visual policy were triggered by the developments of satellite broadcasting in the early 1980s. Since the adoption of the Television without Frontiers Directive (TVwF) in 1989, technological and market developments made it necessary to amend the audio-visual regulatory framework. It was revised in 1997 and 2007. With the last revision, the Directive was renamed Audiovisual Media Services Directive (AVMSD) and then codified in 2010. http://ec.europa.eu/archives/information_society/avpolicy/reg/history/index_en.htm
20. Later Article 128, known as the article on culture, of the Treaty of Maastricht, made specific reference to the audio-visual sector, thus confirming it is difficult to separate the audio-visual dimension from the cultural one.

21. In 2001, Ruffolo's report argued that in the same way as there had been clear political goals leading to economic prosperity, the single market and single currency, the same political was necessary in matters of culture. For achieving political union and in view of the enlargement process the Member States needed to share some common cultural values beside simple economic interests. It would not amount to harmonization but rather a model affording all Member States equal opportunities for the promotion of cultural diversity, in order to achieve the goal of what he called "unity in diversity". Ruffolo suggested that the formulation of European cultural policy would be of Part 2 European Union. See Report: on cultural cooperation in the European Union (2000/2323(INI)), Committee on Culture, Youth, Education, the Media and Sport Rapporteur: Giorgio Ruffolo. http://www.europarl.europa.eu/sides/getDoc.do;jsessionid=730677AFCB8F09FE473261E87C97DFD2.node2?language=EN&pubRef=-//EP//NONSGML+REPORT+A5-2001-0281+0+DOC+PDF+V0//EN
22. Quoted in Nina Obuljen, *op. cit.*, p. 30.
23. Art. 128 TEC, until 1999, and Art. 151 EC from 1999 to 2009.
24. Evangelia Psychogiopoulou, *op. cit.*, pp. 9–11.
25. See Declaration on European Identity, Bull EC no. 12, 1973.
26. See Resolution of the European Parliament of 13 May 1974 on Measures to Protect the European Cultural Heritage, OJ C79, 5/4/1976.
27. L. Tindemans, "Report on the European Union", Bulletin EC, supplement 1/1976.
28. "Community Action in the Cultural Sector", Commission Communication to the Council, Bull. EC, supplements 6/77, 1977.
29. Resolution of the European Parliament of 8 March 1976 on *Community Action in the Cultural Sector*, OJ C79, 5/4/1976; Resolution of the European Parliament of 18 January 1979 on *Literary Translation in the Community*, OJ C 39, 12/2/1996.
30. Evangelia Psychogiopoulou, *op. cit.*, p. 11.
31. "Stronger Community Action in the Cultural Sector", Commission Communication to the Parliament and Council, Bull. EC, supplement 6/82, 1982.
32. SOLEMN DECLARATION ON EUROPEAN UNION European Council Stuttgart 19 June 1983 Reproduced from the Bulletin of the European Communities, No. 6/1983. http://aei.pitt.edu/1788/1/stuttgart_declaration_1983.pdf
33. See Second P. Adonino Report for a People's Europe, Bull. EC, Supplement 7/85, 1985.
34. European Commission, a Communication, *A Fresh Boost for Culture in the European Community.*

35. See Resolution of the European Parliament of 17 February 1989 on a fresh boost for Community action in the cultural sector, OJ C69, 20/3/1989.
36. Initiating cultural activities in the EC, Adopted by the European Parliament on 17 November 1989.
37. Introduced as Art. 151 in the Treaty of Amsterdam.
38. Consolidated Version of the Treaty on the Functioning of the European Union, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN
39. See for example Kaufman and Raunig's detailed analysis of Article 151. T. Kaufman and G. Raunig, *Anticipating European Cultural Policies*, European Institute for Progressive Cultural Policy, Vienna, 2002.
40. M. Niedobitek, *The Cultural Dimension in EC Law*, Kluwer Law International, New York, 1997.
41. Jörg M. Schlinder, *op. cit.*, p. 2.
42. R. Crawfurd Smith, "Article 151: Status Quo or Unexplored Potential?", Paper given at Annual Congress of the Academy of European Law, 3–4 December 2004 (Trier).
43. See Report: On Cultural Cooperation in the European Union (2000/2323(INI)), Committee on Culture, Youth, Education, the Media and Sport Rapporteur: Giorgio Ruffolo, http://www.europarl.europa.eu/sides/getDoc.do;jsessionid=730677AFCB8F09FE473261E87C97DFD2.node2?language=EN&pubRef=-//EP//NONSGML+REPORT+A5-2001-0281+0+DOC+PDF+V0//EN
44. Nina Obuljen, *op cit.*
45. Decision 719/96/EC of the European Parliament and the Council of 29 March 1996 establishing a Programme to Support Artistic and Cultural Activities Having a European Dimension (Kaleidoscope), OJ L 99, 20/4/1996.
46. Decision 2085/97/EC of the European Parliament and the Council of 6 October 1997 establishing a Programme of Support, Including Translation, in the Field of Books and Reading (Ariane), OJ L 291, 24/10/1997.
47. Decision 2228/97/EC of the European Parliament and the Council of 13 October 1997establishing a Community Action of Support in the Field of Cultural Heritage (the Raphael programme), OJ L 305, 8/11/1997.
48. http://cordis.europa.eu/ist/ka3/digicult/non-research-programmes.htm#raphael
49. Decision 508/2000/EC of the European Parliament and the Council of 14 February 2000 establishing the Culture 2000 Programme, OJ L 99, 3/4/2004.
50. Decision No 1855/2006/EC of the European Parliament and of the Council of 12 December 2006 establishing the Culture Programme (2007 to 2013), OJ L 372, 27.12.2006.

51. http://ec.europa.eu/culture/tools/culture-programme_en.htm
52. Regulation (EU) No 1295/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Creative Europe Programme (2014 to 2020) and repealing Decisions No 1718/2006/EC, No 1855/2006/EC and No 1041/2009/EC Text with EEA relevance. OJ L 347, 20.12.2013, pp. 221–237.
53. Cornelia Bruell, *ifa-Edition Culture and Foreign Policy Creative Europe 2014–2020. A New Programme—A New Cultural Policy As Well?*, Ifa, 2013, available at: http://www.ifa.de/fileadmin/pdf/edition/creative-europe_bruell.pdf
54. Cornelia Bruell, *op cit.*, p. 13.
55. See http://www.creativeeuropeireland.eu/culture/projects/case-studies/locis-european-artists-in-residence-programme
56. *Op. cit.*, See Article 2 Definitions, p. 225.
57. European Commission, *The Development of European Identity/Identities: Unfinished Business. A Policy Review*, Directorate-General for Research and Innovation. Socio-economic Sciences and Humanities, 2012.

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CHAPTER 10

New European Economic Governance versus European Economic Government: From Market Constitutionalism toward a More Redistributive Constitutionalism

Ainhoa Lasa López

1 Eurozone Crisis as a Constitutional Crisis

There have been many and varied interpretations of the various financial, economic and public debt crises that have threatened eurozone implosion over the last decade. Some scholars see the main trigger of the eurozone crisis as lying in the high level of indebtedness of some European Union Member States (EUMS).[1] For those who consider the crisis to be one of sovereign debt, the solution lies in improving the legal framework of the European Economic and Monetary Union (EMU).[2] Others, however, see the eurozone crisis as a liquidity crisis in which the spread between public bond markets can only be avoided if the European Central Bank (ECB) is made into a lender of last resort, underwriting payment to holders of sovereign debt. This would entail questioning the overriding priority of price stability in the monetary policy.[3]

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Both interpretations, while differing in the causes and solutions they propose, share a common belief that the problems arise from the EMU's defective architecture. Indeed, they agree that this is a substantive problem, caused either by the asymmetries generated by the eurozone's structural design itself, or by the rigidities that accompany fixed exchange rates. One might therefore think that reformulation of the design of the EMU in one sense or another would provide the necessary remedy for ending the current crisis and preventing future ones.

However, various economists dissent, noting that these are short- or long-term responses that cannot overcome the eurozone's institutional deficiencies and are thus ineffective for solving the real obstacle, the problem of taking collective actions in intergovernmental governance.[4] This reasoning differs from the others in that it is committed to a federalization of relevant aspects of economic policy.

The problems arise when the theoretical framework from which the functions of MS and European institutions are defined is the same, European Economic Governance (EEG). Some arguments seek to reconcile the two models as if the terms of the EEG–European government relationship could be conjugated in a multiplicity of mutually complementing meanings. If economic government is characterized by the primacy of politics legitimized by the possibility of public intervention in the economy, economic governance involves a radical change in the conception of politics, leading to the privatization of political decision-making.[5]

For this reason, we believe the issue is not merely a failure in the eurozone's institutional architecture, as if it were an autonomous and independent system. On the contrary, we believe the causes of this crisis lie in the contradictions of the political, economic and legal functioning of the globalization process, a process whose essence is perfectly reproduced in the European integration project—the regulatory state as a form of economic intervention by public government in the economy, an alternative to political direction of the economy. The principal feature of the proposal put forward in the 1980s in response to the disquiet caused by the form of state created in the fundamental text of the second postwar period, the social state, is the state as the guarantor of the market and its prerogatives.[6]

We therefore believe that what triggered the crisis was the systemic crisis of globalization and, thus, of European market constitutionalism as a paradigm of realization of the content of the globalizing project to which it confines itself. From this perspective, we consider that the proposals made for dealing with the crisis are insufficient. This is particularly

true bearing in mind that the only alternative to the current EEG crisis is reinforced governance, which really means extending the Union's current economic model. There is no alternation of models, only an unqualified acceptance of the continuity and strengthening of the fundamental political decision adopted in the treaties: to protect and guarantee the principle of an open market economy with free competition.

2 The Economic Model of European Market Constitutionalism

2.1 European Economic Constitution: A Methodological Approach

One of the main difficulties facing any analysis of the concept of economic constitution is the lack of a consolidated legal language to address the real implications of the term within the field of European constitutional science. Nevertheless, in general terms it is possible to identify a differentiated, two-fold approach. On the one hand are those who consider the economic constitution to be an independent or autonomous concept of the political constitution that is redirected to the set of rules governing the economic order. One direct effect of this methodological separation is the neutrality of the implications of political constitution—an aseptic and speculative economic model because its contents are dependent on the prevailing trends at any time.[7]

A second approach to the concept is characterized by the necessary association between the fundamental principles that express the political formula of the integration process and the economic constitution. In this argument, the foundations of the European economic constitution cannot be reduced to economic relations, essentially because they must be viewed in reference to the underlying political choice associated with the Union's form and objectives, for which these provisions are the instrument of implementation.[8]

To establish the bases of the European economic constitution, adopting the premise that the basic political idea is an essential constituent element alongside the economic device, requires referring the economic constitution back to the constitutional framework predetermined by the Union's referential values. Once the constitutional links are established, the European economic constitution emerges not as a constitution that is independent of the integration process but as a part of the political constitution.

This notion of a prescriptive economic constitution resurrects a debate first mooted in the Weimar Republic, from which it is commonly accepted that the concept derives. At that time, there were two opposing positions. One thesis defended incorporating elements of social justice into the economic system, with consequent state intervention through the transfer of economic management to the political sphere. This proposal was subsequently incorporated into post–World War II constitutions. The other thesis advocated assigning to state interventionism the role of guarantor of the functioning of the economic system.[9]

The latter thesis, proposed by members of the Freiburg School, has consequently been recovered in the process of European integration, where it characterizes the EU as a regulatory state, in which the rupture of the social bond and the centrality of the market form the theoretical grounds for the Union's economic constitution.

2.2 The Constitutional Parameters of Negative Integration

There is constant tendency in the legal literature to resort to the term "economic constitution" to address the origins and evolution of European integration.[10] Apart from the first texts on the community's economic constitution, basically involving descriptive formulations which did not tap into the full potential of the formula,[11] debate on the concept has been strongest since the late 1980s and early 1990s, due to the changes introduced by the EMU.

As for the origins of the integration process, we believe that the most interesting proposal is that which interprets the Treaties Establishing the European Communities, linked to ordoliberalism (as opposed to the intervention model of the social state) as representing the construction of opposing spaces, introducing contradictory logics, that is, European market constitutionalism versus MS social constitutionalism. In other words, they stand for a separation between the national social dimension and the European institutionalization of a system of free competition.[12]

The starting point is without doubt the Freiburg School. Certainly, in the ordoliberal proposal, the economic constitution is presented as being opposed to that of the social state's economic constitution, articulated around corrective state intervention in the market as determined by the social bond. Indeed, according to ordoliberal postulates, its economic model is based on indirect regulation and not on a state-directed economic system. In contrast, in indirect regulation the political power establishes

the structural conditions for the effective functioning of the process. The economic bond defines the limits of the public sphere in the market, and the law on competition, as a guarantor of regulated competition, governs its correct functioning.[13]

In this economic-political core, this competence acts constructively, seeking to restore its role as a stimulating force and a means of social organization through actions aimed at preserving and stabilizing the economic efficiency of competition. For ordoliberal theorists, the purpose of *Völlständiger Wettbewerb* ("perfect competition") is the essence of economic order, making it the guiding principle of government policy.[14]

Theories on competition embody the abandonment of both the liberal postulate of non-interventionism and the social postulate of interventionism to correct the socio-economic inequalities generated by the market. In the liberal paradigm, this is because the fundamental issue, for which the public powers are an essential mechanism, is to guarantee perfect competition. The existence of an economy with free competition is guaranteed by the state's exercising a constituent role in the market order that ceases to be spontaneous. In the ordoliberal thesis, the divide between the public and private space ceases to exist. In the case of social constitutionalism, on the other hand, it is because competition, according to ordoliberal thought, acts as a limit to further state intervention in the economy. The legitimacy of state intervention is the guarantee of competition, which is the guarantee of the free market. The state only intervenes when market conditions endanger the competition that defines the field of political power and its sphere of realization. From this perspective, politics is functionalized and the relationship between economics and politics, as conceptualized by the social state, is reversed.[15]

The second significant element of ordoliberal thought, in terms of its impact on the European legal order, is the social market economy, especially following its formal introduction in Article 3.3 of the Treaty on European Union (TEU). Opening up to state intervention allows for a widening of the public space that extends to social policy and intervention in the situation. However, in Freiburg School formulations, the social market economy is always considered to be subject to the logic of the market and delimited by the preservation of the market.

However, the social market economy is based on constructive competition developed in the field of quality and efficiency which requires a connection with fields of action that border the economy, such as social action. The social objective of the social market economy is promoted in

a manner inherent to market principles. Indeed, the social goals include the protection of competition. Moreover, the active economic policy must be limited to that adoption of market-oriented measures, defined as being measures that ensure the social purpose without impairing or interfering in the market mechanism.[16]

In the social market economy, therefore, all social policies are subordinated to the logic of the market, where they find their limits. In social policy it is critical to stop trying to make social reforms through interventions that alter the market balance. Direct manipulation is replaced with an indirect social policy that can in no way encumber the economic market. This means rejection all social policy that does not act in accordance with the market.[17] These references help to highlight the functionalization of ordoliberal public intervention in the market and the guarantee of its functioning, as well as subordination of social policy to the market by way of a subordinate compatibility.

Returning to the interpretation that views the original community economic constitution in terms of rupture with social constitutionalism, the separation between European economic integration and social state as opposing models can be seen to tie in directly with ordoliberal thinking. In this interpretation, the level of European competition cannot be distorted by the political functions that require a political legitimacy that can only exist within the institutions of Western democracies.[18]

3 Strengthening the Economic Bond: New European Economic Governance

3.1 Theories on Enhanced European Economic Constitution

The first great systemic crisis of globalization has been accompanied in the European supranational space by the adoption of different measures that seek to offer normative responses to this impasse. Under the auspices of a reinforced architecture for Economic and Monetary Union, the EEG's new legislative pack has taken the form of reform of the Stability and Growth Pact (SGP),[19] the Euro Plus Pact (EPP),[20] the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG)[21] and the Treaty establishing the European Stability Mechanism (TESM).[22] These steps have been analyzed from different perspectives in the literature.

Firstly, there are those who maintain that the changes introduced by the new EEG represent a break with the original economic model. From this perspective, the new improved legal framework of the EMU will result in a mutation of EU law in general, and of the principles governing the institutional structure of the EEG in particular. Thus, it is argued, some of the structural reforms and rules of secondary law adopted by European institutions and EU Member States represent a breach in the principle of an open market economy with free competition, insofar as the concept of internal market ceases to be presented as the ideal governing the *modus operandi* of European institutions within the EMU.[23] From this perspective, these legislative measures have resulted in a transformation of the legal principles governing the eurozone, going from deregulation to a regulation which—although attenuated—has led to a "strong governance", with all the resulting constitutional and legal implications.[24]

This reflection is argued from two associated but substantially different perspectives. The first analysis links the reversal to the break in Hayek's radicalism as the theoretical basis for defining the model. Market autonomy as an expression of a self-organizing system involves constitutionalization of the market economy as an economic model by the Treaty of Lisbon. Nonetheless, some of the reforms of the European economic constitution involve changes in the structural elements of the integration process, to the extent of questioning the self-stabilizing ability of the markets. Rescue programs for financial institutions, the ECB's abandonment of its role as a guarantor of the economic constitution of the European regulatory state, implementing measures such as the unlimited rollover, and the adoption of corrective actions by EU institutions are just some examples that create contradictions with the characteristics of a model defined as an open market economy with free competition.[25]

In contrast, the second interpretation links the change of model with the abandonment of ordoliberalist principles, the replacement of the original economic constitution, linked to integration through law, with another based on collective governance where the law cedes control of the space of enforceable decisions in order to restore the conceptual basis of the rationality of the new model, at a remove from the necessary democratic legitimacy of the decision-making process.[26]

Critics of the set of rules of the reinforced economic constitution adopt a view that extends beyond the structural element of eurozone reform to highlight the subversive character of the new model. This questions the legitimacy of constitutional democracy by strengthening the use

of intergovernmental mechanisms outside the confines of Union law, undermining the decision and competition spaces articulated by primary law, and introducing new complexities that are difficult to articulate and compose in legal and constitutional terms. The TSCG and the EPP, as mechanisms of international law of doubtful legal character in EU law, embody the fundaments of a new economic constitution, in opposition to that of the Treaty of Lisbon.[27]

In this argument, the debate on the European economic constitution lies within the scope and meaning given to the modifications introduced by the new EEG. Despite the heterogeneity of the proposals, both consider the economic model introduced to manage the crisis to be an economic constitution that legitimates a type of intervention that runs contrary to the original model.

3.2 New EEG and Economic Order

The needs that emerged in the EMU crisis began to manifest themselves, at least in normative terms, in 2010. The European Commission decided to give a shot in the arm to the eurozone with a proposal to adopt a number of provisions of secondary law. At the same time, various countries in the eurozone, taking into account the formal limits of the Treaties, began the process of strengthening the economic bond by integrating commitment to the golden rule into their constitutional texts and adapting their domestic labor laws to a process of convergence through the assumption of the postulates of market constitutionalism. Simultaneously, the emergence of new crisis management agents (such as the troika and the Eurogroup) and the creation of new decision-making spaces, such as the European Semester, have created a troubled scenario where the drift toward intergovernmentalism, the conferring on European judges of the role of guardians ensuring the process of constitutionalization of budgetary stability, and the inclusion of positive integration among the determining factors of market autonomy, thus absorbing any attempt to direct the debate toward the goals of social justice, have shaken the very pillars of the European project.

Nevertheless, I believe that it is somewhat forced, at least, to consider this phase of the integration process as an erosion of the principle of open market economy with free competition, particularly, given that the arguments supporting this contention refer essentially to Hayek's radicalism as the theoretical anchor for defining the model of economic constitution.

It seems more appropriate to analyze the scope of the innovations incorporated by the new EEG from a twin perspective: on the one hand, from the meaning and scope of the rules adopted to determine their potential conflict with the previous EEG; on the other, from the combination of intra- and extra-European instruments and in particular, the legal anomalies introduced by the international agreements adopted at this stage.

To focus first on Union law, the relevance of the reformed SGP is that it introduces stricter mechanisms, consolidating a type of intervention that links macroeconomic stability to market autonomy. In the reform of 2011, the philosophy accompanying the SGP was to strengthen the elements of action based on prevention, monitoring and implementation of corrective measures. The inclusion of deficit in public debt does not signify a redefinition of the theoretical and ideological macroeconomic structure that serves as regulatory support for these control rules on public debt. The control mechanism of the Union's economic policy (price stability and budgetary discipline in the context of an open market economy with free competition) reflects the compatibility of public intervention based on a monetary policy of containing public debt with the centrality of market protection.[28]

The SGP, as a mechanism for controlling and extending the contents of the European economic constitution to MS through budgetary links essentially affecting national social intervention instruments (e.g. the reduction of social spending on health, education, social services, structural reforms of national labor markets and pension reform), has the additional function of consolidating the economic model in force since the original Treaties.

A similar argument may be made with regard to the pacts. The EPP reinforces multilateral surveillance. To this must be added the revival by national authorities of a policy of pursuing perfect competition or maximized competition, which acts as a limit to greater state intervention in the economy.[29] Competition defines the space of intervention that is the market. This is especially true given that the four objectives of the EPP are all linked to the goal of promoting competition as a guiding principle of improving labor markets and national welfare systems.[30] This maximization of competition can only be achieved through the use of modernization measures, masked structural reforms and social and labor laws inherited from the parameters of social constitutionalism.

As can be seen, the enhancement of competition focuses particularly on public intervention, consolidating the institutionalization of the economic rationale in the sphere of international agreements and rejecting any

measure of direct economic interventionism or Keynesian management. It seems clear, then, that the EPP maintains and reinforces the principle of a system that determines and presides over EU law, the open market economy with free competition.

Moreover, the TSCG provides for response mechanisms against countries that have not incorporated the golden rule or structural deficit limit into their constitutions (Article 3.1.e). The refusal of Treaty signatory states to adopt counter-cyclical economic policies means criminalizing and blaming the crisis on public spending. The goal is to control budgetary stability. Furthermore, it seeks to reduce the Social State, which is identified with public spending, the main obstacle to a containment of the negative effects of imbalances. This decision by the member countries embodies the internalization of the Union's constitutional values in national law, denaturing and deconstitutionalizing the contents and the limitations to the economic bond. From this perspective, then, one can see continuity and reinforcement of the original model of economic constitution.[31]

Similarly, when the new EEG is interpreted as a mechanism that transcends the domestic political democracy of the MS and the control instruments introduced by the rule of law,[32] it is worth remembering that these same problems were raised when the original SGP was approved. In particular, the aim of the SGP, agreed in 1997, to reconcile respect for national sovereignty in defining and directing their economic policies with the maintenance of sustainable economic convergence, was compromised. This was fundamentally due to the fact that the imposition at that time of greater restrictions than those envisaged in the Treaty of Amsterdam, was not especially compatible not only with the treaty itself but also with the system of division of powers established under primary law.[33] There is therefore no replacement or mutation of the European economic constitution model, but rather a reiteration of the contradictions that this model incorporates.

4 Final Remarks

As we have discussed, criticism of the new EEG based on the absence of a direct and clear grounding in the Treaty of Lisbon is nothing new. A different issue, however, is the persistence of the problems arising in terms of the normative legitimacy of both the reinforced SGP (incorporating a special securing system that transcends the legal system of the Treaty through a tightening of the budgetary principles in undisputed rules of secondary law) and the TSCG (straining the Union system through external routes which

in formal terms have nothing in common with it). These disparities can be summarized in the following terms: the contradiction between market and democracy materialized in the TSCG illustrates the unlimited exaltation of the economic bond, calling into question the EU's control mechanisms. This contradiction is further augmented in the case of domestic constitutions that require a reform process to adapt to the economic logic.

The new legal references determine the integration process itself, but due to their ties with the logic of monetarist fundamentalism, it is unlikely that they will be called into question by EU institutions. On the contrary, their inclusion in the core of the Treaty on Stability, particularly the European Commission and the Court of Justice of the European Union (paragraph 1 and 2, article 8 TSCG), brings greater doses of ambiguity and uncertainty. The hegemony of a new type of law, attached to market constitutionalism, questions the traditional rule of law and, at the same time, opens new spaces for the canons of legal technique that are difficult to reconcile with our traditional rule of law.

It is therefore even more necessary to build an area of contention at a European scale and to erect limits to the unconditioned centrality of the market, preventing the colonization of national spaces of protection and guarantees of the social bond. A social bond must be established to the European economic constitution in order to articulate the relation between economic stability and social justice from the space of public distribution, in terms radically opposed to those of monetarism. The hyper-rigidity of budgetary balance should be replaced by another principle that can articulate the public-private relation in the systemic crisis of the globalization project.

This suggestion goes beyond the theoretical debate on models of European economic constitution, standing within the global and EU context.[34] The EU is the domain in which the principles of the political model of globalization take material form. The failure of this model to tackle the crisis, generating new phenomena of poverty and social exclusion, must therefore necessarily lead to its removal.

This process must actively involve the European citizenship in a way that goes beyond mere recognition of a set of political rights without granting capacity to inform policy decisions. Definition of the contents of economic constitution, far from being in the hands of intergovernmental bodies, which would devalue an issue that is essential to political and democratic debate, should be traced back to the framework of plurality.

Only by defining core issues (the rescue of social Europe, the economic constitution) for real citizen participation, will active support of the

people of Europe for the integration process be ensured. Otherwise, the possibility of joining in a shared project of such diverse socio-economic realities will be no more than a chimera.

Notes

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19. The reinforced SGP is made up of new laws, known as the Six Pack [Regulation (EU) no. 1173/2011, on the implementation of efficient budgetary surveillance in the euro area, published in OJ L 306 of 23 November 2011; Regulation (EU) no. 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, published in OJ L 306 of 23 November 2011; Regulation (EU) no. 1175/2011 amending the surveillance procedures of budgetary positions, published in OJ L 306 of 23 November 2011; Regulation (EU) no. 1176/2011 on the prevention and correction of macroeconomic imbalances, published in OJ L 306 of 23 November 2011; Regulation (EU) no. 1177/2011 amending the procedure concerning the excessive deficits, published in OJ L306 of 23 November 2011; and Directive 2011/85/EU on the requirements for budgetary frameworks of the Member States, published in OJ L 306 of 23 November 2011] and the Two Pack [Regulation (EU) no. 472/2013 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, published in OJ L 140 of 27 May 2013; Regulation (EU) no. 473/2013 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, published in OJ L 140 of 27 May 2013].

At the end of 2014, the European Commission proposed a review of SGP to consider to what extent the new rules introduced by both the six pack and the two pack have been effective in achieving their goals, and whether they have contributed to progress in ensuring closer coordination of economic policies and sustained convergence of economic performances of the MS. Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions. Economic governance review. Report on the application of Regulations (EU) no. 1173/2011, 1174/2011, 1175/2011, 1176/2011, 1177/2011, 472/2013 and 473/2013, Brussels, 28.11.2014, COM(2014) 905 final.

20. This was agreed among euro area Member States, as well as six non-euro area countries. The Pact was endorsed by EU leaders in March 2011. It has four main objectives: to strengthen competitiveness, a high level of employment, sustainability of public finances and to reinforce financial stability.
21. Also known as the Fiscal Pact, the purpose and scope of the Treaty, as established in Article 1, is "to strengthen the economic pillar of the EMU by adopting a set of rules intended to foster budgetary discipline through a fiscal compact, to strengthen the coordination of economic policies and to improve the governance of the euro area".
22. The ESM replaces the European Financial Stability Facility (EFSF) which arranged the distribution of loans to European MS with financial problems. The new mechanism is intended to be a permanent bailout fund for euro area MS. It follows the model of the International Monetary Fund (IMF), with an effective lending capacity of 500 billion euros reviewable periodically. The conditions of financial assistance are very strict, within the framework of a macroeconomic adjustment program and a rigorous analysis of the sustainability of the public debt. In addition, the State rescued must establish a participation of the private sector consistent with the practices of the IMF. It is important to highlight that the ESM is an international organization that is not subject to the rules applicable to EU institutions.
23. Agustín José Menéndez, "La mutación constitucional de la Unión Europea", *Revista Española de Derecho Constitucional*, no. 96, 2012, pp. 83–86.
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CHAPTER 11

The Transcendental Construction of the Social Dimension of the European Union: The Challenges of the EU Social Model During and After the Crisis

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1 What Does the European Social Model Mean?

Although most attention regarding the eurozone crisis has tended to focus on an unusual degree of legislative activism both within and outside Union law, it is equally true that European institutions have promoted the adoption of social legal measures to reduce the social effects of the crisis of financialized capitalism.

Before considering this catalogue of legislation, however, it is important to analyze the meaning and scope of the expression "social model" in the European legal system. The one major question that needs to be answered is whether this is a distinctly European notion—inferring that there is an autonomous social model at a European scale—or whether

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instead, the European social model consists of an amalgam of principles, objectives and values inspired by the common constitutional traditions of the Member States (MS).

Most writers believe that the European social model is not a welfare model common to all European partners, given the diversity of national experiences and the difficulties in choosing and generalizing one of these models. Moreover, the current design of competences in EU Treaties would also pose an obstacle to building positive European integration.[1]

There are others, however, who argue that the European social deficit is simply the result of the political and legal model around which the Union has been constructed since its origins. These writers reject the methodological and pragmatic criticism, focusing instead on the material constitution of the integration project as the true epicenter defining the spaces for the realization of the European social dimension.[2] In this assessment, the arguments are linked more to the decision on the Union's system than to the instability of the mechanisms envisaged in primary and secondary law to create a common social regulation.

From the outset, this discussion requires that the term "social model" be considered from a transnational perspective, disregarding any reference to national social models. This is fundamentally important, since the same words do not connote the same model if the context in which they are formulated is different. In particular, in the European legal order, social objectives are not incorporated into the primary sources in the context of a materiality engendered by the emergence of the Social State. The institutionalization of the distributive conflict with the resulting political and economic integration of its protagonists is a dynamic that extends beyond market constitutionalism.[3]

By contrast, the European social model contains the values that inform the fundamental principles that give unity to the whole of European design. The European institutional and constitutional complex is built from a new material reality that is opposed to that of the Social State. The key is that this new material reality involves the rupture of the social bonds of the economic system established in social constitutionalism. Definition of social intervention for and from the market creates a new centrality that entails a contradiction between market and conflict integration, laying the grounds for a new material constitution characterized by the centrality of the market. The remercantilization of the State places the market at the center of the form of state, sanctioning its autonomy and linking public activity to the protection and guarantee of the latter.[4]

Secondly, configuration of the social model in European market constitutionalism is conditioned by the European economic constitution and competitive solidarity which are at the same time constitutional parameters of the new material constitution. The principal component of the European economic constitution is the open market economy with free competition. Article 3, paragraph 3 of the Treaty on European Union (TEU) introduces the term "social market economy", apparently appealing to a conjunction of interests of positive and negative integration.

Nonetheless, this expression, far from representing a third way, distinct to both the invisible hand of the market and the redistribution of wealth,[5] highlights the marginalization of the social sphere in European law. The transition from a model that performs functions of macroeconomic stabilization to one that concentrates European regulatory activity on limiting the capacity for state intervention, illustrates the status assumed by European social policy. Establishing economy as social policy marks a transition from redistributive solidarity to competitive solidarity. Precisely those competences linked to the social model are articulated through residual competences that seek to serve the market. Market autonomy is the material criterion of the division of competences characterized by weak European intervention in the socio-economic field, as compared to the strong control through the new European Economic Governance (EEG) mechanisms that discipline state intervention.[6]

The new commitment of the European and national public powers to protecting market autonomy, as embodied in market constitutionalism, means that the internal market determines the content of solidarity. Protectionism and redistributive policies give way to the achievement of competitive and productive success, which become mechanisms for defending national solidarity. Thus, the social asset of the EU's system is configured from the institution of the internal market, which is the main engine of integration process. In the European project, defined as a highly competitive social market economy (Article 3, Paragraph 3 of the TEU), the absence of a European social policy disassociated from the market is justified not by caution with regard to the social autonomy of national governments but by the conditioning factor of its conformity with the market.

Consequently, the social intervention of the European institutions is legitimate if it is justified by the exigencies of the constitutionalized economic model, market autonomy and free competition. The European status and guarantees of social rights contrast with their conception in the national constitutional orders—mainly, because the objective of social

citizenship of the Union corresponds to the specific requirements of the internal market. From a more general perspective within the field of the Union's social policy, as established in the new Title IX of the Treaty on Functioning of the European Union (TFEU), social rights become mere parameters of normative legitimacy, assuming a validity not in themselves but as additional rights to economic freedom.[7]

In this context, "competitive solidarity" determines the transition to a social model corresponding to European market constitutionalism, where the subordination of the social policy to the imperatives of the internal market illustrates the rupture of the model and the intrinsic negative potentiality of competition law is a question of consistency with the new model.

Thirdly, the new meaning of social intervention, linked to the constitutionalism of the European market makes it possible to apprehend the new significance and scope of the social policy within it. More specifically, within the overall hierarchy of the Union's purposes, social policy objectives occupy a subordinate position to the economic objectives of monetary union. At the apex of the hierarchical pyramid of purposes stands economic policy, followed by the canons of monetary union, founded on the criteria of controlling inflation and public debt.

Paradigmatic in this regard is the second paragraph of Article 151 TFEU, which states that social policy must take into account the need to safeguard the competitiveness of the Union's economy. The third paragraph asserts that the various social objectives established by the provision (promotion of employment, improved living and working conditions, etc.) will primarily be achieved through the functioning of the internal market which will in turn favor the harmonization of social systems. Thus, social policy is made subject to an unequal balance with the monetary demands of economic efficiency and budgetary stability in which the means to achieve them—sound public finances—not only stand above the social purpose in hierarchical terms but also determine its real legal scope.[8]

Paralleling this, references to the instruments of international law concerning social rights, such as the European Social Charter of 1961 and the 1989 Community Charter of the Fundamental Social Rights of Workers in an article associated with policies and social policy rather than rights, are an implicit recognition of the paucity of legal rules influencing the Treaty of Lisbon that build the European social dimension. At the same time, the fact that the social rights contained in the two documents constitute neither a limit nor an objective of Union action (underscored by use of

the formula "having in mind" in Article 151) limits the legal effect of the provision to a lesser bond than that derived from the debate on the programmatic rules. All in all, the absence of regulatory safeguards, together with transferal of the effects of positive integration to the field of political availability, prevents articulation of legal and constitutional resistance, as opposed to the need to maintain the competitiveness of the Union's economy.

2 Some References to the Policy Agenda Adopted During the Systemic Crisis to Relaunch the Positive Integration: Balancing Interests?

Sadly, the euro crisis has not wrought a change in the subordinate status of the social dimension in the EU described above. Legislative responses have focused on preserving the eurozone project at all costs. Furthermore, the use of normative figures outside the bounds of Union law, such as the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), have introduced a strong legal distortion in the Union[9] that is only precariously composed by incorporating interpretation clauses in accordance and compatible with the Treaties (Article 2 TSCG).

In addition to these considerations, however, we wish to highlight the way in which measures engendered to correct the asymmetry of social justice in Europe have remained within the limiting coordinates of European market constitutionalism, demonstrating once again the shortcomings of the structural design of the European social model. We shall do this by focusing on an analysis of the Europe 2020 strategy,[10] a policy document which has replaced the Lisbon Agenda and aims to help MS deliver high levels of employment, productivity and social cohesion by setting goals and objectives for the EU's growth strategy that will enable the economic system to become smart, sustainable and inclusive. These objectives are intertwined and mutually reinforcing and are supposed to be reached by the EU through specific objectives and actions that should be implemented at both EU and MS levels:

1. Increase of the employment rate among women and men aged 20–64 to 75 % by 2020—to be achieved by getting more people into work, especially women, the young, older and low-skilled people and legal migrants.

2. Better educational attainment particularly by reducing school drop-out rates to below 10 % and increasing the rate of 30–34-year-olds with tertiary education (or equivalent) to at least 40 %.
3. Reduction in the number of people in or at risk of poverty and social exclusion by at least 20 million.[11]

It is precisely in the objective of inclusive growth that the high level of employment, equality and non-discrimination, and the fight against poverty and social exclusion are located, along with the economic, social and territorial cohesion that should guide this growth.

The European Commission has undertaken a number of initiatives to promote employment and social inclusion at a supranational level, including the Youth Guarantee,[12] the "Agenda for new skills and jobs" (e.g. flexicurity, reduction of labor market segmentation, improved work-life balance and increase in gender equality)[13] and the European Platform against Poverty and Social Exclusion.[14] The priority objective pursued by both mechanisms is to improve access to employment. The Union's employment policy therefore represents the preferential, revitalizing element for the purposes established.

Placing the Youth Guarantee, reduction of poverty and the antidiscrimination and gender equality objectives pursued by European authorities within the context of the Union employment policy, conditioned as it is by the parameters imposed by the centrality of the market, means designing a regulatory framework consistent with those guidelines. There are two ways of doing this: in the political arena, a decoupling of the mechanisms of political subjection; and in the economic sphere, the adoption of restrictive fiscal policies linked to control of inflation, and monetarism as a fundamental element for the economic policies that make budgetary discipline the preferred field of action.[15]

From this perspective, the way in which employment is configured in Article 145 TFEU is consistent with the model of market constitutionalism. Indeed, one-way referral (*renvoi*) of employment policies to the general guidelines of MS economic policies (Article 146.1 TFEU) and not in the opposite direction bolsters the status of employment as a legal minority in EU law. Under the terms of this rule, the regulatory spectrum of employment policy is a combination of the provisions of Article 121 TFEU and Articles 119 and 120 TFEU, setting out the normative basis of the EMU.

The result of this concatenation of norms is that the Union is not free to define its employment policy, not only out of a lack of competence, but above all, because any such policy must be defined both in accordance

with the principles of an open market economy with free competition (Article 120 TFEU) and the guiding principles of stable prices, sound public finances and monetary conditions and a sustainable balance of payments (Article 119.3 TFEU). These provisions prevent recognition of a real employment policy in the European supranational space and leave employment policy in a marginal position (limiting its ability to influence economic policy), thus also preventing the possibility of rebalancing the contents of negative integration with the promotion of a highly competitive social market economy targeting full employment and social progress. In this regard, the characterization is established on the basis of achieving a hierarchically predetermined goal through the means established for its fulfillment: internal market economy and competition.[16]

2.1 A Special Look at Equality and Non-Discrimination Social Measures

The endogenous constraints to EU social and employment policy, mentioned above, can be seen in the design of the Youth Guarantee, the fight against social exclusion, and the proposed directives on equality and non-discrimination. In addition, Europe 2020 retains the above-mentioned paradigm of regulatory intervention, market autonomy and the subordinated compatibility of social and employment policy. The market economy remains the starting point for achieving inclusive growth. Only under this dogma can one understand supervision at national level of the Youth Guarantee and the fight against poverty in the context of the European Semester, implying that it is an additional mechanism for monitoring compliance with the conditions of European market constitutionalism by national public finances, where the social considerations on quality youth employment, poverty and social exclusion are far from being placed at the same level as the macroeconomic conditions.[17]

The primary focus in the EU construction process has been on the economic and financial sphere, establishing it as a base from which to grow. Without doubt, this has been the "enemy within" for the social sphere. Some MS have failed to comprehend the essential nature of sustainable and responsible growth, fostering the belief that socially and environmentally responsible economic growth is a chimera. Consequently, if the economic interests are and have been the pivotal cornerstone upon which the EU has been built, they view a threat in the fact that it has to be balanced against social rights and it is inevitable that these interests are always given priority

whenever one or the other must prevail. If the social model that the EU claims to seek not only entails economic growth but is also intended to embrace those features and values with which the Union has been identified, it must shift its core element from the economy to the people.

As we shall illustrate by examining the process of the antidiscrimination and gender equality directives, construction of the EU's social sphere is one of the best examples of how the integration process should shift more to the positive model and how it would benefit more from it.

2.2 The Directive Proposals on Equality and Non-Discrimination: A Never-ending Story?

In 2008 the Commission issued two proposals for Directives, the "Horizontal Directive" (published only five years after application of Directive 2000/78 and covering the same grounds with greater scope)[18] and the "Maternity Leave Directive"[19] In 2012 a further proposal was issued, commonly known as the "Women on Boards" Directive.[20] As of July 2015, only the Horizontal Directive and the Women on Boards Directive proposals are still on the table, given that the Maternity Leave Directive was subsequently withdrawn. However, we shall include it in this section as a very illustrative example of the problems faced by these proposals.

The Horizontal Directive[21]

The levels of protection against discrimination (on the grounds of racial or ethnic origin, gender, religion or belief, disability, age or sexual orientation) regulated in Directives 2000/78 and 2000/43 differ greatly. For this reason, in 2008 a Directive Proposal was issued. This came to be known as the Horizontal Directive, since it aimed to eliminate the hierarchy of protection that existed against different grounds for discrimination. The proposal was presented in 2008, but it is important to note that with only a few exceptions, the deadline for transposition of the Directives was late 2003. In other words, in less than five years the EU had already come to realize that the 2000 Directives did not go far enough and had carried out all the consultations and preparatory work required for the Proposal to be presented to the Council.

The Proposal has yet to be adopted and the European Parliament and NGOs working in the field are pressing the EU institutions to take action.[22]

Meetings on the Horizontal Directive stopped in 2011. In February 2014, the European Parliament approved an *Annual Report on Fundamental Rights in the European Union*, urging MS to adopt the Horizontal Directive.[23] In November 2014, seven NGOs, think tanks, agencies and other organizations (ILGA, ENAR, AGE, the Social Platform, the European Women's Lobby, the European Disability Forum and the European Youth Forum) issued a joint statement, which came in addition to their individual lobbying for adoption the Horizontal Directive during this period.[24] A meeting of the Council was held to discuss the Horizontal Directive in December 2014. Since then, the Council has taken no further steps, but Věra Jourová, EU Commissioner for Justice, Consumers and Gender Equality met with representatives from NGOs to discuss the proposal in February 2015[25] after giving a commitment to support adoption of the directives at the Employment, Social Policy, Health and Consumer Affairs Council on December 12, 2014.

The proposal has been consistently supported by both the Commission and the European Parliament, as demonstrated by Mr. Juncker's statement in his Agenda.[26] Nonetheless it has encountered major opposition in the Council, with some MS arguing that the cost of applying some of the measures contained in the Proposal is too great to impose at national level.[27]

The Maternity Leave Directive

The Maternity Leave Directive is one of the saddest examples of the way in which financial interests will prevail as long as the Council is allowed to retain its current power, a situation that could be resolved by the progressive establishment of a positive integration model in the EU.

In the mid-2000s, several movements emerged within European institutions to promote equality between men and women. After much pressure was brought to bear by the Commission and the European Parliament, a proposal was submitted in 2008 as one of the priority initiatives in the Commission's work program. The proposal sought to support the fight against gender discrimination because of gender inequalities in employment rates and the need to protect women giving birth or breastfeeding and incorporate them into the labor market under the same conditions as previously.

The main legislative changes provided for in the proposal are an increase in maternity leave from 14 to 18 weeks and the possibility of this leave being paid (the European Parliament subsequently agreed on 20 weeks paid leave).[28]

Although the proposal encountered little opposition, since some MS already had national laws establishing these objectives (with up to 52 weeks maternity leave in some cases), some countries positioned themselves against changes in current legislation, despite reports by the aforementioned European institutions advocating such change and despite the evident need for harmonization in this issue. And so the Maternity Leave Directive also got stuck in the Council along with the other equality and non-discrimination proposals.

The thorniest issue is undoubtedly the mandatory requirement that during maternity leave, women should receive their full salary. This, it has been argued, places a heavy burden on SMEs and small businesses. However, the proposal states that MS would have flexibility in establishing the percentage of that leave that would be met by the State (rather than the employer) and in determining a ceiling on compensation. Nevertheless, payment of the full amount of the salary is essential in order to ensure that women do not lose financial power when they give birth. The proposal also envisaged a measure that would allow women returning to work after giving birth to benefit from working hours that adapt to their new situation (although the employer is not required to make these adjustments, it is obliged to consider the request), albeit this was included as a virtually declaratory provision. However, it would be both logical and consistent with existing antidiscrimination legislation to establish a similar requirement to that of the "reasonable accommodation" that exists in cases of disability, forcing the employer to take such requests into account provided that they are "reasonable" and "proportionate".

Some MS on the Council of Ministers opposed the bill so strongly, deeming the cost of adopting the proposal excessive, that it has never even reached a first reading. Because it has to be approved by both the EP and the Council, this has led to the permanent blocking of the proposal.[29] The situation remained unchanged and the Council remained unyielding in its stance from June 2011[30] until the Commission proposed withdrawing the proposal if no agreement were reached in the first half of 2015. Despite strong pressure from lobbyists, the European Parliament and the Commission, the proposal was withdrawn due to non-agreement in early July 2015, with a promise from the Commission to take other measures to improve the situation of working women who had given birth or were breastfeeding.[31]

Women on Boards Directive

The first grounds of discrimination on which the EU has legislated extensively since its creation is gender. Achieving a gender balance in employment and breaking the so-called glass ceiling has been a priority for decades, but it was not until 2010 that the Commission established participation of women in decision-making as a priority through its *Strategy for equality between women and men 2010–2015*.[32] In 2011, the Commission, through an initiative entitled "Women on the Board Pledge for Europe" called for MS to increase the presence of women progressively to 30 % by 2015 and 40 % by 2020 (in line with the Europe 2020 objectives discussed above).

The European Parliament, through a resolution of July 6, 2011, requested the Commission to make a *lege ferenda* proposal before 2012 that would introduce mandatory quotas. This request was repeated in its resolution of March 13, 2012.[33]

In March of that year a progress assessment was conducted, showing that the voluntary measures proposed in 2010 by Commissioner Redding had only succeeded in increasing female presence by 0.6 % between 2003 and 2012, making any achievement of the targets set impossible.[34]

The results of this study led to a public consultation process to measure and evaluate the impact. This concluded with a Communication from the Commission entitled "Gender balance in business leadership: a contribution to smart, sustainable and inclusive growth"[35] together with a Directive proposal which on this occasion contained binding legislative measures, in line with the principal results of the research, which showed that the greatest increase had taken place in MS that had implemented mandatory measures, such as France and Norway.[36]

The proposed quota system is (naturally) in line with the jurisprudence of the Court of Justice of the European Union. The main aim of the proposal is that publicly-traded companies that do not have a "less-represented gender" presence of at least 40 % of non-executive directors should be obliged to make the appointments to these positions on the basis of a comparative analysis of the qualifications of each candidate, using clear, pre-established criteria formulated in a neutral fashion, devoid of ambiguities, in order to achieve the aforementioned percentage for those companies listed as public undertakings no later than January 1, 2018, with a temporary difference allowed during a period of two years for those which are not public undertakings. SMEs are excluded from the Directive's scope of application.

The process of adopting the proposal has been paralyzed since November 2012, apart from informal meetings, at which minutes are not even taken, and official meetings from which no information is issued,[37] such as the one held in December 2014.[38]

Some MS have voluntarily introduced measures in this regard, and others (such as Norway) already had the necessary national measures in force prior to the proposal. In France, Italy and Belgium a binding quota system was adopted, while in the Netherlands and Spain legislation was approved but provided no measures in the event of non-compliance. In 2013 several programs were implemented in MS, including "Women mean business and economic growth"[39] in Italy and "Promociona"[40] in Spain. In Denmark, Finland, Greece, Austria and Slovenia, the measure only applies to the public sector.

This proposal has also become stuck in the Council, although at least partial agreement was reached in November 2013. Nonetheless, no more readings have taken place, apart from a discussion within the Council and its preparatory bodies in December 2014, from which no document or information has officially emerged.[41]

3 Shadows of the Post-Crisis Vision of a Transnational Social Dimension

In his opening statement in the European Parliament plenary session, entitled "A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change",[42] the current President of the European Commission, Jean-Claude Juncker, emphasized the need for a new approach to reverse the high rate of youth unemployment, poverty and loss of confidence in the European project. Of the ten policy areas contained in the Agenda, we shall focus on three.

The first of these is the "Jobs, Growth and Investment Package," which will enable the mobilization of up to €300 billion in additional public and private investment in the real economy over the next three years. A significant proportion of this amount will be channeled towards projects to help young people get decent jobs. However, the use of national budgets for growth and investment must respect the Stability and Growth Pact (SGP), although reference is made to making better use of the flexibility built into the existing rules of this Pact (page 4 of the Agenda).

As regards the second policy area, "A Deeper and Fairer Economic and Monetary Union" the following proposals are particularly significant: a stability-oriented review of the reinforced negative integration; encouragement of further structural reforms; replacement of the troika with a more democratically legitimate structure; and, more importantly, the proposal "that, in the future, any support and reform programme goes not only through a fiscal sustainability assessment but through a social impact assessment as well. The social effects of structural reforms need to be discussed in public" (pages 7–8 of the Agenda).

Finally, Jean-Claude Juncker sets non-discrimination as his seventh objective. "Discrimination must have no place in our Union, whether on the basis of nationality, sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, or with regard to people belonging to a minority. I will therefore maintain the proposal for a directive in this field and seek to convince national governments to give up their current resistance in the Council."[43]

Regarding gender equality, he makes reference only to the selection of Commissioners and the gender balance required in the make-up of the Commission. However, the underlining idea is that it should also continue to be a priority in a broader sense and he states that "I will do my utmost to ensure a gender-balanced choice of leading personnel in the Commission, both at political and at administrative level. Gender balance is not a luxury; it is a political must and should be self-evident to everybody, including to the leaders in all capitals of our Member States when it comes to their proposal for the choice of members of the next Commission. This is in itself a test for the commitment of the governments of Member States to a new, more democratic approach in times of change."[44]

The language used by Juncker in his speech is charged with a terminological density that engenders confusion and ambiguity. Sanctioning the direct link between EEG and the social model creates an overlap between two terms with a semantic coincidence. The aim is to advance the social market economy as a means of supporting the Agenda in creating more sustainable growth, with more and better-quality jobs and reduced poverty. The social market economy, as we have seen, does not correct the lack of symmetry between the European economic constitution and social justice. On the contrary, it emphasizes its asymmetry. Its extension to the EMU's guiding principles as objectives for achieving the social goals of promoting employment and reducing poverty places social objectives in a vicious circle where they can only be achieved within the terms established

by the determinist rationale of economic calculation. They lack spaces of realization, binding regulatory safeguards. Not even the consideration of the right to work or the right to social assistance recognized by the EU Charter of Fundamental Rights (CFREU, articles 15 and 34.3) allows spaces to be created for the defense and protection in terms of the essential content of these social rights. The Charter's generic referral to national and European legislation (article 52 CFREU), situates the direct source of these provisions in these areas, marginalizing the CFREU as the framework of reference of the constitutional guarantee of rights. The formulation of these spaces, both European and national, reveals the dictates of market constitutionalism.[45]

From this perspective, the EU's social sphere is far from being a real social sphere constructed by and for the citizens, since the structure and decision-making process of the EU makes it impossible to achieve the objectives established in this regard. Citizens are increasingly identifying the Union with economic interests, given the lack of progress in the social area and the prevalence of financial and economic interests. A very good example of the way in which the negative integration model imposed is blocking the development of the social sphere can be found in the situation faced by the Equality and Non-discrimination Directives, the proposals for which have been blocked for several years now in the Council. Until these measures are given real significance to establish a genuine model of positive integration, the social sphere will remain a chimera or, even worse, a utopia.

Only by going beyond the normative limits established by the economic bond, therefore, will it be possible to construct a Europe capable of responding to the real social demands of the crisis (jobs, social inclusion, gender balance), which are not the demands of financialized capitalism. In short, it is about constitutionalizing at supranational scale the government of politics and democratic control of the economy, to activate the regard of European citizens towards the European project.

Notes

1. Giuseppe Bronzini, "The Social Dilemma of European Integration", *Law Critique*, no. 19, 2008, pp. 259–262.
2. Fritz W. Scharpf, "The Double Asymmetry of European Integration Or: Why the EU Cannot Be a Social Market Economy", *Max-Planck-Institute für Gesellschaftsforschung Working Paper*, no. 9, 2012, pp. 25–30.

3. *Ibid*., pp. 29–30. In author's words: "[…] the 'European Market Economy' That Could at best be Brought About Through Positive Integration Would Resemble The Socioeconomic Regimes of Liberal Market Economies, Rather Than Recreate a Social Market Economy at the European Level".
4. Ainhoa Lasa López, "Algunas Consideraciones metodológicas a propósito de la nueva relación entre Estado, Derecho y Justicia social en el constitucionalismo de mercado europeo", *Estudios de Deusto*, no. 1, 2013, pp. 155–192.
5. Christian Joerges, "Sozialstaatlichkeit in Europe? A Conflict-of-Laws Approach to the Law of the EU and the Proceduralisation of Constitutionalisation", *German Law Journal*, no. 4, 2009, p. 344.
6. Wolgang Streeck, "Competitive Solidarity: Rethinking the European Social Model", *Max Planck Institute for Study of Societies Working Paper*, no. 8, 1999, available at: www.mpifg.de/pu/workpap/wp99-8.html (accessed 10 August 2015).
7. Ainhoa Lasa López, *Los derechos sociales en el constitucionalismo de mercado: aporías de la dimensión social en la Unión Europea*, Universidad del País Vasco, Servicio Editorial, 2012, pp. 113–118.
8. *Ibid*., pp. 113–118.
9. This abnormality in the TECG is typified by the fact that the treaty eludes the control mechanisms established in the TEU, highlighting a contradiction between market and democracy manifested in the handling of the EMU crisis.
10. Communication from the Commission EUROPE 2020 A strategy for smart, sustainable and inclusive growth, 03/03/2010, COM(2010) 2020 final, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF (accessed 14 September 2015).
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12. Information about the Youth Guarantee is available at: http://ec.europa.eu/social/main.jsp?catId=1079 (accessed 15 September 2015).
13. Information about the Agenda for new skills and Jobs is available at: http://ec.europa.eu/social/main.jsp?catId=958 (accessed 15 September 2015).
14. Council Recommendation of 22 April 2013, on establishing a Youth Guarantee. Official Journal of the European Union, 26.4.2013, C-120/1-C 120/6. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. The European Platform against Poverty and Social Exclusion: a European framework for social and territorial cohesion. Brussels, 16.12.2010 [COM(2010) 758 final].

Both measures—the youth guarantee and the European platform—must contribute to the three Europe 2020 strategy targets: 75 % employment among 20–64 year olds, early school-leaving rates of under 10 % and at least 20 million people to be lifted out of poverty and social exclusion.

15. Colin Crouch, "Stretching Neo-Liberalism: The Current Agenda of European Social Policy", in *Resocialising Europe in a Time of Crisis*, ed. Nicola Countouris and Mark Freedland, Cambridge University Press, 2013, pp. 36–60.
16. Simon Deakin, "The Sovereign Debt in Crisis and European Labour Law", *Industrial Law Journal*, no. 3, 2012, pp. 251–153.
17. Klaus Armingeon and Lucio Baccaro, "Political Economy of the Sovereign Debt Crisis: The Limits of Internal Devaluation", *Industrial Law Journal*, no. 3, 2012, pp. 254–275. Simon Deakin and Aristea Koukiadaki, "The Sovereign Debt Crisis and the Evolution of Labour Law in Europe", in *Resocialising Europe in a Time of Crisis*, ed. Nicola Countouris and Mark Freedland, Cambridge University Press, 2013, pp. 163–180.
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CHAPTER 12

Constructing the European *Demos* through External Action? The Case of Consular Assistance to EU Citizens

Steffen Bay Rasmussen

1 Introduction

Analyzing the possibilities for constructing the European *demos* through external actions, this chapter takes its point of departure in the perceived need to complement the discussions of institutional reform and the constitutional nature of the European Union (EU) and put the focus on the EU's real ability to contribute with added value to the EU citizen and not merely live up to abstract political and legal ideals or the expectations of Member State governments. Creating a European *demos* does not primarily depend on perceptions of the Member States of the usefulness of the EU in the pursuit of each of their policy objectives, but about how the EU is seen as a natural and efficient level for providing the citizens with the services for which they pay their taxes. In essence, the question is whether the European Citizenship is actually incorporated into the individual political identities of EU citizens.

The idea of EU citizenship was created with the 1993 Maastricht Treaty and it was from the beginning acknowledged that this would also have an external dimension. The EU itself saw the protection of citizens in third

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states as a policy area that would not only strengthen the identity of the EU as an effective actor in international relations generally, but also increase citizens' identification with the EU and its integration project.[1] This chapter focuses explicitly on the external dimension of EU citizenship in the analysis of how the EU delivers on its promise of providing citizens with consular assistance in third states.[2] The Member State level is thus explicitly left out, and the focus in on how and to what extent the EU as an organization is capable of using its role as a direct service provider to create an increased identification with and sense of loyalty toward the EU—that is, a European-wide *demos* to serve as a stable basis for the EU's political and administrative system currently based on treaties between sovereign Member States.

Consular affairs have generally experienced a sharp increase in activity due to increased cross-border activities of individuals,[3] and with the expansion of the EU to 28 Member States and a population of roughly 500 million citizens, an effective organization of consular assistance is ever more necessary in the EU setting, particularly relevant when considering that the improvement of the EU's external actions was one of the primary motivations behind the Lisbon Treaty and the creation of the European External Action Service (EEAS).

After a conceptual clarification in section 2, the third section briefly outlines the historical evolution of the process of European integration in this area, using the juxtaposition of intergovernmentalism and supranationalism as ideal-type models to characterize the different options available when institutionalizing consular assistance and defining the division of labor between Member State embassies and EU Delegations. In spring 2015, the EU finally adopted the long-awaited Directive regulating the scope and organization of the consular assistance that EU citizens have the right to enjoy in third states according to the Treaties. Section 4 of this chapter is dedicated to its analysis, whereas the fifth section discusses the implications of this Directive for citizens' identification with the EU.

2 Protection by Diplomatic and Consular Authorities as Citizens' Rights

2.1 The Treaty Basis of the EU Citizens' Right to Consular Assistance Abroad

When considering the EU's role in the protection of EU citizens in third states, a certain imbalance in the constitution of the EU should be noted. On one hand, as competence in consular affairs has not been expressly

attributed by to the EU by the Member States in the Treaties, and Member State and EU institutions have continuously stressed the lack of competences of the Union,[4] it remains a Member State competence.[5] The EU Member States remain sovereign in their external relations and the question of the activities of their diplomatic and consular representations is therefore a policy area where the Member States, both under EU law and international law, remain sovereign actors with no general transfer of competences to the EU. On the other hand, the right of citizens to protection abroad by consular and diplomatic authorities has a solid legal basis in EU law, as it is established in article 46 of the EU Charter of Fundamental Rights (CFR), article 23 of the Treaty on the Functioning of the European Union (TFEU) and article 35 of the Treaty on European Union (TEU).

The Charter of Fundamental Rights reproduces in its article 46 the first sentence of article 23 of the TFEU, so its relevance consists mainly in reaffirming the right to protection by consular and diplomatic authorities as a fundamental right. Article 23 (TFEU) establishes as one of the rights of Union citizens the following:

> Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of the State. Member States shall adopt the necessary provisions and start the international negotiations required to secure this protection.
>
> The Council, acting in accordance with a special legislative procedure and after consulting the European Parliament, may adopt directives establishing the coordination and cooperation measures necessary to facilitate such protection.[6]

With this wording the right of the citizen is to protection by the "diplomatic and consular authorities" by the representation of other Member States when her own state is not represented in a given third country. Also, the citizen has the right to be treated on terms similar to those of the citizens of the protecting State. With respect to the rights of the EU citizen, it is clear that the treaty does not establish a common standard, but bases the right on non-discrimination of EU citizens by Member States, a construction which could give rise to the problem of forum shopping, as discussed below.[7] The TFUE mentions only the rights of citizens and obligations of Member States, but in its article 35, the TUE establishes the role of the EEAS and the EU Delegations in third states in the third paragraph:

> They shall contribute to the implementation of the right of citizens of the Union to protection in the territory of third countries as referred to in Article 20(2)(c) of the Treaty on the Functioning of the European Union and of the measures adopted pursuant to Article 23 of that Treaty.

There is thus no specification of the role of the Delegations, apart from the fact that they shall contribute to the implementation of the right of citizens to protection in third states, reflecting the general absence of clearly defined Delegation functions in the Treaties. With respect to the treaty basis, the conclusion is therefore that a right to protection in third states is established for EU citizens, and whereas the treaties only mention the Member States for the implementation of this right, we also see a clear intention for the EU to regulate the field and a near-total silence on the role of the EEAS and the EU Delegations in this area. The precise regulation is left to a later Council decision regarding the functioning of the EEAS and a Directive regarding the implementation of the rights of citizens, as analyzed below.

A further complicating factor is that the treaties are by their wording not clear on exactly what rights the citizens have. There is no universally agreed upon meaning of the term "protection by diplomatic and consular authorities" and since the EU in the treaty text does not refer to the established categories under general international law,[8] this remains unclear from a legal point of view, even if a common understanding by EU Member States that excludes diplomatic protection seems to exist.[9] The next section is dedicated to a conceptual clarification of related concepts of international law that helps understand the context of the EU treaties and further regulation in this respect.

2.2 Conceptual Clarification

The terminology used in the EU treaties is generally "protection by consular and diplomatic authorities", an imprecision generating considerable legal insecurity apart from making it more difficult to define precise roles for Member State embassies and EU Delegations in the implementation of this right. Under international law, diplomatic protection and consular protection are established institutions, related but distinct, and the vague formulation seems to indicate that both categories are invoked by the treaty text. The exception to the vague formulations is the title of article 46 of the Charter of Fundamental Rights "Diplomatic and consular

protection" which specifically frames the rights of EU citizens within both these two institutions of international law, although the text of the article reproduces the vague formulation of the TFEU.

Diplomatic protection is an established institution of customary international law that refers to the possibility for one state to hold another state responsible when the latter has committed an international wrongful act causing injury to a citizen of the former, for example by illegal expropriation or a breach of fundamental rights established under international law. Although the subject status of individuals is continuously evolving and the object of intense academic debate, it is clear that the individual does not generally enjoy *locus standi* before international tribunals. Therefore, diplomatic protection arises as the process through which the state of which the injured individual is a citizen can hold the state breaching an international obligation accountable under international law.

The confusingly denominated institution of diplomatic protection thus presupposes a breach of international law causing injury to a citizen and the actions of the state of which that individual is a citizen to obtain reparation from the breaching state. Considering the nature of diplomatic protection as a state prerogative aimed at solving the problem of limited individual subjectivity under international law, it seems contrary to logic to attribute this function to the EU Delegation. As a sui generis entity, this would not solve the basic problem that generally only states can hold other states accountable, for instance by demanding reparation through diplomatic channels or presenting cases to the International Court of Justice, where the EU does not enjoy *locus standi*, in spite of its unilateral declaration of having full legal personality.[10] Also, since diplomatic protection does not need a diplomatic mission accredited to the third state in question but can be exercised by central state organs, it is not necessary for Member States to be able to exercise diplomatic protection on behalf of other Member States not present in the third state.

Consular protection refers to protection by the Consul in a third state of a citizen of the sending state, when this citizen has suffered injury because of a breach of international or domestic law by an organ of the receiving state. In these cases, the Consul will exercise consular protection by taking action directly against the organ of the receiving state that has committed the infraction. This way, consular protection does not invoke the international responsibility of the receiving state, although we are still dealing with the actions of a state official to protect the rights of its citizens against a breach of law.

Consular assistance is a third category that refers to a series of typical functions of a consular mission aimed at helping its citizens in situations that do not necessarily imply a breach of law by the receiving state. These other functions include issuing of travel documents, voting in national elections, issuing of marriage licenses, evacuation in case of emergencies and other kinds of assistance a citizen may need from the state of which she is a citizen when living or doing business in another state. In fact, consular protection can be considered as one of the specific activities of the consulate within the broader category of consular assistance.[11]

These three concepts are often confused, no doubt due to the fact that consular and diplomatic missions are often co-located in an embassy. Unfortunately, the imprecision of the EU treaty texts contributes to the confusion. The confusion deepens with the title of article 46 of the Charter which expressly mentions diplomatic protection, when it is clear from the 2015 Directive as well as previous reports and working documents from the EU institutions that what the EU seeks to regulate is basically consular assistance. Before analyzing the Directive, the following section consists of a consideration of the policy options available to the EU when defining the functions of the EEAS and how the right to consular assistance of EU citizens could be implemented.

3 Two Models for Providing Consular Assistance: Historical Evolution

As mentioned in the introduction, an external dimension of the EU citizenship created by the 1993 Maastricht Treaty was foreseen from the beginning, as was the potential impact of a common protection of citizens abroad on the generalized perception of EU citizens regarding solidarity within the Union and the added value of EU activities. Throughout the history of European integration, two main models of how integration should take place have coexisted and sometimes clashed: An intergovernmental model, where the cooperation and coordination among sovereign States and decision-making in the Council are key tenets; and a supranational model, where integration proceeds on the basis of transfer of competences to EU institutions, most notably the Commission. This tension has been reproduced in the field of consular assistance, with Member States being very defensive of what they consider a core function of the sovereign state and the Parliament and Commission foreseeing a greater role for the EU institutions.

Integration proceeded slowly throughout the 1990s, with Council Decisions 95/553/EC and 96/409/CFSP advancing in the definition of non-representation and establishing a list of the types of assistance foreseen: In event of death, serious illness, accidents, arrest or detention as well as repatriation. A further clause adds the obligation on diplomatic and consular authorities present in the third states to also assist in other circumstances within their powers.[12] These developments continue the spirit of the treaty text, considering the phenomenon of consular assistance basically as an issue of non-discrimination among EU citizens. Whereas the lack of precision and no mention of the role of Commission Delegations left some room for interpretation, these Council Decisions seemed to confirm that consular assistance would be implemented using the intergovernmental model.

As a response to the adoption of the Charter of Fundamental Rights in 2000, a perceived demand from EU citizens and several international emergency situations, several non-binding guidelines and proposals were circulated by Member States and EU institutions, the most important of which is the 2006 Commission Green Paper with proposals for how to move forward.[13] The enlargement of the EU from 15 to 28 states after 2004 obviously also made necessary a more effective system for the protection of unrepresented EU citizens in third states. Unsurprisingly, the Green Paper foresees more functions for the Commission Delegation, such as hosting common offices for consular assistance and common centers for treating visa applications from third state nationals. The Green Paper also argues the logic of the Delegation exercising the protection if the question at hand falls within EU competences, in parallel to its mention of full-fledged euro-consulates in a separate communication.[14] This way, the Green paper can be seen as an input to the ongoing debate and a clear intent to move consular assistance toward the supranational model.

The European Parliament's response to the Green paper starts from the assertion that the EU should guarantee the protection of citizens abroad as an integral part of the EU citizenship.[15] The Parliament applauds the Commission's interpretation of what has become article 23 TFEU[16] as not excluding EU action and calls upon the Commission to establish a system for pooling resources, establish a call center for EU citizens to call when needing assistance in third states and argues for expanding the scope of the cooperation to include diplomatic protection. Notably, the Commission is invited to develop a long-term strategy for consular assistance, particularly rethinking the area in the context of the creation of the EEAS, seeming to suggest a reopening of the debate on the general design.

There was thus a growing consensus on the inadequacy of existing consular cooperation in the Council, Parliament and Commission,[17] motivated to a large extent by the performance during international emergency situations such as the 2002 Bali bombings, the 2004 tsunami in South East Asia or the 2008 Mumbai attacks.[18] At the same time, however, there were wide differences of opinion within the EU with respect to how to proceed, the main dividing line being between the Commission and Parliament arguing for a regulation closer to the supranational model and the Member States in the Council, particularly France and the UK,[19] defending an intergovernmental model for consular protection based on the Lead-State concept. This concept was developed in non-binding Council guidelines,[20] and refers to emergency situations and not the day-to-day services provided to citizens.

In this context the negotiations of the Lisbon Treaty took place, itself motivated in large part by the need to increase the international agency and visibility of the EU. With the ongoing negotiations of the creation of an EU diplomatic service, it seemed that all policy options were again viable. Nevertheless, the Lisbon Treaty maintained the article on consular protection (now 23 TFEU), although including a provision on the need to further develop the area through Directives. With respect to the possible exercise of consular assistance functions by the EEAS, the Council Decision establishing the External Action Service specifies that the Delegations will provide support to Member States in terms of consular protection "upon request by Member States",[21] suggesting that the role of the EU Delegations as intended by the Council is strictly limited and clearly subordinated to the actions of Member State representations.

Although it would seem perfectly logical for European citizens to be assisted in third states by EU Delegations, it is clear from the Lisbon Treaty and the Council Decision establishing the EEAS that the intergovernmental option had triumphed. Member States were simply unwilling to transfer this function to the EU, in spite of the significant cost-cutting incentives to do so and it seems that Stanley Hofmann's old distinction between low politics and high politics[22] is still relevant. At least, EU Member States are not willing to renounce this core function: Aiding its citizens when in trouble abroad. This is in line with the general constitution and role of the EEAS, which is complementary to and supportive of Member State activities and, as such, far from a supranational model of diplomatic representation, although not purely intergovernmental either.[23]

Due to the increased necessity for regulating the protection of EU citizens in third states and as foreseen in article 23 TFEU, the Commission proposed a Directive on Consular Protection for EU citizens in 2011, which was finally approved by the Council in April 2015. The following section will analyze the regulation set forth in this Directive.

4 The 2015 Council Directive[24]

The previous sections have outlined the historical context to the 2015 Directive, and the general impression is that there is a clear continuity in the development of the policy field from the previous Council Decisions, and it is clear that the Directive constitutes a further sedimentation of the intergovernmental model.

Generally, the stated objective of the Directive is to lay down the coordination and cooperation measures necessary for ensuring the right to protection of EU citizens. With respect to the scope of the right, the Directive clearly treats only consular affairs, clearing up the confusion generated by the treaty language, particularly the title of article 46 of the CFR, and disregarding the calls of the Parliament to include diplomatic protection as a right of EU citizens. The Directive considers consular protection, but understood in the widest possible sense as any kind of consular assistance. Article 9 lists the typical situations foreseen, largely reproducing the list of the Decision 95/553/EC, which is repealed by the Directive: Arrest or detention, victims of crime, serious accident or illness, death, relief and repatriation during emergencies and emergency travel documents. This should not be seen as a closed list, and a lot of day-to-day activities will consist in putting citizens in contact with the authorities of their Member State and providing information. Paragraph 14 of the preamble explicitly states that the scope of protection is not to be understood as limited to the mentioned situations.

The main idea stated in article 2 is that Member State representations abroad should provide consular protection to unrepresented citizens on the same conditions as to their own nationals. Unrepresented means in this case a citizen whose state of citizenship does not have a permanent embassy, consulate or honorary consul in the third state or if these are not "effectively in a position to provide consular protection in a given case".[25] It is thus only when the state of citizenship is not able to provide protection on the ground in third states that a citizen has the right to protection from another Member State. But even in such a case, the Directive makes clear

that consular protection remains a prerogative of the state of citizenship and that the Member State retains the right to provide consular protection to its citizens even when it is unrepresented in the relevant third state.[26] The Member State whose citizen requests assistance from another Member State must therefore immediately be fully informed and consulted before assistance is provided, except in cases of extreme emergency, thereby allowing the unrepresented state to insist on exercising consular protection itself.[27] These provisions show very clearly the reluctance of the Member States to renounce what they perceive as a core function of the state, and in this case article 3 functions as a safeguard clause, always allowing the Member State to ignore EU cooperation on the matter and take matters into own hands. A given Member State might even have financial incentives to do so, due to the combination of the failure of the Directive to establish common standards and the established obligation to reimburse the assisting state of the costs of protection. If, for instance, the citizen seeks assistance from another Member State with a higher level of consular services, the unrepresented state is obliged to reimburse the assisting state for this higher level of assistance. Although the Member State of citizenship can demand that the citizen reimburse it, there is nevertheless a clear incentive for states to be wary of a potentially very costly assistance provided by other states. Nevertheless, it should also be observed that without the provisions explicitly laying the financial burden on the Member State of citizenship,[28] and thereafter on the citizen, the situation would be even worse. It is simply not feasible that it be the assisting Member State shouldering the cost. Considering for instance the situation of Malta being the only Member State offering consular services in Benghazi, Libya,[29] or third states where only very few EU Member States are represented. In these cases the represented Member States are in principle responsible for attending the needs of all EU citizens in the area. By virtue of the Directive, at least it is clear that only the practical and not the financial burden falls upon the represented Member State.

With respect to the level of assistance, article 1 makes clear that the obligation upon Member States is only to provide assistance to citizens of unrepresented Member States on the same conditions as its own citizens. There is thus no ambition to harmonize the levels of consular assistance among the Member States, and paragraph 5 of the Preamble explicitly states that the "Directive does not affect Member States' competence to determine the scope of the protection to be provided to their own nationals". It is thus clear that for an EU citizen needing consular assistance in a third state where her Member State of citizenship is not represented, the

assistance provided will depend on the level of assistance of the represented EU Member States and from which specific Member State assistance is requested. This could of course give rise to the problem of forum shopping, where citizens have a clear incentive to shop around for the best assistance, something that is not desirable from any perspective, be it that of Member States or that of an EU that seeks to increase its legitimacy in the eyes of citizens. This is foreseeable especially in the case of assistance provided to family members who are not citizens of the Union accompanying a citizen in a third state where her state of citizenship is not represented. In this case, these family members should by virtue of article 5 be treated as family members of the citizens of the assisting Member State. The right to consular assistance of accompanying family members that are not citizens is another big area where Member State legislation and practice may diverge, giving yet another incentive for EU citizens to shop around for where their family members would get the best assistance.[30] Another incentive for forum shopping is the potentially different financial implications for the citizen requesting protection, since article 14 makes clear that the unrepresented citizen must reimburse the Member State of nationality according to the standard practice of the assisting Member State.

The problem of forum shopping could be remedied by practical arrangements on the ground in third states. Whereas article 7 of the Directive starts by stating the right of EU citizens to seek assistance from the representation of any other Member State, structures of permanent cooperation on the ground in third states are also foreseen. These should ideally take the form of a division of labor among the represented Member States so that it is clear from which embassy the citizens of each non-represented Member State should seek assistance. This could take the form of one Member State representation "doing" consular assistance to non-represented citizens or a distribution of non-represented Member States among the represented Member States. This is not detailed in the Directive but left to local on-the-ground cooperation among the EU Member State representations and EU Delegation. This is arguably beneficial in the sense that concrete arrangements can be adapted best to local conditions and relative capacity of each represented Member State. However, the solution to the problem of forum shopping is thereby also left to local arrangements. From an analytical point of view, it would have been far simpler to simply harmonize the standards of consular assistance, although of course this would have proven difficult in the light of the political insistence of Member States to safeguard the issue area within each their sovereign domain.

With respect to the coordination and cooperation measures, the Directive follows the general philosophy regarding the functioning of the EU diplomatic network, where the general obligation is to mutually inform, consult and cooperate, but the details are left to be worked out by the EU Delegation and Member State representations on the ground in third states. In this respect, it is beneficial to distinguish between the daily consular assistance provided to citizens due to their individual situations and the consular assistance in case of major crisis, be they natural disasters or political upheavals.

Concerning day-to day coordination, article 12 formalizes the exchange of relevant information through local cooperation meetings, which is also where the practical distribution of unrepresented citizens among the represented Member States should take place. It is noteworthy that the meetings are in principle to be chaired by a Member State and not the EU Delegation, although in close cooperation with the latter. This further cements the impression of a strict state control on consular assistance with a marginal role for the EU Delegation. In fact, the only notable role for the EEAS foreseen in article 10 is the exchange and systematization of information regarding the local division of labor and other purely formal and practical aspects. Consular practice has shown that Delegation activities typically consist of providing contact information, pre-financing repatriation and functioning as an intermediary between an EU citizen and local authorities,[31] although the latter two activities should in principle be performed by a Member State according to the Directive. The conclusion therefore remains that a certain scope for flexibility exists with respect to the role of the EU Delegation and that the division of tasks among local actors depends mainly on the specific situation in the third state.

The role of the EU institutions is greater during emergency situations, although the general model of cooperation is based on the Lead-State concept, as specified in article 13. This means that one (or more) of the represented Member States is in charge of preparing for and coordination during emergency situations, particularly with respect to the needs of citizens of non-represented Member States. Contingency plans must be developed by the Lead State before emergencies occur, taking unrepresented citizens into account, and it must coordinate with all Member State representations and the EU Delegation. When a crisis occurs, the Lead State will be supported by other represented Member States and the EU Delegation, including the crisis management resources of the EEAS and the EU Civil Protection Mechanism.

A final aspect of the Directive that is important to keep in mind is its three-year transposition deadline, meaning that it cannot be expected to be fully implemented before May 2018,[32] although since it represents a further development of the pre-existing approach, a gradual increase in cooperation and its effectiveness is the most likely outcome. A review of the functioning of the Directive is to be submitted by the Commission to the Council and the Parliament three years later, by 1 May 2021. This timeframe means that the debate on how to guarantee EU citizens consular assistance abroad has been settled for the foreseeable future, and any speculation about euro-consulates or other supranational options for protection of EU citizens in third states has effectively been laid to rest.

5 Consular Assistance for the EU *Demos*? Challenges and Opportunities

5.1 The Directive: A(nother) Lost Opportunity

The purpose of this chapter is to consider how external action in the field of assisting EU citizens in third states could contribute to an increased citizens' identification with the EU, and in this sense, the Directive seems like a lost opportunity. The Member States have effectively retained control over even detailed aspects of consular assistance to EU citizens and, through the Directive, institutionalized a strictly intergovernmental model of consular assistance. This was to be expected and is a logical outcome for two main reasons. First, the Directive is clearly an incremental step forward along the already known path of a minimal EU regulation aimed only at ensuring a certain level of assistance to unrepresented EU citizens in third states, leaving aside more ambitious reforms aimed at standardizing the level of consular assistance offered to EU citizens abroad and rationalizing the organization of consular assistance to EU citizens, for example through a consular section in the EU Delegations, with Member State representations in the supporting role. Second, whereas the creation of the EEAS after the entry into force of the Lisbon Treaty constituted a major window of opportunity for more fundamental changes in the organization of the EU as a diplomatic actor, the general outcome of this process has meant that the Member States remain firmly in control and that the EU Delegations do not, except in certain limited cases within the EU's exclusive competences, substitute the Member States in diplomatic interaction. The EU as a diplomatic

actor can generally be characterized by its network organization, where Member State foreign policies and diplomatic machineries continue to operate alongside the EEAS and its Delegations in third states. Increased coherence and effectiveness of EU external action generally is thus not sought by a transfer of competences to EU Delegations but rather by intensifying coordination of Member State activities. It is therefore only logical that the 2015 Directive regarding consular assistance and the role of EU Delegations herein should be located within this approach. The conclusion reached by Ana Mar Fernández in 2011 about the attitude of Member States toward consular assistance is therefore as true as ever: Whereas they are willing to cooperate and coordinate, thus changing the practical way in which this sovereign competence is exercised, they are not willing to relinquish the competence in favor of the EU.[33] Still, the motives of Member States may vary according to own capacities. A smaller Member State will, *ceteris paribus*, have a larger incentive to see consular assistance provided by EU Delegations and costs attributed to the EU budget, whereas the UK has been the principal opponent of the transfer of competences, with France insisting on the EEAS having mainly a coordinating role in crisis situations.[34]

Perhaps surprisingly, the area of consular assistance seems to have been an even more closely guarded aspect of Member State sovereign functions than foreign policy toward other states more generally. EU Delegations chair the coordination meetings of EU Member States in third states, generally assuming the role previously held by the rotating Presidency of the Council. This gives the EU Delegation a centrality in the network on the ground in third states, both with respect to policy formulation, both also regarding information exchange and development of strategic initiatives. This centrality is not formally reproduced within the field of consular assistance, where a Lead State is formally in charge of coordination, although in cooperation with the EU Delegation.

Relying on the concept of path-dependency, it could be argued that the main impact of the Directive is to effectively close the door on supranational options for providing consular assistance to EU citizens, at least until the review scheduled for 2021, where it is also unlikely that we will see a general change to the supranational model but rather an identification of weaknesses and proposed solutions within the intergovernmental model. The greatest reform of diplomatic representation and external action in EU history undertaken with the Treaty of Lisbon, fusing the

representation of the policy areas formerly belonging to different pillars and creating a new External Action Service with new tasks to be defined, was a window of opportunity for more substantial change that has effectively been closed.

It should be noted that consular assistance by EU Delegations through a transfer of competence is by no means unproblematic. There is an inherent tension between EU law establishing an international role for the EU on one hand and general international law on the other, and consular assistance is of course no different.[35] The Vienna Convention on Consular Relations[36] establishes sets of reciprocal rights and obligations among sovereign states only, a fact that EU Member States cannot choose to change without the consent of the concerned third states, due to the basic international legal principle of *pacta tertiis nec nocent nec prosunt*. This means that no treaty between EU Member States can create legal obligations upon third states without their consent, a principle also enshrined in international treaty law binding the EU Member States.[37] Therefore, these cannot oblige third states to recognize any role for the EU Delegation in terms of consular assistance, and as a sui generis international legal subject, the EU cannot easily become a party to the Vienna Convention on Consular Relations. This, however, does not mean that a transfer of competences is not a viable option, particularly as the diplomatic institution is generally immersed in a process of change that can be characterized as a pluralization of practices, institutions and discourses.[38] Already, EU Delegations are generally recognized by third states as if they were state embassies in the sense of the diplomatic law on inviolability and immunity as specified in the 1961 Vienna Convention on Diplomatic Relations.[39] Ultimately it would be an empirical question, since nothing would impede an agreement between the EU and a third state. Nothing indicates that third states would not be willing to accept that EU Delegations offered consular assistance to EU citizens, and it could be argued that the situation is exactly the same for the intergovernmental model: Third state consent is also necessary for one Member State to be able to assist citizens of other Member States, a fact of which the EU is also aware.[40] In terms of international responsibility in crisis situations for missions to protect that have gone awry and led to a breach of international law, a lack of express consent by the third state authorizing specific agency by a Lead State in conjunction with other states would also give rise to problems in the intergovernmental model,[41] just as it would if it were an EU Delegation acting. Rather than a legal impossibility, the choice of the intergovernmental model should thus

rather be interpreted as a lack of political will combined with a lack of legal ambition to push the rather rigid international legal order in a direction generally more favorable to the presence and actorness of the EU.[42]

The supranational option of creating an EU standard for consular assistance provided by the EU Delegations would also effectively solve the forum-shopping problem mentioned above. The Directive does address this problem by inviting the establishment of a fixed local division of labor; however, the effectiveness of this provision remains to be seen.

5.2 Way Forward: Consular Assistance and EU Identity

The supranational option would have had many advantages over the intergovernmental model in terms of citizens' identification with the EU and the gradual creation of the EU *demos*. It would indeed be very easy for the citizen to associate the EU with improved consular assistance when this would take place in an EU Delegation and according to an EU standard.

Nevertheless, to keep pondering supranational options for consular assistance is of limited usefulness after the adoption of the Directive. Choosing the intergovernmental model undoubtedly steps up the challenges for the EU in terms of generating increased citizens' identification with and loyalty toward the EU as a polity, but the question is where the EU can go from here. At this point, without a clear-cut and visible role for EU Delegations, the impact of consular affairs on citizens' identification with the EU comes down to two main categories of factors: (1) Delivering real added value in terms of improved consular assistance and (2) Communicating this to the public.

Delivering Real Added Value

With respect to the first aspect, the lack of detailed regulation in the Directive has its pros and cons. Leaving specific cooperation arrangements to be settled locally has obvious advantages in terms of being able to take into account local factors, such as the historical and cultural relations of the Member States with the third state in question, the relative capacity of each Member State representation and the relative number of Member State citizens present in the third state. The model therefore allows adapting cooperation to what makes sense locally and taking into account the country-specific interests of the Member States, arguably key factors for an effectively working system. However, the drawback is a possible lack of uniformity across third states and a possible different treatment of two EU

citizens from different unrepresented Member States, who by virtue of local arrangements must seek consular assistance from different Member States. Each has the right to a treatment according to Member State legislation on a non-discrimination basis, but they are not assured that they will get a similar level of consular assistance. Such differences will of course undermine any notion of a single EU citizenry, as long as two individuals are potentially treated differently because of the different nationalities.

Given the networked situation on the ground in third states and the reduced formally established role for the EU Delegations, the way forward for the Delegations is to take advantage of their presence to gain a real centrality in day-to-day consular practice. For this, the Delegations must be able to provide a real added value to the Member State representations, be it monetary resources, logistical capabilities, analytical capabilities or something different that international and EU law does not expressly prohibit. Here, the available budget will likely prove the main restriction, although depending on the Delegation, qualified staff may also be an issue. Under the Lead-State concept, the actor that generally has the bigger role is the one that is able to find a niche and add real value to the network, whereas those who cannot are sidelined in the informal division of labor.[43] This should by no means be a new situation to the Delegations, since from the very beginning, their competences and role vis-à-vis the Member State representation has been only vaguely defined, and often they each have had to find their own way of adding value through specific local initiatives. Of course, a strategy defined by the EEAS central administration in Brussels based on the input from the Delegations could help systematize this effort and enable a process of shared learning among the geographically isolated Delegations.

EU Communication and Citizens' Identification

Still, no matter how successful the Delegation may become in adding real value to EU citizens in terms of consular assistance, the impact on citizens' identity and feelings toward the EU is far from guaranteed. Rather, the constitution of EU consular assistance as defined by the Directive, where the role is largely informally determined and complementary to and supportive of Member State action, gives rise to a huge communicative challenge for the EEAS, when the goal is an increasingly positive citizens' view of the EU and the added value it provides to the individual EU citizen. One factor is that a relatively small number of citizens need consular assistance every year when compared to the total EU population,

a fact that leads to conclude that their communicating messages about the EU's virtues to their immediate surroundings will have a small impact only. Another factor is that if the role and contribution of EU delegations to the field of consular assistance to the citizen are not clear in the news flow on the basis of which citizens think and act, all the activity of the EU, no matter how much value is provided, will not have a great impact on citizens' perceptions. The point of view of citizens depends not merely on objective fact, but on subjective perceptions of the EU's role in providing this increased consular assistance. Identification with the EU, and related aspects of the perceived legitimacy of the EU as a political system and provider of services to the citizen, is a subjective quality where each individual is her own world. Whether the EU will be able to take credit for a better functioning consular assistance, should this be the outcome, depends thus largely on its ability to communicate with the EU citizens, particularly when it is probable that the EU will be blamed for any mishaps or inadequacies by state politicians and media engaging in traditional EU-bashing.

The argument here is thus not related to the international identity of the EU as perceived by third states and the EU itself,[44] nor Member States' perceptions regarding the efficiency of consular cooperation and usefulness of the EU as a forum for foreign policy implementation and provision of services to the citizens. Rather, in the context of the question about the creation of an EU *demos*, we are dealing with ideas, perceptions and identities held by individuals. EU communication regarding consular assistance should thus be directed at citizens and should include at least two strategic messages. First, in the absence of an EU standard for consular assistance and when local arrangements determine how it is provided, the EU must in its communication give a clear overview of typical consular assistance that citizens have the right to in states where they are not represented by the state of citizenship—starting by doing away with the confusing use of the concepts of international law once and for all, and by explaining the roles of each actor in the EU network of representations. This should take place in the context of other communicative initiatives aimed at explaining the nature of the EU's external representation and the functioning of the EEAS generally. It is vital to avoid a fragmented EU communication and think together the communication to a domestic European audience and to foreign publics.[45] Coordination with communicative initiatives on other aspects of the EU citizenship is also important. To avoid that this EU communication becomes merely a question of outlining facts and figures, a traditional EU communicative approach

much criticized, this could be complemented by typical case stories of EU citizens that receive consular assistance, in the communicative tradition of the success stories that the EU tends to highlight in its public diplomacy to illustrate the impact of its actions.[46] Second, the case stories should be accompanied by a convincing narrative about how it is the EU that makes it possible for the citizens to enjoy consular assistance throughout the world. Such a narrative should link the history and nature of the EU's evolution toward an increasingly "normal" polity to the EU Citizenship and the rights that come with it, as well as to the fact that it is the EU by its actions, and not the Member States jointly, that guarantees EU citizens access to consular assistance throughout the world. A narrative is thus here considered a broad concept that in turn permits for communicating using different channels, both formal and informal and governmental and non-governmental channels.[47]

On a more abstract level, the present enquiry into consular assistance also leads to question the nature of a potential EU *demos* and how it relates to citizens' sentiments. Just as EU citizenship is complementary to Member State citizenship, an EU identity held by citizens is also complementary to national identity rather than a substitute for it, a point of departure generally prevalent in academic enquiries into the question of the Europeanization of citizens' identities.[48] Considering the European *demos*, it is therefore reasonable to consider that this would also be hybrid phenomenon—national and transnational at the same time, just as the EU political system is not simply a new polity in itself but rather an additional political and administrative layer to pre-existing polities. Complexities abound, and the observations made here serve merely to argue the necessity of not only focusing on EU-level problems and initiatives to generate increased identification with the EU and an increased legitimacy of the EU political system and administration, but also recognize the complexity of the question and increase focus on how the EU level and the Member State and sub-state levels constitute a complex web of overlapping identifications and loyalties. Taking this interconnectedness into account would also allow for conceptualizing how any development in terms of identification on the EU level invariably causes an impact on these other interconnected levels—and subsequently understand the why and how the resistance to these development on the part of Member States and great parts of the public, who may see any advance of the EU in these respects as a threat to established personal identification with the nation-state. The fact is that political forces stressing the bonds between citizens and nation-states are

increasing their appeal across the Union, as reflected in the 2014 elections to the European Parliaments where these forces won approximately 20–25 % of the vote.[49] The resistance indicates the need to think a national and local dimension into the EU strategic communication aimed at modifying the identification of citizens with different political levels, to be able to find a way to frame an EU consular assistance narrative that is not perceived by citizens as threatening their bond with their nation-state of origin. Such an undertaking would require detailed study of citizens' political identities in different EU Member States and regions and obviously fall well beyond the scope of the present chapter. Nevertheless, such an academic effort should be of direct and vital use to the EU, should it wish to follow the recommendations for political and communicative action outlined here.

6 Conclusion

To understand the prospects for the creation of a European *demos* to function as a basis for the EU, this chapter started from the assertion that it is helpful to move beyond the discussions of institutional reform and the constitutional nature of the Union and to also look at the EU's real ability to contribute with added value directly to EU citizens. Therefore, the chapter has focused on consular assistance to EU citizens in third states and how the scope and organization of this consular assistance impacts on citizens' identification with and loyalty toward the EU—that is, their perception of being EU citizens and part of an EU-wide *demos*.

From the perspective adopted here, the main conclusion is that the creation of the EEAS and the 2015 Directive on consular assistance to EU citizens constitute two lost opportunities for establishing a supranational model of EU external action and consular assistance that would have had a great potential for contributing to the creation of an EU *demos* through increased citizens' identification with and loyalty toward the EU. Both are thus reflective of the degree to which Member States safeguard their competences and sovereign privileges in this policy area as well as indicators of the general lack of political and legal ambition of the EU when it comes to establishing itself as a relevant actor on the international scene.

The 2015 Directive effectively closes the debate on the different available policy options and installs an intergovernmental model for providing consular assistance to EU citizens. The right to consular assistance bestowed upon EU citizens by the TFEU and the Charter of Fundamental

Rights are conceptualized as the right to assistance from the representations of other EU Member States when the state of citizenship is not represented in a given third country. A main negative effect of the Directive for the creation of the European *demos* can be identified in the failure to establish a common EU standard for consular assistance, meaning that EU citizens will not necessarily receive the same treatment in third states, this being determined by the legislation and practice of the state that actually provides the assistance. Furthermore, whereas the precise roles and function of the EU network are left to local arrangements in each third state, the main actors are clearly the Member State representations with a Lead State taking charge of EU coordination, and with the EU Delegations in principle having only a marginal supporting role.

Two ways forward for the EU were identified at this point. First of all, the Directive does not specify a specific division of labor or the exact roles of Member State representations and EU Delegations in the provision of consular assistance, a fact that gives the Delegations a certain space for finding ways to contribute with real added value and thereby increase their centrality in the EU diplomatic network present on the ground in a given third state. The precise method obviously depends on the third state in question and the relative interests and capabilities of the Member States present. Secondly, due to the lack of precision in defining the EU Delegations' role in providing consular assistance, the EU is also faced with an enormous communicative challenge, which itself is two-fold. The EU must on one hand communicate the complexity of the consular protection rules and specific practices of local cooperation in the third states. On the other hand, and perhaps more importantly, the EU must communicate convincing narratives that link the nature of the EU Citizenship to the right to consular assistance and communicate clearly that although provided by a Member State representation, it is actually the condition of EU citizen that gives the right to assistance and thereby it is the EU's achievement that it is provided to EU citizens throughout the world. For the elaboration of these narratives, further studies should be concluded that focus on how a potentially strengthened EU *demos* impacts on citizens' identification with the nation-state and sub-state regions so as to avoid that citizens see identification with the EU or the state in zero-sum terms, where the EU easily comes to be perceived as a threat to the nation and an individual's personal identification with this.

Notes

1. See Council Decision of the representatives of the Governments of the Member States meeting within the Council of 19 December 1995 regarding protection for citizens of the European Union by diplomatic and consular representations (95/553/EC), published in OJ L 314/73 of 28 December 1995 (hereafter referred to as Council Decision 95/553/EC).
2. Other traditional consular functions are thereby explicitly excluded from the analysis, such as the question of visas to third state nationals. For an analysis of EU visa policy, see Mara Wesseling and Jérôme Boniface, "New Trends in European Consular Services: Visa Policy in the EU Neighbourhood", in *Consular Affairs and Diplomacy*, ed. Jan Melissen and Ana Mar Fernández, Martinus Nijhoff, Leiden, 2011.
3. Jan Melissen, "The Consular Dimension of Diplomacy", in *Consular Affairs and Diplomacy*, ed. Jan Melissen and Ana Mar Fernández, Martinus Nijhoff, Leiden, 2011, p. 5.
4. Annemarieke Vermeer-Künzli, "Where the Law Becomes Irrelevant: Consular Assistance and the European Union", *International and Comparative Law Quarterly*, Vol. 60, 2011, pp. 981–982.
5. TEU, article 5.
6. The resulting Directive was not adopted until spring 2015; see section 4.
7. The problem of forum shopping refers to the phenomenon where an absence of a standard level of assistance in principle incentivizes the unrepresented EU citizen to "shop around" to see which Member State representation provides the highest level of consular assistance. See section 4 analyzing the current state of affairs created by 2015 Council Directive.
8. The only notable exception being the title of article 46 of the Charter of Fundamental Rights of the EU, as analyzed in the following section.
9. Annemarieke Vermeer-Künzli, *ibid.*, p. 968.
10. TEU, article 47.
11. Ander Gutiérrez-Solana Journoud, "Artículo 46: la protección diplomática y consular. Una mínima extensión internacional de los derechos ciudadanos de la UE", in *La Carta de los Derechos Fundamentales de la Unión Europea y su reflejo en el Ordenamiento Jurídico Español*, ed. Ixusko Ordeñana Gezuraga, Aranzadi, Pamplona, 2014.
12. Council Decision 95/553/EC, article 5.
13. Commission Green Paper on diplomatic and consular protection of Union citizens in third countries, COM(2006) 712 final. For an overview.
14. Commission Communication: Implementing The Hague Programme: The Way Forward, COM(2006) 331 final.
15. European Parliament Resolution of 11 December 2007 on the Commission Green Paper, "Diplomatic and Consular Protection of Union Citizens in

Third Countries", Doc no. P6_TA(2007)0592, available at the Parliament website: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2007-0592&language=EN&ring=A6-2007-045 (accessed 30 September 2015).

16. The Treaty on the Functioning of the European Union as adopted in Lisbon reproduces in its first sentence the consular assistance provision of article 8 of EC Treaty as adopted in Maastrict in 1992: "Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of the State", and merely adds that cooperation measures and directives should be adopted. For clarity, this chapter refers throughout to article 23 TFEU.
17. Jan Wouters, et al., The European Union and Consular Law, *Working Paper no. 107*, Leuven Centre for Global Governance Studies, Leuven, 2013, p. 7.
18. Ana Mar Fernández, "Consular Affairs in an Integrated Europe", in *Consular Affairs and Diplomacy*, ed. Jan Melissen and Ana Mar Fernández, Martinus Nijhoff, Leiden, 2011, p. 102.
19. *Ibid*., p. 103.
20. Council of the European Union, European Union Guidelines on the implementation of the consular Lead State concept, 2008/C 317/06.
21. Council Decision (2010/427/EU) of 26 July 2010 establishing the organization and functioning of the European External Action Service, art. 5(10).
22. Stanley Hofmann, "Obstinate or Obsolete? The Fate of the Nation State and the Case of Western Europe", *Daedalus*, Vol. 95, 1966.
23. On the nature of the EEAS, see Jozef Bátora, "The 'Mitrailleuse Effect': The EEAS As an Interstitial Organization and the Dynamics of Innovation in Diplomacy", *Journal of Common Market Studies*, Vol. 51, no. 4, 2013.
24. Council Directive (EU) 2015/637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC, published in OJ L 106/1 of 20 April 2015.
25. *Ibid*., art. 6.
26. *Ibid*., art. 3.
27. *Ibid*., art. 10.
28. *Ibid*., arts. 14–16.
29. Malta Ministry of Foreign Affairs, *Malta the only EU Member State Offering Consular Services in Benghazi*, Targeted News Service, Washington, DC, 2013, available through ProQuest.

30. To fully assess the importance of the differences in Member State practices and thereby the problem of forum shopping, a comparative empirical analysis of the levels of consular assistance to citizens and non-citizen family members should be carried out, something which is beyond the scope of the present chapter.
31. Jan Wouters, et al., *op.cit.*, pp. 11–12.
32. Council Directive (EU) 2015/637, art. 19.
33. Ana Mar Fernández, *op.cit.*, p. 114.
34. Kristi Raik, *Serving the Citizens? Consular Role of the EEAS Grows in Small Steps*, EPC policy brief, European Policy Centre, Brussels, 2013.
35. Analyzed in more detail by Annemarieke Vermeer-Künzli, *op.cit.*
36. Vienna Convention on Consular Relations, 1963.
37. Vienna Convention of the Law of Treaties, 1969, article 34.
38. See Noé Cornago, *Plural Diplomacies. Normative Predicaments and Functional Imperatives*, Martinus Nijhoff, Leiden, 2013.
39. Vienna Convention on Diplomatic Relations, 1961.
40. Council Directive (EU) 2015/637, *op.cit.*, Preamble paragraph 6; Commission Green Paper, *op.cit.*, paragraph 5.
41. Annemarieke Vermeer-Künzli, *op.cit.*, p. 986.
42. Ander Gutiérrez-Solana Journoud, *op.cit.*
43. For the informal division of labor among EU actors, see Tom Delreux and Karoline Van den Brande, "Taking the Lead: Informal Division of Labour in the EU's External Environmental Policy-making", *Journal of European Public Policy*, Vol. 20, no. 1, 2013.
44. For an insightful discussion of the EU's international identity as represented by different actors in the EU network, see Caterina Carta, *The European Union Diplomatic Service: Ideas, Preferences and Identities*, Routledge, London, 2012, chapter 6.
45. Policy recommendations for EU public diplomacy made by Simon Duke that are particularly relevant here. Simon Duke, "The European External Action Service and Public Diplomacy", *Clingendael Discussion Papers in Diplomacy no. 127*, Netherlands Institute of International Relations 'Clingendael', The Hague, 2013, p. 35. For a general analysis of the communicative challenge of the EEAS, see also Steffen Bay Rasmussen, "El Servicio Europeo de Acción Exterior: un reto comunicativo para la diplomacia pública de la Unión Europea", *Cuadernos Europeos de Deusto*, no. 44, 2011.
46. For good examples of this tradition, see the webpage of DG Development of the Commission.
47. Mai'a K. Davis Cross, "Conceptualizing European Public Diplomacy", in *European Public Diplomacy: Soft Power at Work*, ed. Mai'a K. Davis Cross and Jan Melissen, Palgrave, New York, 2013, p. 5.

48. See, for instance, Thomas Risse and Jana Katharina Garbowsky, "European Identity Formation in the Public Sphere and in Foreign Policy", *RECON Online Working Paper*, 2008, available at http://www.reconproject.eu/projectweb/portalproject/RECONWorkingPapers2008.html (accessed 30 September 2015); Thomas Risse, *A Community of Europeans? Transnational Identities and Public Spheres*, Cornell University Press, Ithaca, 2010.
49. Depending on how specific parties are considered and grouped. EP results are available at the Parliaments website: http://www.europarl.europa.eu/elections2014-results/en/election-results-2014.html (accessed 30 September 2015).

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PART IV

Extending the European Democratic Model to Other Global and International Actors: The EU as an Embryo of Cosmopolitan Polity?

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Introduction

The fourth part of this book takes the analysis of the building of a European *demos* beyond the borders of Europe, asking what impact the achievements of the EU have had on global governance. It looks at recent developments of international relevance that place the EU's internal accomplishments within the context of the larger emerging cosmopolitan order.

The section begins with an assessment of the part played by the European Neighbourhood Policy in the promotion of democracy and the promotion of human rights within states that are part of this policy, designed to create a "circle of friends" in North Africa and the Middle East. Even while it has often struggled with a democratic deficit at home, the EU has arguably gained international credibility through its political and economic support of changes in Eastern and Central Europe, revolving around enlargement to the east since 2004. That credibility has recently been challenged by the threats posed to EU achievements by Russian policy in the Ukraine,

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by questions regarding EU leadership in the wake of the Arab Spring, and by the considerable stresses posed by the refugee crisis in the wake of the Syrian civil war. In spite of this, EU external governance has succeeded in promoting critical reforms and transformations in the neighborhood, with important long-term consequences.

The role of the EU as an actor in the promotion of regional and international peace and security has been central both to its work at home and abroad, recognized notably by its receipt of the Nobel Peace Prize in 2012. Over the decades it has assumed a number of military and civilian tasks that have impacted its role in global governance, although—like all global actors—it has had to tailor its approaches to changing circumstances. The reinvention of policy remains a challenge as these circumstances continue to change.

Prime among these changed circumstances has been the particular challenge posed by shaping a workable response to the increased flow of refugees, immigrants and asylum seekers from third countries. The EU has become—alongside the USA—one of the two primary magnets for immigration, impacted by a combination of "push factors" encouraging people to leave their home countries and "pull factors" that attract more people to the opportunities offered by Europe. The EU came somewhat late to the process of harmonizing its policies on asylum, but has recently found them strained to near collapse under the weight of refugee flows in the wake of the Syrian civil war. This has posed problems not just for focused policies, but to the entire exercise of integration as many member states push back against the concept of open borders.

Looking beyond political, security and migration issues, the final topic of Part IV concerns the key role played by the EU in the negotiation of international trade and investment agreements, providing—as it does—a potential model for increased transparency in such negotiations. The recent debate over the Transatlantic Trade and Investment Partnership does, however, indicate that there is still much to do in order to ensure that the democratic deficit is not also a problem in the international arena, as it is at home.

CHAPTER 13

European Neighbourhood Policy: New Models of External Governance

Aurelia Dercaci

1 Introduction

The EU is an international political actor with a major commitment to the promotion of democratic norms and values and the promotion of human rights. Since 1990 the Union has gained credibility in this regard and it was successful in supporting democracy abroad during its largest expansion in 2004. The EU's policy and influence toward Eastern and Central European countries before their accession has been considered as the most successful model of democracy promotion beyond the EU.[1] This chapter offers a general review of democracy promotion through the European Neighbourhood Policy (ENP) as an aspect of the EU's external governance in neighboring countries and identifies certain elements that have determined the success or failure of the process.

2 European Union External Governance

One of the questions of most importance and interest discussed in recent years has been the capacity of the EU to exert influence beyond its frontiers in third countries (i.e. in countries that are not EU Member States).

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The EU provides rules and mechanisms oriented toward influencing the actions of external actors and thus exerting external governance. In the case of neighboring countries that are not EU members and have no prospect of accession, the domestic impact of this governance and adaptation to it is known as "Neighborhood Europeanization".[2] The impact of the EU on the external actors can be seen in three major directions. The first is its influence through the internal market, which due to its attractiveness has become a tool for shaping economic and policy rules for global governance. The second is the influence on candidate states during the enlargement process, especially eastward enlargement, when the adoption and transposition of the *acquis communautaire* was a *sine qua non* for EU accession. The third direction is the influence on countries that are not EU members and have no desire to join the union—that is, the European Economic Area—or those which are not eligible for membership, whether or not they wish to join. Here we are referring to the ENP toward its eastern and southern neighbors.

As a community of democratic states, the EU seeks to promote democratic values in third countries. In the case of the ENP, the aim is to contribute to their approximation to European norms and rules.

Scholars of European studies identify different models of EU democracy promotion.[3] The first is linkage, in which, on the basis of the existing conditions in a society, the existing democratic opposition is promoted and supported from outside. The second model is leverage, where the EU contributes to the promotion of democratic reforms through political conditionality. The third way in which the EU promotes democratic principles through functional cooperation with third countries is governance.[4] This third model of democracy promotion was adopted mainly in 2000 when the EU launched the ENP, intended to bring neighboring countries closer in line with the EU by promoting EU values and principles and encouraging transformation of policies, institutions and politics.

External governance involves institutionalized relationships with countries that are neither members nor candidates but which are committed to adapting their legislation, institutions and domestic policies to EU *acquis*, as is the case of partner states in the ENP.[5]

In the models of democracy promotion, cited above, scholars distinguish between four dimensions:

(a) The target system of democracy promotion, the level at which it operates—oriented toward the polity, the society or a sector-specific policy;
(b) The outcomes of the process—at the polity level, the outcomes are the democratic institutions, accountability and rule of law; at a societal level these are democratic culture and civic participation; and at sectorial level, democratic governance;
(c) Channels of democracy promotion, which may be intergovernmental, transnational or transgovernmental, depending on the actors being addressed;
(d) Instruments of democracy promotion: conditionality and socialization.

In the case of the ENP, conditionality is an important instrument for promoting reforms. The EU makes the receipt of rewards such as financial assistance or other incentives (e.g. movement of citizens or access to the internal market) conditional on the adoption of democratic rules and practices. In this case, the EU exerts a direct impact on the target government and it incorporates the intergovernmental channel of external incentives, compulsory impact and a compliance mode of governance.[6] Adoption of EU-promoted norms and rules, such as human rights, democratic elections and the rule of law, has a variety of political costs for the governments of the countries involved. The *conditionality* model is a rational choice of bargaining model and the actors are rational bargaining players who seek to maximize their own material and power interests.

Another model is that of socialization, defined as a process of inducing actors into the norms and rules of a given community. This is a constructivist theoretical model, which assumes the "logic of appropriateness".[7] According to this logic, the actors' actions are driven by rules of appropriateness, that is, they do what they consider appropriate for themselves or seek to do "the right thing". In this context the EU acts to persuade outsiders that these policies are appropriate and, as a consequence, to motivate them to adopt EU policies. This entails intergovernmental "social learning" and constructive impact.[8]

In promoting democracy in ENP countries the same tools have been used as those that have proved to be efficient in the case of the EU's eastward expansion. There, conditionality was instrumental, since the most significant incentive—membership of the Union—was at stake. The

ENP lacks this essential incentive for transformations, as it does not offer the prospect of EU accession.

The ENP has been reformulated several times since it was first launched. One of the main reasons for this shift in its discourse has been the issue of the Union's own security. However democracy promotion still holds an important place among the EU's objectives in the field of external relations.

Indeed, the promotion of democracy is an important constitutive element of EU founding treaties and is closely associated with the Union's framework of external relations and with the ENP as a component of these relations.

The preamble to the Maastricht Treaty stipulates that Member States confirm their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and the rule of law. This commitment is reiterated in Title V, Provisions on Common Foreign and Security Policy (CFSP).[9]

The Amsterdam Treaty identifies democracy as one of the founding principles of the EU: "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States".[10]

Article 21(1) of the Treaty of Lisbon sets out a commitment to promote the founding principles in the wider world: "The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law".[11]

In the process of establishing actions to support democracy outside the EU, the objective of the Council is to promote democracy and rule of law. The Council also decided to draw up the EU Agenda for Action on Democracy Support in EU External Relations, whose aim is to improve the coherence and effectiveness of EU democracy support.[12] The agenda stipulates that "Human rights and democracy are inextricably connected. Only in a democracy can individuals fully realize their human rights; only when human rights are respected can democracy flourish" and "While there is no single model of democracy, democracies share certain common features. These include respect for human rights and fundamental freedoms, including the principle of non-discrimination, which provides that

everyone is entitled to enjoyment of all human rights without discrimination as to race, sex, language, religion, political or other opinion, national or social origin, birth or other status. Democracy should ensure the rights of all, including the rights of persons belonging to minorities, of indigenous peoples and other vulnerable groups".[13]

The third part of the document highlights other aspects to be taken into consideration in the process of democracy promotion in external relations: a country-specific approach; dialog and partnership; EU coherence and coordination; mainstreaming (in line with existing commitments, both from an institutional perspective and in policy and geographical/thematic instruments); international cooperation; and visibility.

3 Democracy Promotion in the EU's Neighbourhood Policy

Following the EU's largest expansion, the Union now borders countries that have faced grave problems, fragile states which were, and are still, prone to crisis and conflicts.[14] On the eve of the 2004 enlargement the need for a specific approach to the new neighbors arose, and the aim was to "develop a zone of prosperity and a friendly neighbourhood—a 'ring of friends'—with whom the EU enjoys close, peaceful and co-operative relations".[15] Democracy is considered to be a condition for attaining stability and wealth, in order to achieve the objective of contributing to the security and prosperity in neighboring countries. As already mentioned, the mechanisms and models of democracy promotion applied in Eastern and Central European candidate countries have been considered highly successful, and a similar pattern has been followed in the case of the neighborhood states, the difference in this case being that the chief incentive, the prospect of accession, is lacking.

At the time of its creation the ENP was oriented toward filling the gap between the enlarged EU with its consolidated borders and the countries remaining outside. It is a broad political instrument, designed to encompass a wide range of policies and dimensions.

Democracy promotion is not the only—nor even the primary—objective of the ENP. The main reason for creating the policy was to ensure stability, prosperity and security on the borders of the EU. Democracy promotion, therefore, is not a goal in itself but a means which, along with political reforms, contributes to achieving the priority objective of ensuring security: "the best protection for our security is a world of well-governed states".[16] Democracy promotion in the ENP is part of the

concept of "shared values" including democracy as a norm[17]: "the privileged relationship with neighbours covered by the ENP will be based on joint ownership. It will build on commitments to common values, including democracy, the rule of law, good governance and respect for human rights, and to the principles of market economy, free trade and sustainable development, as well as poverty reduction. Consistent commitments will also be sought on certain essential concerns of the EU's external action including the fight against terrorism, non-proliferation of weapons of mass destruction and efforts towards the peaceful resolution of regional conflicts as well as cooperation in justice and home affairs matters".[18]

Democracy, together with other fundamental principles promoted by the EU, such as peace, freedom, human rights and rule of law, was explicitly mentioned in the 1973 Copenhagen Declaration on European identity.[19]

The democratization of countries outside EU borders is achieved through two approaches: on the one hand, through transferal of the institutional democratic framework, in which the state's institutions are formed as a result of a fair election process; and on the other, the promotion of elements of democracy, such as accountability, transparency and active citizen participation.

The EU reshaped the ENP in response to the new challenges in its vicinity. The Joint Communication "A New Response to a Changing Neighbourhood" states that the result of assessment of the policy "have shown that EU support to political reforms in neighbouring countries has met with limited results".[20]

The new approach was intended to be based "on mutual accountability and a shared commitment to the universal values of human rights, democracy and the rule of law". For the specific area of democracy promotion, the aim was to "provide greater support to partners engaged in building deep democracy—the kind that lasts because the right to vote is accompanied by rights to exercise free speech, form competing political parties, receive impartial justice from independent judges, security from accountable police and army forces, access to a competent and non-corrupt civil service—and other civil and human rights that many Europeans take for granted, such as the freedom of thought, conscience and religion".[21] The Communication proposes to adapt levels of EU support to partners depending on their progress in achieving political reforms and in building deep and sustainable democracy, and it identifies the following commitments that such governments must assume: free and fair elections, freedom

of association, expression and assembly and a free press and media, the rule of law administered by an independent judiciary and right to a fair trial, fighting against corruption, security and reform of the law enforcement sector (including the police) and the establishment of democratic control over armed and security forces. Another aspect is the reinforcement of the partnership with society, through the establishment of partnerships in each neighboring country and making EU support more accessible to civil society organizations through a dedicated Civil Society Facility; support for the establishment of a European Endowment for Democracy to help political parties, non-registered NGOs and trade unions and other social partners; promotion of media freedom by supporting unhindered access by civil society organizations to the Internet and the use of electronic communications technologies; and reinforcement of human rights dialogues.[22]

The Joint Communication "European Neighbourhood Policy: Working towards a Stronger Partnership" mentions that some progress has been made and highlights that there is "an increasing divergence in democratic reforms in the neighbourhood countries. The EU will therefore respond in a more nuanced manner, based on the 'more for more' principle and a rigorous review of reform commitments. […] The universal values on which the EU is built—freedom, democracy, respect for human rights and fundamental freedoms, and the rule of law—also underpin the ENP. For partners who want to become as close to the EU as possible, it is the main reference point for their domestic reforms".[23]

In order to identify ways of making the EU's external policy on human rights and democracy more active, more coherent and more effective, the Communication "Human Rights and Democracy at the Heart Of EU External Action—Towards A More Effective Approach" highlights that the EU should continue to support the vibrant civil societies that are vital to democratic states, and social partners who are key to sustaining reforms.[24]

A recent European Commission consultation paper on the need to review the ENP to address the reality and challenges in its southern and eastern neighborhood, expresses concern regarding the promotion of democracy: "The level of instability in some partner countries not only disrupts progress towards democracy but also threatens the rule of law, violates human rights and has serious impacts on the EU, such as irregular migratory flows and security threats".[25]

In terms of the ENP, the Treaty of Lisbon introduced a new feature in Article 8 of the TEU. The article does not expressly refer to the ENP but

to the "neighboring countries" with which it aimed to develop a "special relationship":

1. "The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.
2. For the purposes of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation".

As well as the power to "develop a special relationship", use of the word "shall" implies an obligation on the EU to develop this relationship.[26]

Although the text remains the same as in articles 1–57 of the Constitutional Treaty, its location in the Treaty of Lisbon is altered. Article 8 of the TEU is included in the Common Provisions of the Treaty of the EU and is excluded from Title V TEU on External Action of the EU and CFSP, where it is no longer, as before, in the proximity of the provisions on enlargement.[27] This change in the position of the article confirms that this policy is seen as an alternative to the enlargement process, and this may be a way to "highlight the distinct nature of the cooperation on offer".[28]

The reference to values was always an important element of previous EU documents and agreements with neighboring countries. The difference in the case of article 8 is that it stipulates that the relationship between the EU and its neighbors is founded on the values of the Union (and not values to be promoted), and introduces a clear element of conditionality, referring to the "values of the Union", not to "shared values" as before.[29]

4 Democracy Promotion in the Eastern and Mediterranean Dimensions of the ENP

Action Plans are key instruments for the implementation of the ENP and include the promotion of democracy in countries in the neighborhood, showing the different sub-actions that the state administrations have to implement.

There are two approaches to promoting democratization in the ENP. The first involves promotion of a democratic institutional framework

through which to ensure proper democratic elections in order to establish legitimate governments, and the second is based on the momentum of introduction of democratic elements, such as accountability, transparency and citizen participation. The distinction is that formal democracy is defined as constituting the institutional characteristics and procedural arrangements that guarantee citizens the possibility to freely exercise their vote, whereas substantive democracy is defined as constituting the principles and instruments through which it can exercise actual citizen control over political processes and distribution of power by political elites.

This distinction is particularly important to any analysis of the efficiency of democratic development in the neighboring countries in Eastern Europe. A number of these countries wish to move closer to the EU, to have closer cooperation and to explore the future prospect of becoming EU members. Under these circumstances, the purpose of these statements is to fulfill the conditions of the agreements under which they were allowed closer proximity to the EU model. The primary objective of these countries—which include Georgia, Moldova and Ukraine—is European integration, and most, if not all, internal reforms are undertaken for the purpose of fulfilling the conditions set out in the Action Plans.

Compliance with the criteria of the Action Plans is an important condition for further progress in cooperation, and the level of compliance with these provisions is assessed annually by the EU through country progress reports. The rhetoric of promoting democracy is present in the action plans of all ENP countries and can be broken down into the following general points: strengthening the stability and effectiveness of institutions guaranteeing democracy and the rule of law; reform of the judicial system; reforms to the civil services; the fight against corruption; strengthening democratic institutions; review of existing legislation so as to ensure the independence and impartiality of the judiciary, including the impartiality and effectiveness of the prosecution; and strengthening the capacity of the judiciary.

Each Action Plan includes the concrete actions to be taken to fulfill the specific commitment for each country.

The ENP covers countries in Eastern Europe and countries in the Middle East and North Africa; although the general objectives included in the Action Plans are similar and are founded on shared values, the interests of the partner countries are different.

Given this difference in interests, aspirations, political circumstances and capacities of the ENP partner countries, the EU has sought to adopt a differential approach.

4.1 Eastern Partnership

In 2009 the EU launched its Eastern Partnership (EaP) following the initiative of Poland and Sweden to offer the EU's eastern neighbors a specific framework of cooperation oriented toward political association and economic integration and as an attempt to consolidate the eastern dimension of the ENP, oriented toward Armenia, Azerbaijan, Georgia, Belarus, Moldova and Ukraine.

The EaP is based on the principle of conditionality; the EU offers the partner country assistance, financial resources, market access, and greater cooperation in exchange for the recommended changes and transformations. Another important mechanism is socialization, a process in which countries drive reforms and change their policies because they learn the EU model through social contact and adopt it because they consider it to be the most appropriate and legitimate model.

In the case of the EaP, the element of conditionality has been considered inefficient, since the main incentives it offers—such as association agreements, participation on the European market and liberalization of the visa regime—are achievable only in the long term and, therefore, do not provide sufficient motivation to partner countries.

However, given the difference between partner countries, we can see that positive conditionality has proved more efficient in cases where the same countries are also interested in closer proximity with the Union. In this regard, Moldova, Georgia and Ukraine are all examples: despite the different internal political crises faced in recent years, they have kept up the pace of reform, knowing that eventually it may bring significant incentives in line with their aspirations.

Negative conditionality (the so called "less for less"), on the other hand, appears to be less effective. The sanctions imposed on the Lukashenko regime in Belarus, for example, proved not to be an efficient tool of influence; the political situation in the country did not change, nor was there any impact on democratic norms.

Conditionality is considered to be the most powerful and effective tool of enlargement, directly influencing the construction of institutions and legislative adjustments. The incentive used by the EU during the enlargement process was accession itself, which is what made conditionality so effective. In the case of the ENP and EaP, a similar process has been used to enforce the commitments made by neighboring countries in a series of issues similar to the *acquis communautaire* (some scholars have dubbed ENP as "enlargement-lite"[30]) but without offering them the prospect of accession.

Indeed, even if the EaP and the ENP were designed as a way to further enlargement issues, partner countries aspiring to obtain the future prospect of accession are keen to make progress and undertake the transformations, since they consider that converging with the EU in a wider number of issues will bring the prospect of membership closer.

Differentiation is another factor which should be taken into consideration when cooperating within the EaP framework. There is a need for greater differentiation between partner countries. Traditionally, the EU has used fixed models and "one-size-fits-all" agreements. However, such agreements are not suitable for the different situations, challenges and levels of ambition of each of the partner countries. The question is whether the EU is ready and able to develop several individual models.

The EaP countries have different expectations of the EU. While some (Moldova, Georgia, Ukraine) are willing to promote reforms and democratic transformation in order to get closer to the EU, others are interested more in economic cooperation without making other democratic transformations (e.g. Azerbaijan and Armenia). Positive conditionality may be a very effective tool for promoting change and development in these countries. On the other hand, countries that are not interested in promoting internal political reforms in order to converge with the EU and prefer to maintain the existing *status quo* may not be attracted by the EaP offer of closer cooperation.

4.2 Southern Mediterranean Countries

In 2008, the bilateral dimension of the ENP was complemented by the Union for the Mediterranean (UfM), which gives it a multilateral dimension and establishes European policy toward Mediterranean regionalization.

The southern dimension of the Neighbourhood Policy includes Arab states lacking a fully developed democracy. The logic and foundations that are presumed to be central to the ENP lie in incentives or rewards offered by the EU for democratic reforms in the southern Mediterranean area. A commitment to review progress and to reallocate resources and benefits on a regular basis, based on the respective degrees of political liberalization of Arab governments has been assumed by the European Commission. It was expected that competition between Arab states would help them to advance in the reform process. In the case of these countries, positive conditionality was offered only at a very general level in exchange for commitment to reforms by Arab governments. Like the Barcelona Process,

the ENP is formulated primarily in terms of shared goals and "ownership" (joint ownership) between north and south. In this case, the ENP does not offer what the Arab states are looking for, that is, more symmetrical economic liberalization and free movement of workers.[31]

In terms of objectives, it can be seen that in both the eastern and the Mediterranean neighborhoods, the political and economic situation in many of the states has declined. In the southern neighborhood, the security environment worsened dramatically, with civil protests and uprisings in countries such as Syria and Libya, which directly threaten European security. In countries such as Egypt, instability has increased. In general there has been a worrying increase in terrorism, migratory pressure, movement of refugees and organized crime linked to migration in the region. Even in the case of states that can be considered successful, such as Tunisia, Morocco and Jordan, it is clear that they are not fully democratic and respectful of human rights.[32]

On the other hand, the EU's actions to promote democracy in the Middle East and Southern Africa have been called into question because of a certain generality or lack of clarity and the use of "nebulous language"[33] and the abandonment of the principle of negative conditionality, which sends a message to the autocratic governments of these countries that democratic reforms can be postponed without sanctions being applied.

5 Conclusions

The EU commitment to promote democracy in third countries is generally acknowledged and is set out in its strategic and foundational documents and official discourses. In its relationship with neighboring countries, democracy promotion is embedded in the promotion of values in these countries. The ENP, created mainly as a response to its new neighbors resulting from eastward enlargement and to prevent possible threats to EU security, sought to contribute to the stability, prosperity and security of conflict-prone states on the EU's borders. Democracy promotion has always formed part of the relationship between the EU and its ENP partners.

External governance through the ENP has lately faced a range of challenges in partner countries. The uprisings in the Arab world in 2011 have irrevocably transformed the Middle East. The EU has tried to reshape its neighborhood policy, but its reactive approach and the lack of leadership in the region has been criticized, as was its previous resilience to the scarce progress toward democratic transformation in the area.

Until a certain point in time, the situation in the eastern neighborhood seemed to be different; a range of eastern countries aspired to obtain the prospect of EU membership and were consequently willing to commit to fall closer into line with EU *acquis*. Nonetheless, the structural and endemic problems of this region have led to stagnation in the transformation processes. Corruption among the political elites and a delay in reform have undermined the success of the Union's orientation. The Ukrainian crisis was, and still is, another serious challenge for the EU's capacity for reaction. The EU tried to react to the situation by supporting Ukraine's independence and aspirations to follow a European path, but Russian influence in the region and the lack of a common position by EU Member States made it very difficult to take strong and efficient action in the area.

Despite these and other challenges, the EU's external governance has succeeded in promoting important reforms and transformations in eastern countries. From our analysis, we may conclude that there are a range of elements that may influence EU external governance, of which we identify three. The one important factor is the coherence of the EU discourse and the credibility of conditionality. The EU's attitude to the countries' stated aspirations or, to put it another way, the criterion of differentiation applied in accordance with each country's orientation and its requirements, interests or needs also plays a significant role. Finally, a crucial element is the partner country's identification with the EU and its aspiration to obtain candidacy status. When this condition exists, countries can be seen to be more willing to accept changes oriented toward greater alignment with the EU, even when these come at a high cost.

These elements may contribute to more efficient EU external governance in a changing world and in a highly challenging European neighborhood.

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CHAPTER 14

The European Union as an International Actor of Peace and Security

Antonio Manrique de Luna Barrios

The European Union (EU) is now an important actor in international society. It needs to develop a range of actions to favor regional and international peace and security, since states interact with other states in different ways. According to Joseph Nye, international society today faces several problems that extend far beyond the mere preoccupation of states with guaranteeing their national security.[1] In this context the EU needs to develop a number of military and civilian capacities that will help it contribute to global governance, as it did in the Mali crisis of 2012 when it contributed to peace mediation, transnational justice and security sector reform.[2] In the ambit of peace and security, the EU has cooperated with other international and regional organizations in managing internal and international conflicts[3]; however, within the EU it has not always been easy to coordinate peace missions in a specific country, Bosnia-Herzegovina being a case in point. Nye shows that by their transnational nature, some issues can only be dealt with multilaterally and for this reason must be resolved in cooperation with other states. Peace and security is one such topic. In order to consolidate these capacities, the EU needs to cooperate with other subjects of public international law such as the United Nations (UN) and the North Atlantic Treaty Organization (NATO).

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The EU has contributed to establishing peace and has tried to deliver adequate protection of the fundamental rights of the population in various locations inside and outside Europe. Particularly with regard to conflicts in international society and those engendering situations that affect the international order, it has been necessary to deploy peace missions for the purposes of reestablishing the pre-conflict situation.

In the light of this problem faced by international society, one must ask, is it necessary for the EU to participate in peace missions to reestablish regional and international security? Has the EU contributed to the creation of a climate of international peace and security in the international scenario?

To answer these questions we have structured this investigation into two sections. In the first, we will study the EU's role in the area of regional peace and security. In the second, we will discuss its role in the area of international peace and security.

The purpose of this chapter is threefold: (a) to foster debate on the role assumed by the EU to contribute to regional and international peace and security; (b) to establish that the actions of the EU are in accordance with the rules and principles established in the Charter of the UN; and (c) to disseminate the lessons learned by the EU with regard to regional and international peace and security.

Finally we should note that this research uses a multidisciplinary approach, combining theory and practice in its analysis of the EU's experiences.

1 The Contribution of the European Union to Regional Peace and Security

The Treaty of Amsterdam transferred the powers of the so-called Petersberg tasks, previously held by the Western EU to the EU.[4] However, for a long time, the Member States of the EU were unable to reach agreement on the way in which the Petersberg tasks should be implemented. Some states preferred low-intensity actions (humanitarian missions, traditional peace-keeping, etc.), while others argued for high-intensity missions (e.g. peace enforcement missions).[5] However, with the adoption of the global objective of Helsinki, it was decided to endow the EU with greater capacity to develop the full range of missions mentioned. Some controversy was also caused among Member States by Article 17.2 TEU, which held out the possibility that the EU might use combat forces to manage certain crises. This led to rejection by some Member States on the grounds that it would create a situation in which some peace enforcement operations might be carried out.

Within the Petersberg tasks, the EU developed new instruments for international crisis management, allowing it to act in different places. It thus put aside *realpolitik* to take a leading role in places where no other parties wanted to intervene in order to safeguard international peace and security. Not only did this approach arise from a strong conviction in multilateralism, but it was also legitimated by the parties that had been in conflict before the peace missions began.[6]

The EU has subsequently continued to develop its "Common European Defence Policy" to try to guarantee regional stability with the coordinated and systematic utilization of the instruments it has been given. To date, the EU has deployed several operations in different regions, particularly in Asia and Africa, which have contributed to international peace and security. For example, with regard to cooperation between the EU and Africa (particularly the African Union), Toni Haastrup writes that cooperation has made it possible to create certain standards of behavior and norms that promote peace and security in the region, as set out in the Joint Africa–EU Strategy.[7] It has also helped to neutralize certain ideological extremes in society that endangered specific nations and regions. In this regard, it should be noted that under the general header of crisis management, the EU tackles quite a wide range of situations and activities identified with interventions whose aim is to bring an end to armed conflicts, protect the civilian population and reconstruct devastated areas, using a combination of military and civilian means. Through this approach, the EU seeks compromise, common ground and ultimately consensus.

In this way, the EU and other regional organizations assumed the challenge of managing crises, seeking thereby to safeguard international peace and security.[8] The EU has had to overcome several problems in the area of crisis management: firstly, it is necessary to create a general policy that applies to all cases of crisis management, regardless of the organizations responsible; secondly, if this general policy is not successful, it is necessary to determine whether the EU has gone beyond the UN in developing its instruments of crisis management; and thirdly, it must identify any contradictions that might exist between the instruments adopted for crisis management and the provisions of the UN Charter.

It is important to note that several instruments of crisis management exist within the framework of the UN which does not have or claim a monopoly on any one. The EU is therefore at liberty to use any or all of them. These instruments include preventive diplomacy, peacemaking, peacekeeping, peacebuilding, disarmament, sanctions and peace

enforcement.[9] In this sense, the EU has developed instruments of a politico-diplomatic, economic, military and civilian nature to contribute to crisis management.

Having presented the way the EU has developed crisis management, it should be noted that until now, it has not been possible to design a single general policy applicable to crisis management, given the number and complexity of the different instruments adopted. Several disagreements have arisen with regard to the possibility of using such instruments and the powers that can be employed to implement them. However, the EU continues to assume a very interesting role in crisis management; from its experience it contributes to the discussion and development of possible tools for the future control of such crises and it is therefore an important help in establishing an international system, firmly based on experience in crisis management and in promoting regional and international peace and security.[10]

Furthermore, the EU has developed a number of instruments for crisis management that are broader than those of the UN, while at all times fulfilling the provisions of the UN Charter.

It may therefore be concluded that the EU wishes to implement an effective operational capacity that will make it possible to solve any problems that might arise affecting international peace and security and assure full respect for human rights. Its success in this regard mainly depends on the ability of the institutions involved in peacekeeping, such as political bodies and regional and international organizations, to identify, develop and designate efficient functioning.[11] Regional organizations that were created for economic purposes (such as the EU) have had to adapt to the new challenges presented by international society and have therefore had to understand that peace, security and respect for fundamental rights and freedoms are essential for maintaining national, regional and international stability.

The EU has developed a series of military and civilian capacities to preserve peace and security. We shall now analyze each one in detail.

1.1 The Need to Cooperate with Other International Organizations to Develop a Military Capacity in Order to Maintain Peace and Security

In light of the EU's inability to manage military crises, demonstrated during the conflicts in Bosnia-Herzegovina and Kosovo[12] and in order to increase its importance in international crisis management it was decided to provide the Union with a variety of resources that would enable it to

assume its responsibilities *vis-à-vis* European security policy and common defense with autonomous action. This was backed by credible military capability and appropriate decision-making bodies.[13]

This process also revealed the need to develop cooperation between the EU and NATO under which the EU could choose which missions it would lead depending on the specific circumstances of each one. The EU could carry out such missions with or without NATO means and resources.[14] This horizontal cooperation between the EU and NATO was intended to avoid any duplication of forces in crisis management. Special attention was to be paid to the terms established in this regard by NATO.[15] Subsequently, the idea of creating the capacity to be able to take autonomous decisions (the Headline Goal) was raised. This would allow the EU to carry out missions in response to any international crisis.[16] However, the help and support of NATO are still required and used. This situation highlights the need for changes within the EU to create new political and military organs and structures so that the Union can perform such operations while still respecting the institutional framework.

1.2 The Need to Develop Civilian Capacities in Order to Maintain Peace and Security

Since the Cologne European Council some Member States (particularly the Scandinavian countries) have expressed concern that the EU might suffer from a certain militarization. For this reason, it was suggested that the EU should also assume a role in civil crisis management.[17] This approach was subsequently formalized by the European Council in Helsinki, which agreed to establish "a non-military crisis management mechanism … to coordinate and make more effective the various civilian means and resources in parallel with the military ones, at the disposal of the Union and the Member States". Finally, the Santa Maria de Feira European Council, held on June 19 and 20, 2000, established a number of tasks with regard to policing activity, restoration of the rule of law, civil administration and civil protection in full respect of the principles of the UN Charter.[18] The aim was to contribute to the establishment of a European Security and Defence Policy, which could strengthen the external actions of the EU. Of the tasks mentioned, which began to be implemented to contribute to the management of civil crises, those linked to policing deserve special mention. An action plan for the development of a European police force[19] was subsequently taken up by the Göteborg European Council.

The objectives in the field of civilian crisis management have been achieved under a commitment voluntarily assumed by EU member states and it is planned to extend these capabilities further.

On a practical level, the EU's experience in autonomous peacekeeping management dates back to 2003, when it launched Operation Concordia in the former Yugoslav Republic of Macedonia (the first operation of a military peacekeeping nature, established under Council Joint Action 2003/92/ CFSP of 27 January 2003) and the EU's policing mission in Bosnia and Herzegovina (first civilian peacekeeping operation, established under Council Joint Action 2002/211/ CFSP of 11 March 2002). Subsequent actions have included, *inter alia*, Operation Althea in Bosnia and Herzegovina (established by the Council Joint Action of 2004/570/ CFSP of 12 July 2004) and the EU NAVFOR—Operation ATALANTA in Somalia (established by Council Joint Action 2008/749/CFSP of 29 September 2008).[20]

2 The EU's Contribution to International Peace and Security

Development by the EU of activities abroad and at an international level raised several questions, such as the geographical scope of the European Security and Defence Policy and the comparative advantages of deploying an EU peacekeeping mission to solve a crisis. It was also necessary to determine whether a prior UN mandate was required and what limits existed with regard to the intensity of the operation and the way in which an intervention was carried out.[21] With regard to the first of these questions, the EU has expressed its desire to develop and interact as a global actor in the area of peacekeeping and international security. It has consequently deployed its peacekeeping missions not only in Europe but also in Africa (the Artemis Operation, the EU Police Mission in Kinshasa and EU Support to the African Union Mission in Darfur), in Asia (with the Aceh Monitoring Mission in Indonesia) and in the Middle East (with the Eupol Copps Mission and the EU Border Assistance Mission Rafah in the Palestinian Territories), among others.

In analyzing the advantages of deploying an EU mission, it is important to note that EU missions enjoy widespread international acceptance. As a result, difficulties do not arise in obtaining agreement from the states in whose territory the peacekeeping missions are deployed, either autonomously by the EU or in application of the Berlin Plus Agreements. However, as

mentioned, the EU still relies on its cooperation with NATO to carry out higher-intensity missions and more complex operations. Low-intensity missions, on the other hand, can be deployed autonomously by the EU.

The next question is whether a mandate from the UN is required before a mission can be deployed. To date, the EU has always acted in accordance with the provisions of the UN Charter and when it is assured of prior authorization by the Security Council when it carries out missions of a military nature. In the case of civilian missions, it has acted directly without any authorization from the Security Council. This approach meets the terms of the UN Charter provided it has prior consent from the state in whose territory the deployment is to take place.

As we have seen, there are differences of opinion with regard to the intensity of the operations conducted by the EU and the type of operations in which it would be willing to participate. Likewise, no consensus has been reached with regard to the maximum geographical distance between the EU and the place where a mission should take place.[22] In terms of the manner in which EU interventions are conducted, they are characterized by being short term and avoiding participation in peace enforcement operations (with the exception of the Artemis Operation in the Democratic Republic of Congo). On a number of occasions, the European Council has made special reference to the EU's role in the DRC, pointing to the new tasks it assumed in the EU Police Mission in Kinshasa (deployed on June 8, 2005) as an example of the EU's contribution to peace and security in Africa.

Finally, the EU has sought to strengthen its relations with Africa in general in the field of peacekeeping and international security. It has reaffirmed its commitment to continue supporting the missions of the African Union and other African organizations and is considering the assumption of new tasks to ensure a transition to peace and security in the region.

As regards the EU's activities in the Middle East and more specifically the peace process, the Union has reiterated the importance of supporting monitoring of the Rafah crossing through the deployment of EU Border Assistance Mission Rafah. It has also sought to strengthen the capacity of Palestinian border management.

Finally, it was decided to continue developing the military capabilities of the EU in regard to battlegroup coordination and in situations where rapid reaction is required when a new crisis arises. With regard to the civilian capabilities of the EU, it was decided to continue working on aspects related to strategic planning, stabilization, reconstruction, conflict prevention, institutional development and support for humanitarian operations.[23]

3 Practical Implementation of the European Union's Peace Operations in the Democratic Republic of Congo

We shall now analyze the EU's peace operations in the Democratic Republic of Congo (DRC) in order to study the Union's actions in fragile third-country states, an example of the conflicts that constantly arise to challenge the effectiveness of the Union's peace missions outside its area of influence.[24] Through these actions, the EU has promoted respect for the human rights of the citizens of Congo and the reestablishment of security in the country. In this analysis, we shall begin by looking at the Artemis Operation and go on to examine the EUSEC RD Congo. We shall consider EU support and the impact on the transition process in the DRC of deployment of the EU peace mission. It is important to remember that the DRC has been through two appalling conflicts (1996–1997 and 1997–2002).

Initially, the EU deployed the Artemis Operation[25] in the DRC to contribute to reestablishing security in that country. This was the EU's first military operation outside Europe without the use of NATO assets and capacities.[26] Later, under the Joint Declaration signed by the EU and the UN on September 29, 2003, it was agreed that the EU would cooperate more closely with the UN in implementing an effective multilateralism, especially in the area of civilian and military crisis management. The EU committed itself to supporting "the process of the consolidation of internal security in the DRC, which is an essential factor for the peace process and the development of the country, through assistance to the setting up of an Integrated Police Unit (IPU) in Kinshasa".[27]

Against this backdrop, on October 20, 2003, the authorities of the DRC issued a request to the Secretary General and High Representative for the Common Foreign and Security Policy (CFSP) for the EU to contribute with the establishment of the Integrated Police Unit (IPU) in the country and, through its activities, to protect the new institutions and reinforce its internal security. In this context, the Council established the EU Police Mission in Kinshasa[28] under Council Joint Action 2004/847/CFSP, dated December 9, 2004, in order to contribute to training, equipping, mentoring and advising the IPU.[29] In addition, it was entrusted with monitoring operation of the unit, as established in the Pretoria Agreement of December 17, 1992. The aim was to ensure that the unit was established, trained and performed its activities in accordance with international standards, in order to guarantee the internal security of the DRC and respect for fundamental rights.[30]

Article 5 of Council Joint Action 2004/847/CFS established that the Political and Security Committee is the organization that will appoint the Head of Mission/Police Commissioner in Kinshasa to exercise operational control and assume day-to-day management of the mission, as well as disciplinary control over the 30 staff members participating in the mission. Under the terms of the action, police officers seconded by each Member State could participate in the EU Police Mission in Kinshasa, as could international and local staff hired to meet the needs which arise during the mission. Third states could also participate in the EU Police Mission if they bore the costs of the police officers or international civilian staff sent to participate in the peacekeeping operation.[31]

However, the IPU had to be set up by the beginning of January 2005. For this reason, it was established that before that date and in order to prepare the Police Mission, a Planning Team should be established not later than December 1, 2004, which would be operational until the start of the mission. The job of this team was to carry out tasks related to the complete risk assessment and preparation of the mission action plan. On April 30, 2005, the EU, in coordination with the UN and to complement the work carried out by the United Nations Mission in the Congo (MONUC), deployed within the framework of its defense and security policy, its first civilian mission for crisis management in Africa, for an initial term of 12 months. Subsequently, Council Joint Action 2005/822/CFSP of November 21, 2005, modified and extended the terms of Joint Action 2004/847/CFS, which expired on December 31, 2005. On November 7, 2005, in light of this modification and the request made by the President of the DRC on October 6 to the Secretary General/High Representative for the CFSP, the Council decided to extend the EU Police Mission in Kinshasa by a further 12 months. It was eventually extended to June 2007.

The EU also wanted to provide support for the transition process in the DRC and to contribute to reform of the security sector. This role was taken over by the EUSEC RD Congo.[32] Operation EUFOR RD Congo[33] also played an important role in this process since it could contribute to the reform and restructuring of the Congolese National Police and operate in close interaction with EUSEC RD Congo and others. On September 23, 2013, the Council adopted Decision 2013/4677CFSP extending the duration of EUPOL RD Congo to September 30, 2014.

EUSEC RD Congo was established to support the Congolese government in aspects related to integration of the military forces and good governance in the area of security. The mission's mandate has been extended to June 2016 but with a reduced number of members.

This was the EU's first civilian mission for crisis management in Africa and was intended to contribute to peacemaking and protection of human rights in the DRC. In this way, the EU sought to demonstrate its interest in playing a more prominent role in the field of international peacekeeping and security, while accepting that the UN still has a high-priority role to play in these areas. However, given the fragility of the DRC, the EU has been unable to implement its PKO as it would have wished. Although the goal of its missions was to strengthen the security system as the guarantor of rule of law and democracy in the Congo, it must be accepted that there is a need to adapt them to the real situation on the ground, and it should perhaps be recognized that the mission's mandate was not the best option. It might be necessary to adapt the aims of the mission to the current situation in Congo where the parties that are required to collaborate and those who are being trained to ensure the suitability of the system of rule of law continue to commit violations of fundamental rights.[34]

It is essential that the EU learns from its experience in the Congo and that it does not limit itself to replacing peace missions from the European Development Fund program. If it wants to become a major player in international society, it must learn to develop its missions in complex areas where the parties are not always willing to cooperate for the success of the peacekeeping mission and where a learning process needs to be undertaken that will allow EU peace operations to restore security and governance.[35]

4 Conclusions

The EU has assumed an important role in the area of peace and international security. Through its policies and experiences from peace missions it has contributed to global governance and to protecting human rights. This approach is part of the EU's commitment to help end existing regional and international conflicts and curb any other threats to international peace and security. This approach also reflects the EU's desire to be a major player in international society, which is affected by cross-cutting transnational issues.

In this context, the EU has implemented the Petersberg tasks in order to be able to act in European and extra-European scenarios and to contribute to international peace and security. However, implementation of the Petersberg missions has required it to develop military and civilian capabilities to deploy missions on its own and in cooperation with other international organizations, particularly NATO.

As regards the EU's civilian operations, through the deployment of civilian personnel it has contributed to solving problems that affect the population of conflict zones. Moreover, the deployment of police missions has played a predominant role in maintaining international peace and security and has enabled it to develop its capabilities effectively and independently.

With regard to military missions, the EU has continued to improve its military capabilities and in this context has created a European Defence Agency, through which it hopes to develop its defense capabilities and cooperation in armaments. It also wants to improve its technological development and to conduct research in the area of defense, among other areas. However, cooperation with NATO remains important for the EU in deploying military missions.

The EU continues to forge partnerships with third countries and (regional or global) organizations that share its values. This allows greater cooperation to be achieved in all fields of international relations linked to peacekeeping and security. The EU is also strengthening its relations with the UN in order to improve its role as an international player in peacekeeping and international security and for this reason it has also undertaken peacekeeping missions in Africa, Asia and the Middle East.

Regardless of the positive results of its peace missions, the EU needs to establish new strategies that will allow it to act in complex situations and deploy in fragile countries. This will make it easier to contribute to international peace and security in places where the Union's support, cooperation and action are really needed.

Notes

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2. Laura Davis, "Reform or Business as Usual? EU Security Provision in Complex Contexts: Mali", *Global Society*, Vol. 29, Issue 2, 2015, pp. 260–279.
3. Antonio Manrique de Luna, "The Observation Mission of the European Union in Georgia: Functions Assumed by this Peacekeeping Operation", *Humanitäres Völkerrecht*, Vol. 22, no. 1, 2009, pp. 41–43.
4. The Petersberg tasks are a series of activities in the areas of humanitarian aid and rescue, peacebuilding and peacekeeping. They were established within the framework of the Western European Union under the Petersberg Declaration of June 19, 1992. See Christopher Hill, "The EU's Capacity for Conflict Prevention", *European Foreign Affairs Review*, Vol. 6, 2001,

pp. 315–333; Western European Union, Council of Minister of Bonn, "Petersberg Declaration", Bonn, 19 June 1992; Marcelino Oreja, *El Tratado de Ámsterdam de la Unión Europea. Análisis y comentarios*, Mc Graw-Hill, Madrid, 1998, pp. 366–374.

5. See E. Esben Oust-Heiberg, "Security Implications of EU Expansion to the North and East", in *Foreign and Security Policy in the European Union*, ed. K.A. Eliassen, Sage, London, 1998, p. 185. cited by Natividad Fernández Sola, "La Política de Seguridad y Defensa como elemento constitucional de la Unión Europea", *Revista General de Derecho Europeo*, no. 2, October 2003, pp. 1–36.
6. Antonio Manrique de Luna, *Las operaciones de mantenimiento de la paz de las organizaciones internacionales de carácter regional*, Dykinson, Madrid, 2013, pp. 1–172.
7. Toni Haastrup, *Charting Transformation through Security: Contemporary EU—Africa Relations*, Palgrave Macmillan, Basingstoke, 2013, 256 pp.
8. See Antonio Manrique de Luna, "Las operaciones de mantenimiento de la paz de la Unión Europea", in *Los procesos de integración como factor de paz*, ed. Eric Tremoloada, Publicaciones de la Universidad del Externado de Colombia, 2014, pp. 283–322.
9. The first three of these instruments can only be used in agreement with the parties involved in a conflict. Sanctions and peace enforcement, however, are only coactive means and, by definition, do not require the consent of the affected parties, only the authorization of the Security Council of the United Nations. Disarmament can be carried out in agreement or in the context of the means as established in Chapter VII of the UN Charter. See United Nations, Supplement to an Agenda for Peace, paragraphs 23–24.
10. Dirk Brodersen, "Konfliktvorbeugung und Krisenbewältigung", *Europäische Sicherheit*, 45. Jg., Nr. 6, Juni 1996, S. 50–52.
11. See M. Ekengren and Mark Rhinard, "European Union Crisis Management (EUCM): The Interface Between Union Institutions and EU Member States", paper presented at the ECMA Conference "Future Challenges for Crisis Management in Europe", Stockholm, Sweden, May 3–5, 2006, pp. 1–5.
12. Adrian Treacher, "From Civilian Power to Military Actor: The EU's Resistable Transformation", *European Foreign Affairs Review*, no. 9, 2004, pp. 49–66.
13. European Union, Cologne European Council, 3–4 June 1999.
14. In the framework of the Berlin Plus agreements a commitment to strategic partnership in crisis management was adopted under which the EU could conduct peacekeeping operations, using the assets and capabilities of NATO. It could also have access to the planning capabilities of this regional organization and its military assets and capabilities.

    Thus, two forms of EU-led peacekeeping mission were established: EU operations using NATO assets and capabilities; and peacekeeping missions led by the EU which did not use the assets and capabilities of NATO. More

about the relationship between EU and NATO can be found in Caja Schleich, "NATO and EU in Conflict Regulation: Interlocking Institutions and Division of Labour", *Journal of Transatlantic Studies*, Vol. 12, Issue 2, April 2014, pp. 182–205.

15. Since the Lisbon Treaty came into force, it has sought to define stronger cooperation with NATO. It has been established that a Common Security and Defense Policy would effectively help to enhance the security of European citizens and contribute to peace and stability in the EU's neighborhood and in the broader world. See Presidency Conclusions of the Brussels European Council, 19–20 December 2013.
16. See Presidency Conclusions of the Helsinki European Council, 10–11 December 1999.
17. See Presidency Conclusions of the Cologne European Council, 3–4 June 1999.
18. According to the Council in Santa Maria de Feira, the EU's civilian capacity should be developed in four areas: policing, strengthening of the rule of law, strengthening of civil administration, and civil protection. See Presidency Conclusions of the Santa Maria de Feira European Council, 19–20 June 2000.
19. See Presidency Conclusions of the Gothenburg European Council, 15–16 June 2001.
20. On November 21, 2014, the Council of the EU extended the mandate of Operation ATALANTA to December 2016.
21. See Alyson J.K. Bailes, "The Institutional Reform of ESDP and Post-Prague NATO", *The International Spectator*, Vol. XXXVIII, no. 3, 2003, pp. 31–46; Elizabeth Schmidt, *Foreign Intervention in Africa: From the Cold War to the War on Terror*, Cambridge University Press, New York, 2013, 288 pp.
22. See Débora Miralles, "La Capacidad de Acción de la Unión Europea: Análisis de las Recientes Misiones de Gestión Civil y Militar de Crisis en el Marco de la PESD", *Revista General de Derecho Europeo*, no. 3, January 2004, pp. 1–14.
23. See Presidency Conclusions of the Brussels European Council, 16–17 June 2005, paragraphs 78–81.
24. See Malte Brosig, "EU Peacekeeping in Africa: From Functional Niches to Interlocking Security", *International Peacekeeping*, Vol. 21, Issue 1, January 2014, pp. 74–90.
25. See Council Joint Action 2003/423/CFSP, dated 5 June 2003.
26. Ståle Ulriksen, et al., "Operation Artemis: The Shape of Things to Come?", *International Peacekeeping*, Vol. 11, no. 3, Autumn 2004, pp. 508–525.
27. See Article 1 paragraph 1 of Council Joint Action 2004/494/CFSP, dated 17 May 2004.

28. The EU Police Mission in Kinshasa is the second Police Mission implemented by the EU. It is also the second mission deployed by the EU in the DRC and the EU's first civilian mission in Africa.
29. The Integrated Police Unit (IPU) was established in the Pretoria Agreement of December 17, 1992, signed by all parties to the conflict in the DRC to establish a government of national unity which brought an end to the internal conflicts and called the first elections in the country's history. Reference was also made to the IPU in the Pretoria Agreement of 6 March 2003.
30. See Article 3 of the Council Joint Action 2004/847/CFSP, dated 9 December 2004.
31. The Council authorizes the PSC to take relevant decisions on acceptance of proposed third-state contributions in the EU Police Missions upon the recommendation of the Police Head of Mission and the Committee for Civilian Aspects of Crisis Management.
32. European Union, Council Joint Action 2005/355/CFSP of 2 May 2005.
33. European Union, Council Joint Action 2007/319/CFSP of 27 April 2006.
34. See Arnout Justaert, "The Implementation of the EU Security Sector Reform Policies in the Democratic Republic of Congo?", *European Security*, Vol. 21, Issue 2, 2012, pp. 219–235.
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CHAPTER 15

European Asylum Law: A Model for a More Cosmopolitan International Asylum Law?

Pablo Antonio Fernández Sánchez

1 Introduction

The Treaty of Rome establishing the European Economic Community made no provisions for the right to asylum or refugee status. At that time, the community's concern did not extend to the field of immigration and, as Professor Escobar Hernandez has argued, any references to these issues by the institutions created under the Treaty may be seen as merely anecdotal or irrelevant.[1]

Communitarization of asylum policy—like almost all other matters related to aspects of immigration within the Community framework—began with the Single European Act of 1986. Its approach to the internal market shook the very concept of borders and thus of aliens. There were packages of this legislation that necessarily had to come under community competence, yet no specific provision was made in this area.

In 1985, the European Commission issued a *White Paper on completing the Internal Market*,[2] proposing that the Council draw up a directive on the coordination of standards on the right to asylum and refugee status.[3] However, the Commission soon realized that the issue was particularly

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sensitive for Member States.[4] Accordingly, "the institutional path was abandoned and instead it was decided to enhance the intergovernmental route. The Member States rejected, for the time being at least, communitarization of such a sensitive issue as asylum; consequently, if they were the only ones with jurisdiction in this area, international agreements would have to be reached unanimously amongst the twelve with the harmony the Commission desired for its legislation to be adapted".[5]

In the various groups created within the intergovernmental framework (the Trevi Group, the ad hoc Group on Immigration, the Rhodes Group, the Palma Group, etc.), asylum is always mentioned as one of the subjects to be regulated and taken into account.

Against this backdrop, in December 1989 the European Council in Strasbourg established the objective of harmonizing asylum policy in Member States and an international treaty was drawn up by the ad hoc Group on immigration and asylum applications in EC territory.

This was the germ of a common European Union immigration policy that has intensified issues related to asylum and refugees.[6] The reason why the European Union (EU) has occupied itself more with this matter than others lies in the political approach and a belief that asylum and refuge have more to do with human rights than with security or the economy. Nonetheless, European asylum and refugee policy has to be considered ungenerous in current circumstances.[7]

As Lambert writes, "Europe has the most advanced regional protection regime in the world".[8] However, this common European asylum system has also been criticized as being more a system for denying the right to asylum.[9]

Could this asylum and refugee policy drawn up by the EU serve as a model for other international organizations or groups of states? This is a question that we shall try to address in the following pages, using empirical methodology to determine the strengths and weaknesses of the system in order to identify the potential of this European policy as an exportable political model.

2 General Aspects of the EU's Immigration Policy

The starting point of the EU's common policy on asylum (as well as compliance with its international obligations—particularly application of the principle of *non refoulement*)[10] has been the restrictive and reductionist concept contained in the 1951 Geneva Convention on the Status of

Refugees. From this basis, it has been directed toward a minimal policy and was made all the more reductionist by the so-called Aznar Protocol to the Treaty of Lisbon, which excludes nationals from EU Member States from the universal benefits of refugee status.[11] The *ratione personae* dimension has thus been minimized. The Qualification Directive itself limits the concept of refugee to the nationals of third countries.[12]

What has been the immediate consequence of this legal situation? To establish European concern on procedures for examining and awarding applications for refugee status. In my personal opinion, this means that the EU has been more interested in establishing common procedures than in material issues. It is not that the procedures are not substantive in law—they clearly are. However, essential issues have been ignored in procedures which should be directed toward protecting those who suffer persecution in their places of origin or residence. A much broader and more generous substantive framework should have been established, as corresponds to the values and principles of the EU.

It is for this reason that the current migratory crisis resulting from displacement of persons from Syria, Iraq and Afghanistan has generated so much indignation and so much impotence. As German Chancellor Angela Merkel has recognized, the current legal framework is obsolete.[13]

Even so, a general approach exists that might be useful in other regional contexts for resolving problems related to refugees in transit, the clause of positive sovereignty, uniformization of procedures for awarding and withdrawing refugee status, subsidiary protection and the model of temporary protection.

The Qualification provides a minimum framework of legal and material conditions of reception and *minimum standards for the qualifications and status of third-country nationals and stateless persons as refugees or as beneficiaries of subsidiary protection.*[14] Although limiting itself to the narrow concept of refugees established in the 1951 Refugee Convention, it updates the criteria of eligibility and establishes more generous requirements.

The status of subsidiary protection has been designed for persons who are not eligible for refugee status but do require individual protection. It would be both arrogant and incorrect to claim that the EU is the first regional group to establish a status similar to that of refugee status; examples can be found in Latin America (in the Cartagena Declaration) and in Africa. However, the EU has extended the scope of the acts of persecution considered and has established clearly the forms of serious harm from which persons need to be protected.

It places the EU at the apex of a pyramid of legal protection for such persons, elevating moral and humanitarian teachings to the category of law. Beneficiaries can now enjoy the right to receive protection without being dependent on the magnanimity of agents of migratory control, governments or states.

In this way, the EU has responded to an enormous strategic problem in the field of human rights[15] although, as Professor Martín y Pérez de Nanclares pointed out in 2002, these rules "reflect a constant concern to demotivate and prevent emigration towards Europe".[16]

3 Common Procedures

An elaborate set of European rules on refugees has already been developed. These are the rules for *determining the State responsible for examining applications for asylum lodged in one of the Member States of the EU,*[17] *the minimum guarantees for asylum procedures,*[18] *the minimum standards for the reception of asylum seekers,*[19] *the procedures for granting and withdrawing refugee status*[20] and cooperation and coordination of regimes of asylum.[21]

However, even this European regulation has provided some Member States with an excuse to cut back on their own more generous legislation on asylum and refugee status by transposing community directives.[22]

In general, the EU's aim has been to establish uniform access to these procedures. However, the system chosen of regulating them through directives gives each state broad discretion to determine that an applicant coming from a third country of transit, for example, has enjoyed sufficient safety there to allow him or her to be returned.

For this purpose, they establish lists of "safe countries" allowing border agents to automatically return applicants by just checking the lists.[23]

As for refugee access to the Union, the EU has not materially regulated the delicate issues of asylum and refugee status. Instead, it has established procedures to determine which state is responsible for examining applications. These aspects are therefore more procedural than material.[24]

However, in my opinion, it has failed to grasp the nettle of the real problem of refugees in Europe, which is the restrictive concept on which all legislation in Member States is based.

The various Dublin Conventions have restricted themselves to homogenizing the minimum content of the 1951 Convention, despite the fact that this was an unnecessary process, given that all European States are

signatories to the Convention. In reality, European policy on asylum has sought to combat the abusive use of asylum procedures, a major form of access for clandestine immigration into the EU,[25] but it has failed to foresee the consequences.

In doing so, it has reduced the concept of "asylum" to the concept of "refugee". In this regard, as Professor Arenas recognizes, "an identification is made between the terms 'refugee' and 'asylum-seeker'—which are internationally and technically different figures—allowing one to conclude that asylum in the community area is limited to the territorial protection afforded to those people who meet the conditions set out in the Geneva Convention".[26]

Kloth summarizes the criteria for agreeing to examine an asylum application as being three: the criterion of humanity (taking into account the justified interests of the applicant), the principle of causality (the state responsible for accommodating the applicant in its territory will be responsible for the application) and the sovereignty clause (the right to examine any application that has the applicant's authorization).[27]

However, what the various Dublin Conventions[28] do not take into account is the individual choice—that is, the will of the asylum seeker—because as Nicholas Blake says, in the hierarchy of criteria in the Dublin Conventions, there is little emphasis on where the actual asylum seeker wishes to seek asylum.[29]

The Council adopted the Directive *laying down minimum standards for the reception of asylum seekers* of 27 January 2003[30] with the purpose of establishing minimum standards for the reception of asylum seekers and not, therefore, to establish any rule of procedure for eligibility. These are asylum seekers in the United Nations High Commissiones for Refugees (UNHCR) definition of the term. This, I believe, includes not only persons who may have well-founded fears of suffering persecution for any of the reasons set out in Article 1 of the Geneva Convention of 1951 but all persons included under the UNHCR mandate. One must therefore include displaced persons and even what has recently come to be known as the reception of "asylum seekers", that is, displaced people who might potentially be eligible to refugee status but who are group applicants from places in conflict or where systematic and serious violation of human rights is continuous. The EU's aim, therefore, is to offer a minimum framework of conditions of reception.

The area of personal, territorial and material application is set out in Article 3 of the Directive, which states that it applies to "*all third country nationals and stateless persons who make an application for asylum at the border or in the territory of a Member State as long as they are allowed to*

remain on the territory as asylum seekers, as well as to family members [as defined in Article 2 d)], *if they are covered by such application for asylum according to the national law*". It does not include nationals of community states, who cannot be excluded on procedural grounds, but might be excluded under the conditions of reception, given that community citizens can fully exercise their rights, including that of free movement.

One important right regulated in this Directive is the right to free movement within the territory of the State. No one can be deprived of this right merely on the grounds that his or her application is pending examination, although "*for reasons of public order, Member States may confine an applicant to a particular place in accordance with their national law*".

The Directive establishes a general principle of discrimination in favor of certain vulnerable groups, although it stipulates specific measures for accompanied and unaccompanied minors and for victims of torture and organized violence.

Finally, the EU approved Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted.[31] This Directive has yet to be transposed by the different States and its achievements therefore remain to be seen. However, it has to be said that, once again, the European criteria which will now have to be adapted may prove more restrictive than national law in this regard, thus reducing the degree of protection or engagement offered.

What have other regions of the world copied—or as McAdam[32] puts it, plagiarized—from all of this? In the case of Australia, the list of safe countries, readmission agreements, regional frameworks, data files, complementary protection and so on.[33] In the case of Latin America, the determination and fast-track procedures.[34]

4 Subsidiary Protection

Another cause for concern in the EU has been the enactment of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.[35]

The Directive establishes a very broad casuistry relating to a literal reading of the 1951 Convention. It analyzes various acts of persecution that are not specified in the 1951 Convention and which have created many legal headaches. Article 9-1 of the Directive, for example, states that acts of persecution must "*(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a)*".

It includes acts of persecution that were not taken into consideration when the 1951 Convention was drafted and which had caused many problems in applying the convention. An example is the case of women fleeing persecution in their places of origin for adultery or so as not to submit to practices that affect their physical or mental well-being and so on.[36] Article 9 Section 2 of the Directive lists some forms, *inter alia*, such acts can take. In other words, it is an open list, which allows other forms of persecution to be included. As Professor Balaguer Callejón puts it, "the list is not exhaustive; in listing the forms [the acts of persecution can take], Article 9 uses the expression '*inter alia*', appearing to accept the possibility of any other situation resulting in irreparable harm justifying a request for asylum".[37]

Moreover, the numerous gaps in the 1951 Geneva Convention have already been demonstrated and these, independently of the definition of "refugees", now belong to the collective *acquis* of the whole world.

With regard to the reasons for persecution, it is also important to note that the EU Directive enumerates all the major concerns in this regard that were not resolved by the 1951 Convention. The 1951 Convention makes clear mention of persecution on the grounds of race, religion, nationality, membership of a particular social group or political opinion. Nonetheless, however expansive subsequent interpretation of the convention has been, it has not gone far enough. The EU Directive therefore lists the elements that should be taken into account in evaluating the grounds of persecution.

This Directive might be said to have been very comprehensive in terms of current interpretation of the 1951 Convention, covering numerous aspects that had not previously been well specified.

I believe these are vitally important considerations, since they relate to an issue that has long been touched on by many commentators. The grounds for persecution extend the scope of application of the Geneva

Convention of 1951 to an enormous extent. Whereas the Convention only listed persecution by reasons of race, religion, nationality, membership of a social group and political opinion, the Directive, as we have seen, extends the area of personal and material application of refugee status.

In a systematic analysis, the current Directive can be seen to establish an objective status, given that Article 2 defines a person eligible for subsidiary protection (as opposed to a refugee) as being a "third-country national or a stateless person[38] who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country".

In other words, it is saying that if the requirements are met, the status is not *ex-gratia* or discretional but objective. The applicant is entitled to this status and his or her status means "the recognition by a Member State of a third-country national or a stateless person as a person eligible for subsidiary protection".

The rights discussed, therefore, are not a gift [*merced*], in the classical sense of the term.

One issue addressed by Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted is the revocation of, ending of or refusal to renew international refugee and subsidiary protection status.

The first rule established for both types of status (see Articles 14 for refugees and Article 19 for subsidiary protection) is that once the Directive comes into force—as it now is—Member States must revoke refugee status or subsidiary protection if the person in question has ceased to be eligible for same, in accordance with the Directive. In other words, the Directive refers to the causes of cessation.

However, there is one aspect that concerns me. This is Article 14(2) which states that "Without prejudice to the duty of the refugee in accordance with Article 4(1) to disclose all relevant facts and provide all relevant documentation at his/her disposal, the Member State, which has granted refugee status, shall on an individual basis demonstrate that the person concerned has ceased to be or has never been a refugee in accordance with paragraph 1 of this Article". In my opinion, this represents a right

to automatic and mandatory review, which seems to me to inappropriate and which would affect legal certainty and create considerable legal complications.

There will be numerous cases in which refugee status is granted by judicial means, for which reason the Directive would be bestowing on the Government an all-embracing power that might, obviously, contravene national law. Specifically, in Spain such circumstances would not allow a review of a case of this kind.

I find it surprising that with regard to the revocation of, ending of or refusal to renew refugee status, a clause is included on state security when there are reasonable grounds for regarding the refugee as a danger to the security of the State or even as constituting a danger to the community of said State, by reason of a final judgment of a particularly serious crime, and yet this clause is not included in relation to subsidiary protection. Once again, the system of community law suffers from proposals and intervention from the political power.

5 Legal Responses to Mass Influx of Displaced Persons

Another of the EU's priorities with regard to refugees has been to design a model of temporary protection for mass influxes of displaced persons.

As we have already discussed, this type of temporary protection is not a new feature in international law, but it *is* new within the European framework. Nonetheless, Professor Fitzpatrick, while not criticizing this institution of temporary protection, does express her concern in this regard; whereas, on the one hand, it extends protection to displaced persons who do not meet the criteria of the 1951 Geneva Convention, at the same time the discretionality and informality of temporary protection might prevent protection for refugees being reinforced, in that it might actually supplant the Convention itself and threaten the system of refugee protection, thus representing a strategy of de-legalization of refugees.[39]

The EU Directive on temporary protection (*Council Directive 2001/55/EC, of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof*)[40] seeks to offer protection to displaced persons who might be included in both categories, if they form part of a mass influx, without altering this traditional differentiation of people in need of protection.[41]

A distinction therefore needs to be drawn between the "temporary"—that is limited in time—nature of the reception and the Temporary Protection device contained in the Directive. The temporality, as we have seen, applies to the quality of subsidiary protection, as well as of temporary protection. Subsidiary protection is addressed to an individualized situation, which is also provisional,[42] and temporary protection addresses mass influx.

Discussions of "temporary protection" *stricto sensu* may refer to either circumstance; hence some confusion has arisen which both the UNHCR (which first made the distinction between complementary and temporary protection) and now the EU have sought to dispel.

Among others, Professor Fitzpatrick referred to the two systems of protection at the same time, in her analysis of the Community Directive on Temporary Protection and this may have engendered certain misconceptions.[43] However, as Professor Kälin rightly says, the Community Directive favors temporarily protecting both the narrow categories of persons entering within the definition of refugee laid down in the 1951 Convention and those broader categories of persons who are victims of armed conflicts and who require temporary protection.[44]

Professor Arenas Hidalgo also shares Professor Kälin's view, believing that the system of temporary protection in Europe does not seek to expand the material area of the 1951 Convention or extend the categories of person listed in it. She believes that Professor Fitzpatrick is mistaken and has misled other scholarly opinion. According to Professor Arenas, Professor Fitzpatrick and other scholars of the time were concerned with "*ad hoc* refugees". In Africa and Central America, as we have already discussed, legal instruments were designed to complete the Geneva Convention. However, Europe responded with a very restrictive dynamic and the adoption of national legislation on foreign residents under which "temporary" protection was awarded to *ad hoc* refugees for humanitarian reasons. This, believes Professor Arenas Hidalgo, is the first of Professor Fitzpatrick's misconceptions.[45]

The second cause of confusion discussed by Professor Arenas lies within the framework of the Yugoslavian crisis. Legal instruments began to be adopted to respond to that situation which Professor Arenas considers to be antecedents of the Directive. The first of these applied not only to cases of large-scale influx but also to displaced persons considered on an individual basis.[46] This is the second cause for Professor Fitzpatrick's confusion, according to Professor Arenas Hidalgo.[47]

Professor Arenas Hidalgo herself recognizes many advantages in the EU Directive on temporary protection. She considers that the chief features of the temporary protection scheme are that: it fills an existing gap; it does not create long-term obligations; it is a flexible system; it allows for burden-sharing; and it allows transfers without additional obligations.[48]

For her part, Professor Arenas believes that this is the first time in Public International Law that an abstract, general rule, intended to be permanent, has imposed a legally binding obligation on a set of States to provide temporary reception under these terms. She considers that the rule perfects the system, creates legal security and reduces the freedom of States insofar as it addresses all phases of reception and provides an element of predictability with regard to possible community action.[49]

The Directive on Temporary Protection, therefore, does not strive to resolve the problem of "*de facto refugees*", even if it contributes to establishing the definition of a person in need of international protection, since not everyone arriving in a mass influx will be subject to this rule. In any case, the aim of the Directive is to avoid "a total bottleneck in national asylum systems in the event of a mass influx, which would have negative effects on the Member States, the persons concerned and other persons seeking protection outside the context of the mass influx, and thereby supporting the viability of the common European asylum system".[50]

Although the European Commission argues in its proposal that temporary protection does not constitute a third form of protection, the fact is that it does, since what is at issue is that in the event of a mass influx of population as a result of generalized violence in their places of origin, temporary protection should be applied first, and not the terms of the 1951 Geneva Convention, which would be more restrictive and, therefore, less protective. It is important to remember that the EU Directive on temporary protection is an instrument serving a common European asylum system and effective application of the Geneva Convention.

This institution of temporary protection has been identified with burden-sharing. Indeed, much has been written on this matter. This is understandable, because burden-sharing, as Noll and Vested-Hansen point out, is like an insurance policy, in which the States calculate the maximum cost of future situations of crisis. Burden-sharing cannot therefore be subject to the whims of *ad hoc* agreements but must represent a minimum common denominator of assistance. It therefore draws on the principle of equitable distribution.[51]

Perhaps the earliest precedent to this situation can be found in the Council Resolution of 25 September 1995 on burden-sharing with regard to admission and residence of displaced persons on a temporary basis,[52] where "the Member States express their desire to share responsibility as best they can regarding the admission and residence of displaced persons on a temporary basis".

In this regard, the debate on temporary protection and burden-sharing is, more than anything, a sort of Eurocratic "technicalitis",[53] particularly because ultimately, the Directive did not imperatively cover burden-sharing but instead addressed the general obligation of a spirit of community solidarity, leaving the exact numbers to the discretion of the individual Member States.

Logically, it refers only to external displaced persons since it is taken for granted that community citizens can already directly exercise their right to free movement throughout community territory. It therefore only affects nationals of third countries and, therefore, displaced persons who have had to leave their country of origin or residence, as well as stateless persons. As we can see, the causes for this migratory movement are related not only to armed conflicts but also to ongoing violence and systematic or generalized violation of human rights.

In any case, in defining displaced persons, the Directive lists the particular grounds of conflict and systematic and serious violation of human rights but does not ignore the general causes. It suffices that such persons are unable to return in safe and durable conditions or that they have been evacuated in response to an appeal by international organizations. I would ask whether it also includes persons displaced by reason of natural or industrial disasters, for environmental reasons and so on.[54] My personal opinion is that it does and that such people are not excluded from the scope of this Directive. I therefore share the same criteria as Professor Fitzpatrick, though, like her, I recognize that this may be a controversial criterion.[55]

Professor Arenas Hidalgo, on the contrary, believes that such persons cannot be considered to be included within the scope of this Directive. She defends this position through a systematic interpretation, based on an analysis of the preparatory work.[56] It is certainly true, as Professor Arenas Hidalgo states, that there have been community institutions, such as the Economic and Social Committee, which in its Opinion on the Directive stated that although it "notes and understands that the proposal only applies to people fleeing from political situations, it thinks there might

also be a case for a directive providing temporary reception and protection mechanisms for persons displaced by natural disasters".[57] This might indeed lead one to make that systematic interpretation on which Professor Arenas Hidalgo bases her argument.

However, the first interpretation that needs to be taken into account here is that of the *lex data*, in its literal sense, and then in its teleological sense—that is, its philosophy, its purpose and the reason for protection. Lastly, one needs to recall the general principles of interpretation which state that where the legislator makes no distinction, neither can the interpreter. Moreover, there is even a national rule of temporary protection, which can now be considered as an implementing measure of the Directive, even though it predates it. Nor should we forget that it is a Directive to be applied with *community solidarity*. I am referring to the Swedish national rule.[58]

In this regard, I disagree with Professor Arenas Hidalgo's analysis, not because I do not consider her opinion to be grounded in law, but because I think that it offers less protection. I believe that in the event of a discrepancy, one must take the side of the persons who are suffering.

However, in order for this Directive to be invoked, the influx cannot be individual but must be on a mass scale.

Clearly, temporary protection, given its exceptional nature and its aims, cannot be incompatible with the 1951 Geneva Convention. For this reason, refugee status may be granted to persons who enjoy temporary protection as displaced persons because the granting of temporary protection cannot prejudice recognition of this status (art. 3). It is because of that nature, in my opinion, that it cannot be considered as a status, like the figure of the refugee or that of subsidiary protection, as we shall see below. One might say that temporary protection is, in the words of Cristina Gortázar Rotaeche, a pre-status, or, if one prefers, an interim status.[59]

Among other factors, this is because the nature of the protection provided by the Directive is temporary; indeed Article 4-1 establishes a maximum period of one year which may be automatically extended for six-month periods up to a period of one year; exceptionally, with the agreement of the Council, a request by a Member State might be examined to extend that temporary protection by up to a maximum of one year(art. 4-2).

The Spanish legislation transposing the directive has had to create a qualified foreign resident status, given that it has opted for the path of regulation, establishing a *Regulation on the regime of temporary protection in the event of mass influx of displaced persons.*[60]

Thus, the maximum duration of the temporary protection that can be provided is three years. This period is not always sufficient, given the nature of the circumstances that can lead to mass influxes of displaced persons. However, the gravity of this transience lies not only in the paucity of this maximum (two years plus one if authorized in exceptional circumstances) but also in the possibility that it may be ended at any time, if the Council so decides (Art. 6).

Note that, unlike subsidiary or complementary protection, temporary protection has a *ratione temporis* purpose and may only be established within a framework of mass, and not individual influx.

Articles 8 to 16 of the Directive provide an exhaustive list of the minimum rights that must be recognized, essentially distinguishing between adults and children, accompanied or unaccompanied, and other more vulnerable groups.

It is reasonable to ask what will happen to persons whose period of temporary protection runs out. Will they have to be repatriated compulsorily or will they be allowed to remain in the country?

Article 20 of the Directive states that "When the temporary protection ends, the general laws on protection and on aliens in the Member States shall apply, without prejudice to Articles 21, 22 and 23". This means that after the maximum period of six months—which may be extended to another six, and, exceptionally, extended for a further year (i.e., a maximum period of 2 years)—persons who have obtained temporary protection must either regularize their situation as permanent or temporary residents, refugees or stateless persons, become illegal immigrants—with all that that entails—or avail of voluntary return to their place of origin.

Nonetheless, the State has the option, before they become illegal immigrants, of carrying out their enforced repatriation.

Another issue of interest mentioned in the community directive on temporary protection is the establishment of certain grounds for exclusion from temporary protection in similar terms to those established in the 1951 Geneva Convention, Article 1-f, to which I refer.

6 Conclusions

The EU has designed a common asylum policy, based on the Member States' international obligations in this area. The architecture of the policy focuses on the procedural, rather than the conceptual, framework. Thus,

the EU has always started from the restrictive definition of "refugee" contained in the Geneva Convention of 1951. This has led it to establish common procedures for determining the State responsible for examining applications for asylum, conditions of reception, minimum guarantees for granting and withdrawing refugee status and cooperation and coordination.

This marks a new departure in the international order, given that no other regional community or group of States have created such legislation.

However, the dysfunctions that have occurred, the differing margins of interpretation and practice of border agents, make more work necessary before it can be used as a model for other regions.

At the same time, the EU has established an extended form of protection, which we call subsidiary protection, for persons who, although persecuted in their places of origin, do not match the grounds of persecution laid down in the 1951 Geneva Convention.

This subsidiary protection should, in reality, have provided equal protection to refugee status but European Member States have sought to reserve powers to ensure that this is not the case. Because the model is discretional, it allows for numerous differences between States, thus creating a disharmonious situation. In all events, it must maintain the criteria and rights for refugees established in the 1951 Geneva Convention.

Nonetheless, there are no other experiences that might serve as models, meaning that the EU is the only area with international protection of this type, with all its limitations.

As regards temporary protection in the event of a mass influx, we have seen that the EU arrived to the issue much later than other regional communities, albeit with better legislation. However, as the crisis of the Syrian refugees is showing, the Member States are not interested in applying these rules, firstly on purely selfish grounds (since not even the States with the greatest interest are seeking to do so in order not to become embroiled in subsequent complications); secondly, because the forecasts on which the legislation were based did not take into account the volumes of mass influx involved; and thirdly, because the maximum two years of temporary protection envisaged is impracticable and they would have offer refugees alternatives which they are unwilling to provide.

There are therefore aspects of the asylum policy which might be exemplary for other political communities but there are many other that manifestly require improvement.

Notes

1. Concepción Escobar Fernández, "La regulación del asilo en el ámbito comunitario antes del Tratado de la Unión Europea: el Convenio de Dublín y el Convenio de aplicación de Schengen", in *Derecho de extranjería, asilo y refugio*, ed. Fernando Mariño Menéndez and Others, Ministerio de Asuntos Sociales, Madrid, 1996, p. 671.
2. Doc. COM(85) 310 Final, of 14 June 1985.
3. For an all-encompassing analysis, see André Nayer, "La Communauté Européenne et les refugies", *Revue Belge de Droit International*, Vol. XXII, 1989, pp. 139–149.
4. Indeed, each state has its own rules, even if they were adapted to the world community, because there were those, such as France, which considered this issue to be of great national interest. For a perspective of the right to asylum in that country during initiation of this process of communitarization of asylum, see Claude Norek, "Le droit d'asile en France dans la perspective communautaire", *Revue Française de Droit International*, Vol. 5, no. 2, 1989, pp. 200–206.
5. Nuria Arenas Hidalgo, "La desprotección del refugiado o de la Europa insolidaria", in *La desprotección internacional de los Derechos Humanos (a la luz del 50 aniversario de la Declaración Universal de los Derechos Humanos)*, ed. Pablo Antonio Fernández Sánchez, Servicio de Publicaciones de la Universidad de Huelva, 1998, pp. 146–147.
6. See Gloria Fernández Arriba, *Asilo y refugio en la Unión Europea*, Editorial Comares, Granada, 2007.
7. See Juan Miguel Ortega Terol, "El asilo y el refugio en la Unión Europea: crónica de un amor ausente", in *Cursos de Derechos Humanos de Donostia-San Sebastián*, Vol. VI, 2006, pp. 55–65.
8. Hélène Lambert, "Introduction: European refugee Law and Transnational Emulation", in *The Global Reach of European Refugee Law*, ed. H. Lambert, J. McAdam, and M. Fullerton, Cambridge University Press, Cambridge (UK), 2013, p. 1.
9. Helen O'Nions, *Asylum—A Right Denied—A Critical of European Asylum Policy*, Ashgate, Surrey, England, 2014.
10. Cintia Balogh, *International Refugee Law and the European Union's Refugee Protection Protocol: A Study of the ius cogens Norm of Non-refoulement*, Hochschule für Wirtschaft und Recht Berlin, Berlin School of Economics and Law, Institute for International Political Economy och-schule für W
11. On asylum for European citizens, see Steeve Peers, Violeta Moreno-Lax, Violeta Moreno-Laxo-Lax Elspeth Guild, *EU Immigration and Asylum Law (Text and Commentary)*, 2nd ed., Brill, Nijhoff, The Hague, 2012, pp. 20–23.

12. See Jean-François Durieux, "The Vanishing Refugee: How EU Asylum Law Blurs the Specificity of Refugee Protection", in *The Global Reach of European Refugee Law*, ed. Hélène Lambert, Jane McAdam, and Maryellen Fullerton, Cambridge University Press, Cambridge (UK), 2013, pp. 230–231.
13. http://news.insidetheworld.org/2015/10/07/merkel-sees-the-system-obsolete-she-says-asylum-and-refugee-crisis-will-change-europe/ (accessed 12 October 2015). Meltem Ineli-Ciger has also classed the system as obsolete, although based on more scientific criteria. See Meltem Ineli-Ciger, "Has the Temporary protection Directive Become Obsolete? An Examination of the Directive and Its Lack of Implementation in View of the Recent Asylum Crisis in the Mediterranean", in *Seeking Asylum in the European Union—Selected Protection Issues Raised by the Second Phase of the Common European Asylum System*, ed. Céline Bauloz, et al., Brill Nihjoff, Leyden, Boston, 2015, pp. 225–246.
14. Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304 of 30.9.2004.
15. For an overview of these issues, see Francesco Cherubini, *Asylum Law in the European Union*, Routledge, London, 2014. With regard to the compatibility of the common European system of asylum and human rights, see Anna Wollmer, *International Refugee Law and the Common European Asylum System: Conformity Or Human Rights Violation?*, Uppsala Universitet, 2014.
16. José Martín y Pérez de Nanclares, *La inmigración y el asilo en la Unión Europea (hacia un nuevo espacio de libertad, seguridad y justicia)*, Colex, Madrid, 2002, p. 24.
17. OJ C 254 of 19/08/1997, pp. 1–12. See the text in http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:41997A0819(01)&from=ES. Spain ratified this legislation on 27 March 1995 and it was subsequently published in the Spanish Official State Gazette (BOE) No. 183 of 1 August 1997, with an amendment in BOE No. 235 of 1 October 1997. This convention was replaced by 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 50, 25.2.2003), which came to be known as Dublin II. This regulation has since been replaced by 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 180, 29.06.2013). The regulation currently in force (Dublin III) seeks to adapt to the jurisprudence of both the ECtHR and the Court of Justice of the European Union in prohibiting the transfer of asylum seekers to states

where they might suffer persecution, establishing a hierarchy of applicable criteria, regulating and limiting detention.

18. Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures, OJ C 274 19.09.1996.
19. Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L 31 6.2.2003.
20. Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326 13.12.2005.
21. Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention, OJ L 316 of 15.12.2000 and 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 50 25.2.2003.
22. Ortega Terol and Juan Miguel, *El asilo y el refugio… op.cit.*
23. Matthew Hunt, "The Safe Country of Origin Concept in European Asylum Law: Past, Present and Future", *International Journal of Refugee Law*, Vol. 26, no. 4, 2014, pp. 500–535.
24. See some practical examples in Karsten Kloth, "The Dublin Convention on Asylum: A General Presentation", in *The Dublin Convention on Asylum—Between Reality and Aspirations*, ed. Claudia Faria, European Institute of Public Administration, Maastricht (The Netherlands), 2001, p. 8.
25. Gloria Bodelón Alonso, "Problèmes liés a la mise en oeuvre de la Convention de Dublín", in *The Dublin Convention on Asylum—Between Reality and Aspirations*, ed. Claudia Faria, European Institute of Public Administration, Maastricht (The Netherlands), 2001, p. 38.
26. ("*se produce una identificación entre los términos refugiado y solicitante de asilo, figuras internacional y técnicamente distintas, que permiten concluir que el asilo en el ámbito comunitario se reduce a la protección territorial brindada a aquellas personas que encajan en las condiciones exigidas por el Convenio de Ginebra*"). Nuria Arenas Hidalgo, *La desprotección…, op.cit.*, p. 150.
27. Karsten Kloth, *The Dublin Convention on Asylum… op.cit.*, p. 14.
28. For an analysis of the amendments to Dublin III, see Karsten Velluti, *Reforming the Common European Asylum System—Legislative Developments and Judicial Activism of the European Courts*, Springer, Heildelberg, New York, Dordrecht, London, 2014, pp. 39–49.
29. Nicholas Blake, "The Dublin Convention and Rights of Asylum Seekers in the European Union", in *Implementing Amsterdam—Immigration and Asylum Rights in EC Law*, ed. Elspeth Guild and Carol Harlow, Hart Publishing, Oxford-Portland, 2001, p. 106.

30. Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers. OJ L 031 of 6 February 2003, pp. 18–25.
31. OJ L 337/9, 20.12.2011.
32. Jane McAdam, "Migrating Laws? The 'Plagiaristic Dialogue' Between Europe and Australia", in *The Global Reach… op.cit.*, ed. H. Lambert, J. McAdam and M. Fullerton, pp. 25–70.
33. *Ibid*.
34. David J. Cantor, "European Influence on Latin America", in *The Global Reach… op.cit.*, ed. H. Lambert, J. McAdam, and M. Fullerton, pp. 71–98.
35. OJEU L 304 of 30 September 2004, pp. 12 and ss.
36. In this regard, see Pablo Santolaya Machetti, "La protección debida a la persecución por razones de género", in *La revitalización de la protección de los refugiados*, ed. Pablo Antonio Fernández Sánchez, Universidad de Huelva Publicaciones, Huelva, 2002, pp. 89–94.
37. ("*esta enumeración no es taxativa, sino meramente enunciativa, porque el artículo 9 cuándo enumera estas formas utiliza la expresión "entre otras", con lo que parece admitirse como posibilidad cualquiera otra situación que redunde en ese perjuicio irreparable que justifica la petición de asilo*") Maria Luisa Balaguer Callejón, "La regulación del derecho de asilo en la normativa comunitaria", in *Revista de Derecho Constitucional Europeo*, Year 1, no. 2, July–December 2004, in the section devoted to legislation.
38. I believe that the use of the singular here is intended to show that unlike temporary protection, the status of subsidiary protection is granted on an individual basis.
39. Joan Fitzpatrick, "Temporary Protection of Refugees: Elements of a Formalized Regime", *American Journal of International Law*, Vol. 94, no. 2, April 2000, pp. 280–281.
40. OJ L 212 of 07/08/2001, pp. 12–23.
41. In this regard, see W. Kälin, *Temporary Protection in the EC: Refugee Law, Human Rights and the Temptations of Pragmatism, op.cit.*, p. 210.
42. These are persons requiring protection because they have a well-founded fear of being subjected to *serious unjustified harm*: torture or inhuman or degrading treatment; violation of a human right; a threat to their life, safety or freedom as a result of indiscriminate violence arising in situations of armed conflict, or as a result of systematic or generalized violations of their human rights (See Article 15 of the Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, COM[2001] 510 final, 12.9.2001).
43. Professor Fitzpatrick stated, *inter alia*, that "(…) some are dissatisfied because the 1951 Convention does not encompass all forced migrants generally acknowledged to be in need of international protection. Formalization of temporary protection could fill this gap in international legal standards,

and provide a comprehensive framework to substitute for the current patchwork of national TP laws and practices". See Joan Fitzpatrick, "Temporary Protection of Refugees: Elements of a Formalized Regime", *AJIL*, Vol. 94, no. 2, 2000, p. 287.

44. W. Kälin, *Temporary Protection in the EC: Refugee Law, Human Rights and the Temptations of Pragmatism*, *op.cit.*, p. 208.
45. Nuria Arenas Hidalgo, *Los desplazamientos forzosos de población a gran escala: la Directiva Europea relativa al sistema de protección temporal*, Thesis defended at the University of Seville, mimeographed, September 2003, pp. 54–56. Same text in *Mass Influx of Displaced Persons: The Temporary Protection in the European Union*, UMI Dissertation Service, Ann Arbor, Michigan, 2004. These ideas can all be found in Professor Nuria Arenas Hidalgo, *El sistema de protección temporal de desplazados en la Europa Comunitaria*, Universidad de Huelva Publicaciones, Huelva, 2005.
46. See Council Resolution 95/C 262/01 of 25 September 1995 on burden-sharing with regard to the admission and residence of displaced persons on a temporary basis, the first section of which defines those persons that Member States are prepared to admit temporarily. The categories included in the 1995 Resolution are the same as those of the resolution adopted by the ministers with responsibility for immigration at their meeting in Copenhagen on 1 and 2 June 1993 on certain common guidelines as regards the admission of particularly vulnerable groups of distressed persons from the former Yugoslavia.
47. Nuria Arenas Hidalgo, *Los desplazamientos forzosos de población a gran escala: la Directiva Europea relativa al sistema de protección temporal, op. cit.*
48. *Ibid.*, p. 287.
49. Nuria Arenas Hidalgo, "El sistema de protección temporal europeo. El resurgimiento de una renovada acogida territorial como respuesta a los desplazamientos masivos de población", *Revista Española de Derecho Internacional*, Vol. LVI, 2003, pp. 775–777.
50. Proposal for a Council Directive, 2000, para. 5.1.2, p. 7.
51. Gregor Jens, "Temporary Protetion and Burden-Sharing: Conditionalising Access, Suspending Refugee Rights?", in *Implementing Amsterdam—Immigration and Asylum Rights in EC Law*, ed. Elspeth Guild and Carol Harlow, Hart Publishing, Oxford-Portland, 2001, p. 197.
52. OJ C 262 of 7 October 1995, pp. 1–3.
53. For more on this idea, see *Ibid.*, pp. 195–196.
54. For a more specific study, see Nuria Arenas Hidalgo, "El Fenómeno de los llamados "Refugiados Medioambientales": ¿un nuevo desafío para el Derecho Internacional de los Refugiados?", in *La Revitalización de la Protección de los Refugiados, op.cit.*, ed. Pablo Antonio Fernández Sánchez, pp. 261–275. Also Nuria Arenas Hidalgo, "La Degradación medioambi-

ental y los desplazamientos de población", in *Oficina do Centro de Estudios Sociais*, no. 170, March 2002, Coimbra (Portugal).

55. Joan Fitzpatrick, *Temporary Protection of Refugees: Elements of a Formalized Regime*, *op.cit*., p. 294.
56. Nuria Arenas Hidalgo, *El sistema de protección temporal europeo. El resurgimiento de una renovada acogida territorial como respuesta a los desplazamientos masivos de población*, *op.cit*., pp. 757–758.
57. Economic and Social Committee. Opinion of the Economic and Social Committee on the "Proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof", OJ, C 155, of 29/05/2001, pp. 21–25, para. 2.3.
58. Aliens Act, Chapter 2, Section 4, Government Bill 1993/1994: "seekers fleeing war, internal conflict or other serious disturbances in public order, as well as, environmental or ecological catastrophes", quoted by Janina W. Dacyl, "Protection Seekers from Bosnia and Herzegovina and the Shaping of the Swedish Model of Time-Limited Protection", *International Journal of Refugee Law*, Vol. 11, no. 1, 1999, p. 164.
59. Cristina J. Gortázar Rotaeche, "La Protección Subsidiaria como concepto diferente a la Protección Temporal. Hacia un Derecho Comunitario Europeo en la materia", in *La Revitalización de la Protección de los Refugiados*, ed. Pablo Antonio Fernández Sánchez, Servicio de Publicaciones de la Universidad de Huelva, Huelva, 2002, p. 233.
60. Royal Decree 1325/2003, of 24 October, published in Boletín Oficial del Estado (BOE) no. 256 of 25 October, 2003, pp. 38160–38167.

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CHAPTER 16

Democratizing International Trade and Investment Agreements in the European Union

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1 Introduction

The public interest in the liberalization of trade and investment in comprehensive international agreements goes well beyond the reduction of tariffs. The effects of an international trade and investment agreement can extend into a range of public policy areas: environmental protection, product safety, intellectual property, consumer protection, labor rights and public health, to name a few. Notwithstanding economic gains, the complexity and unforeseen consequences of such comprehensive agreements on aspects of public policy when balanced against the right to regulate in the public interest delivers certain democratic challenges for policymakers. In the post-Lisbon European Union, the common commercial policy, which includes the negotiation and adoption of international trade and investment agreements, is now an exclusive competence of the EU. The same treaty reforms also introduce explicit democratic principles concerning direct and participatory democracy for European citizens and civil society. The task before EU institutions when negotiating and adopting

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international trade and investment agreements therefore is to provide an openness that enables EU citizens to participate in decision-making so as to add legitimacy and accountability to adopted agreements. The negotiation of the Transatlantic Trade and Investment Partnership between the EU and the USA, one of the most ambitious free trade agreement to date, illustrates that while some initiatives have been put into practice to confront the democratic deficit facing the EU in the negotiation and adoption of international trade and investment agreements, more measures to promote and ensure *effective* transparency and public participation should be considered.

2 EU Competence in International Trade and Investment Agreement Negotiations and the Principle of Participative Democracy

The scope and exclusivity of EU competence in the area of trade and investment has promulgated debate through the years resulting in substantial treaty reforms. From a citizen's perspective, the lack of a clear and simplified delimitation between Union and Member States competences creates uncertainty in terms of accountability and transparency, thus impeding effective public participation in decision-making.[1] This issue was addressed as part of the democratic challenge facing the EU in the Laeken Declaration on the Future of the European Union, adopted by the European Council in December 2001. The Laeken Declaration argued that the division of competences should be made more transparent, affirming that institutions and decision-making must be brought closer to its citizens.[2]

The extension and clarification of EU competence in the area of trade and investment was a key output of the Treaty of Lisbon, which entered into force on 1 December 2009. Concerning the substantive provisions of EU competence, Article 2(1) of the Treaty on the Functioning of the European Union (hereinafter "TFEU") states that an area that is determined an exclusive competence allows only the Union, and not the Member States, to legislate and adopt legally binding acts.[3] In an area not deemed an exclusive competence of the Union, the competence is shared with the Member States to the extent that the EU has not exercised its competence or has ceased to exercise its competence.[4] After the Lisbon Treaty, common commercial policy is an exclusive competence of the EU. Articles 206 and 207 of the TFEU establish the common commercial and external trade policy of the EU for the progressive abolition of

restrictions on international trade and on foreign direct investment. This area includes "changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies foreign direct investment, services and trade related aspects of intellectual property (TRIPs)".[5] Pursuant to Article 3(1) of the TFEU on exclusive competences, only the EU, and not individual Member States, may legislate and adopt legally binding acts falling under the common commercial policy, including the negotiation of *future* comprehensive international trade and investment agreements with non-EU countries. Competence regarding the many *existing* trade and international agreements by individual Member States, however, was not immediately clear.

Prior to the Lisbon Treaty, individual Member States concluded investment agreements bilaterally. Of the virtually 3000 investment agreements in existence today, 1400 have been signed by EU Member States.[6] In July 2010, the European Commission proposed legislation to replace existing agreements so as to provide legal security to both EU and foreign investors, as well as to contribute to the progressive development of a European international investment policy.[7] In December 2012, EU Regulation No 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States was adopted to progressively replace bilateral investment agreements of the Member States with investment agreements by the Union, ensuring the legal certainty of the existing agreements during the transition. Under the Regulation, a Member State must notify and seek authorization from the European Commission if it intends to negotiate or amend an existing bilateral investment agreement.[8] Moreover, the Commission must be kept informed and may request to participate in the negotiations.[9]

As concerning the negotiation of post-Lisbon international trade and investment agreements, under Article 218 of the TFEU, the mandate to negotiate trade and investment agreements emanates from the Member States through the Council of the European Union. The Council authorizes the opening of negotiations, adopts negotiating directives (also referred to as a "negotiation mandate") and authorizes the signing and conclusion of agreements.[10] The European Commission negotiates with the trading partner on behalf of the EU according to the negotiation

directives from the European Council. Article 207(3) of the TFEU further sets out the establishment of a special committee appointed by the Council to assist the Commission with negotiations. The Trade Policy Committee, consisting of high-level trade officials, facilitates communication between the EU negotiators and the representatives of the EU Member States. The Commission is required to report regularly to the Trade Policy Committee and to the European Parliament on the progress of negotiations, both organs ensuring that negotiations are compatible with internal Union policies and rules.[11] The International Trade Committee (INTA) of the European Parliament is the main contact point between the European Commission and the European Parliament. The relevant functions of INTA include the monitoring, conclusion and follow-up of bilateral and multilateral trade agreements governing economic, trade and investment relations with non-EU countries as well as the coordination with the relevant inter-parliamentary and ad hoc delegations for the economic and trade aspects of relations with non-EU countries.[12] The decision to adopt a final agreement requires the approval of both the Council and the European Parliament.[13]

As evidenced by the post-Lisbon treaty reforms and subsequent EU regulation, EU competence in trade and investment policy has not only expanded but its delimitation has also become increasingly more clarified. Notwithstanding the resulting gains in integration and harmonization that this achieves, the democratic deficit in the EU between Brussels and individual citizens remains an issue of concern.[14] Democratic legitimacy is the bedrock of good governance. Yet the treaties in force before the Lisbon Treaty made no direct or indirect reference to participative democracy.[15] Before the Lisbon Treaty, there was more rhetoric concerning citizens' inclusion in decision-making than explicit, legally binding rights.[16] The then mechanisms through which to participate in European decision-making were indirect channels, through directly elected Members of the European Parliament or national governments.[17]

A most notable achievement of the Lisbon Treaty was that it provided an explicit legal basis so as to enable EU citizens to directly participate in European decision-making. Title II of the Treaty on European Union (hereinafter "TEU") on Democratic Principles sets out the guarantees for representative and participative democracy. Article 10(3) of the TEU affirms, "Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen". As concerning the responsibility of EU institutions

to provide for the right of citizens' participation, Article 11 of the TEU sets out specific measures related to participatory democracy and transparency. For example, EU institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.[18] Moreover, the European Commission shall conduct broad consultations with concerned parties "to ensure that the Union's actions are coherent and transparent".[19] These provisions are not guidelines but rather obligations, as noted by the use of mandatory language, made clear by the use of *shall* instead of *may*. Citizens in turn may take the initiative to submit appropriate proposals to the European Commission, within the framework of its powers, to consider that a legal act of the Union is required for the purpose of implementing the Treaties.[20] The citizens' initiative must be formed by at least one million citizens who are nationals of a "significant number of Member States".[21] The citizens' initiative is a novel improvement for participatory democracy at the EU level, but it should be noted that it forms the basis for an invitation to the Commission to initiate the consideration of a legislative proposal and not necessarily an obligation to adopt a legal act. Of interest to note, the roles of national Parliaments are expressly included in the TEU provisions on democratic principles.

What is clear is that the post-Lisbon era provides a stronger legal basis for transparency and public participation in EU decision-making. In the area of trade and investment, the negotiation of the Transatlantic Trade Investment Partnership between the EU and USA is an example of the increasing role of participatory democracy and moreover illustrates ways that specific measures for democratizing trade and investment agreements and dispute resolution in the EU can improve.

3 Transparency and Public Participation in the Negotiation of International Trade and Investment Agreements: Case of TTIP

In 2013, the EU and the USA announced plans to negotiate a comprehensive agreement on free trade and investment protection, the Transatlantic Trade and Investment Partnership (hereinafter "TTIP"), the largest trade deal to date. The economic relationship between the EU and the USA is considerable: with $1 trillion in trade each year, $4 trillion in investment and 13 million workers on both sides of the Atlantic.[22] To put it in perspective, EU investment in the USA is about eight times the amount of

EU investment in India and China combined.[23] Not only is the USA the EU's principal trading partner, but the potential economic, social and political impact of the rules also renders the agreement of great relevance and importance to the Union and its citizens.

The Council of the European Union issued negotiation directives for the TTIP between the EU and the USA, as adopted at the Foreign Affairs Council on Trade on 14 June 2013.[24] The negotiation directives, issued to the European Commission specifically, indicate that any agreement shall be binding on all levels of government. The TTIP negotiations are held in one-week cycles between Washington and Brussels. The tenth round of negotiations was held in Brussels in July 2015. Transparency and stakeholder involvement, in effort to promote democratic scrutiny in the EU, have been salient features of the TTIP negotiation process.

3.1 Transparency and Public Access to Documents in the TTIP Negotiations

For public participation in decision-making to be effective, citizens require timely and uncomplicated access to information and documents. Pursuant to Article 42 of the Charter of Fundamental Rights and Article 15 of the TFEU, access to EU documents is a fundamental right of citizens. Moreover, these provisions form the basis of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents. Public access to documents has been an issue that has received considerable attention from both civil society and EU institutions from the outset of the TTIP negotiations and stands testament to the EU's increasing commitment to transparency.

Transparency and access to documents in the context of the TTIP negotiations has not been entirely without incident. The Council of the European Union issued the negotiation directives for the TTIP in June 2013; however, the document was not declassified and made publicly available until October 2014. The negotiation directives were classified *EU-restricted* despite the explicit inclusion of transparency provisions within the TTIP Agreement's mandate.[25] As a result, a number of NGOs filed a formal complaint with the European Ombudsman who in July 2014 opened an own-initiative inquiry concerning the European Commission's efforts to make the TTIP negotiations transparent and accessible to the public. In the public consultation process, the Ombudsman received over 315 responses and over 6000 emails on the issue.[26] The inquiry revealed that as of January 2013, DG Trade had replied to 30 TTIP-related initial

requests for access to documents and gave (full or partial) access to 520 out of 807 documents assessed.[27] In response to the inquiry, the Commission stated that it would publish and regularly update a list of TTIP documents shared with the European Parliament and Council, ask organizations if they agree to the publication of submitted documents, publish information on all meetings held on relevant issues and review arrangements for access by the EU institutions to trade policy-related information and documents.[28] Noting that a proactive approach to transparency would heighten the legitimacy of the negotiation process, the Ombudsman made a number of recommendations to the European Commission in January 2015, namely, that citizens' fundamental right to public access to information should be made simpler, that there should be greater proactive disclosure of TTIP documents, and that there should be increased transparency regarding meetings that Commission officials hold on TTIP with business organizations, lobby groups or NGOs.[29]

The European Commission has made notable efforts to make EU negotiating texts of the TTIP publicly available. In the Commission's Communication on 25 November 2014 concerning transparency in TTIP negotiations, the Commission declared a commitment to greater transparency making public all the EU negotiating texts that the Commission already shares with Member States and the European Parliament. The Commission also decided to grant all Members of Parliament (MEPs) access to the restricted negotiating documents with the use of a special "reading room" though they are not allowed to share the restricted documents publicly.[30] Moreover, the Commission also announced additional steps to enhance transparency, including reporting more extensively on the outcome of negotiation rounds, publishing online material explaining EU negotiation positions and approaches, and increasing civil society and general public engagement in Brussels and within Member States, alongside greater outreach and communication efforts and the use of social media.[31]

The publicity of TTIP negotiation texts cannot be underestimated. This was the first time the European Commission has ever published proposals for legal text in an international trade agreement.[32] This is made ever more remarkable considering that confidentiality can be very effective in the strategy and conduct of a negotiation. It should be noted however that providing public access to negotiation documents does not guarantee full disclosure, but it does require a duly justified explanation in the case of any non-disclosure. Nevertheless, the breadth and diversity of information available on the TTIP negotiations on the Commission's dedicated DG Trade website goes beyond the textual proposals and position papers of the EU negotiators. Citizens are provided with impact assessments of

trade-related policies, evaluations of DG Trade's Citizen Dialogues, a list of meetings and TTIP stakeholder events, public consultations, advisory group meeting reports, videos and photos of meetings, explanatory videos including on transparency, DG Trade Commissioner statements and speeches, chapter-by-chapter factsheets, glossary of key terms and so on.[33] Moreover, the public can receive notice of the publication of documents and news by subscribing to the website by RSS or following the DG Trade's TTIP Twitter account (@EU_TTIP_team).

Beyond the access to information provided on the designated TTIP website, the European Commission has more generally established separate online platforms for public access to information and greater transparency. The Transparency Portal is a consolidated website of various portals that provide access to EU documents and provide for direct and indirect public participation, including access to legislation, access to published and unpublished documents, access to historical archives, access to public consultations, a register of expert groups, information about recipients of EU funds, an open data portal, information on ethics for Commissioners and staff, petitions responses and the Transparency Register.[34] The Transparency Register, a joint project between the European Commission and the European Parliament, is a public website where organizations who represent interests at a EU level (lobbyists, interest representatives and activists) register to provide greater transparency on their activities on their influence on EU policy, as well as a complaints mechanism for an administrative inquiry into information contained in the Register or suspected breaches of the Code by registered organizations or individuals.[35] While registration is voluntary, the European Parliament does require prior registry for accreditation and access to the Parliament and its Committee Public Hearings.[36] It should be noted that the DG Trade website, and accordingly all the TTIP documents published online, are in English. The Transparency Register, on the other hand, is accessible in the 24 official working languages of the EU. Undoubtedly, translation is a costly and timely endeavor. However, in the absence of translation, access to documents exclusively in English in a multilingual EU does pose a challenge.

3.2 Public Participation in the TTIP Negotiations

As concerning public participation in the TTIP negotiations and EU trade policy generally, the European Commission organizes meetings with stakeholders both during and between negotiation rounds, implements

public consultations in the form of online questionnaires and provides various access points for EU citizen input. Though it should be noted that public participation concerning the TTIP negotiations is further promulgated outside of Brussels. Many events are held outside of the EU capital, with locations including Germany, Poland, Denmark, France, Spain and the UK.[37] A host of non-EU institutions, ranging from the British Chambers of Commerce in Denmark to Politico Magazine, regularly organize events directed to procure stakeholder feedback and involvement in the TTIP negotiations. Such events are often disseminated on the DG Trade-designated TTIP website.[38]

During each round of TTIP negotiations, a Stakeholder Forum is held on one of the days of the weeklong negotiation rounds. DG Trade (when negotiations are held in Brussels), or the Office of the US Trade Representative (when negotiations are held in Washington), hosts the Stakeholder Forum to provide an update to all interested stakeholders on the status of the negotiations and to solicit their input and feedback. The TTIP Stakeholder Forum has two components: stakeholder policy presentations and chief negotiators briefing. The stakeholder policy presentations allow interested stakeholders to make a presentation to the EU and US negotiators. Registration for presentations is done online and closes the week prior to the event. Such presentations are open to the public and press. Presentations most often come from environmental and consumer groups, business and trade unions. Following the stakeholder presentations, EU and US chief negotiators brief registered stakeholders on the status of the negotiations.

Between negotiation rounds, DG Trade implements Civil Society Dialogue meetings with EU-based not-for-profit organizations on the TTIP negotiations and trade policy more generally.[39] Organizations must be registered in the European Commission's Transparency Register and typically include trade and labor unions, NGOs, business federations and community-based groups while excluding political parties and elected representatives. For organizations outside of Brussels, which is the site of the meetings, the Commission even provides some travel expenses.[40] The objectives of such meetings are to open dialogue and provide for information exchange between registered civil society organizations and the Commission. Meetings range from updates on TTIP negotiations to more general topics like sustainability and trade. Since January 2008, approximately 165 Civil Society Dialogue meetings have been held involving some 1750 participants.[41]

In a 2014 report by Coffey International Development, the effectiveness, efficiency and relevance of DG Trade's Civil Society Dialogue was assessed to deliver recommendations for its improvement and better management. The assessment was conducted between December 2013 and July 2014 upon request of the European Commission. While the report acknowledged that the Civil Society Dialogue initiative fulfills the citizen participation mandate in the Lisbon Treaty, certain steps could be carried to make the participation of civil society organizations more effective. The report described the Civil Society Dialogue meetings as "an information relay", lacking any real debate or clear outputs from participants to inform trade policymaking.[42] The report suggests that the Commission consider clear objectives for the Civil Society Dialogue meetings that effectively assist DG Trade, for example, publishing questions or identifying areas where civil society organizations could add value in advance of the meetings as well as identifying and inviting new stakeholders that represent different points of view.[43]

Beyond the aforementioned meetings of stakeholders, the Commission has also incorporated public participation in the TTIP negotiations through the written form. At a few select points in the negotiation process of the TTIP, the European Commission has published online questionnaires to collect targeted information on particular issues.[44] In 2014, the European Commission launched two public consultations concerning the TTIP. In July 2014, the Directorate General for Trade and Growth jointly launched a online survey on small- and medium-sized enterprises (SMEs) in the context of TTIP negotiations to identify the trade barriers currently faced by European industries and individual companies when doing business with the USA. The survey was carried out by Ecorys, a consultancy working on behalf of the Commission, and targeted at European businesses with a particular focus on SMEs. The survey was published on the European Commission's interactive policymaking website and distributed across Europe through the Enterprise Europe Network. The survey opened in July 2014 and closed in January 2015, receiving a total of 869 responses from firms across all EU Member States except Malta, Cyprus and Slovakia.[45]

Earlier in 2014, the European Commission also held an online public consultation on the approach the EU should take on investment protection and investor-State dispute settlement (ISDS) in the TTIP. The online process was conducted over the course of three months, commencing on 27 March 2014 and concluding on 13 July 2014. The consultation took the form of a questionnaire and focused on 12 key points: the scope of the substantive investment protection provisions, non-discriminatory

treatment for investors, fair and equitable treatment, expropriation, ensuring the right to regulate and investment protection, transparency in ISDS, multiple claims and relationship to domestic court, arbitrators' ethics, conduct and qualifications, reducing the risk of frivolous and unfounded cases, allowing claims to proceed (filter), guidance by the parties on the interpretation of the agreement and an appellate mechanism and consistency of rulings.[46] A total of 149,399 responses were received, 99 % of which came from individuals.[47] It should also be noted that the questionnaires are published in English.

Rather than collective means of public participation on the TTIP negotiations, DG Trade also provides individual points of contact. A "Have your say" page on the DG Trade-designated TTIP website invites individuals to call from anywhere in the EU toll-free or submit an online enquiry so that individual citizens may share their views with the EU TTIP negotiation team.[48] Moreover, a link to an interactive map is provided so that citizens may identify and contact their representative MEPs directly.[49] Alternatively, a link is provided for citizens to Europe Direct, a central information service on the EU.[50] If not through the DG Trade website, EU citizens can access the European Commission's Your Voice in Europe website, a consolidated access point on a variety of public consultation and feedback opportunities.[51] The assortment of access points for public participation in the TTIP negotiations, while rather significant, does however beg the question of which, if any, is the most effective manner for an EU citizen or civil society organization to deliver an actionable input on the negotiation of an international trade and investment agreement.

3.3 The Effect of Public Consultation on the TTIP Negotiations: Dispute Resolution

In the earlier rounds of negotiation of the TTIP, like the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada before it, the proposed text provided for investor-State dispute settlement. Investor-State dispute settlement (ISDS) allows the investor to bring a case through international arbitration directly against the host country without the intervention of the investor's home State. International arbitration is a non-judicial mechanism that provides a final and binding resolution by one or more party-appointed arbitrators. The possibility for investors to resort to ISDS in the case of a breach of the investment protection rules is a standard feature of international investment agreements.[52]

In an international context, arbitration of investment disputes provides certain key advantages: a neutral forum, the choice to appoint specialized adjudicators and the near universal enforceability of awards provided by the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958. However, international arbitration has also been critiqued generally for the confidentiality of both the conduct of arbitral proceedings and the awards. The general debate surrounding ISDS centered on the need to balance investor protection against a State's sovereign right to regulate. The negotiating parties' original decision to include ISDS was a response to denial of justice concerns from foreign investors in domestic courts and concern for the abusive or arbitrary treatment of EU and US investors in each other's respective territory.[53] Despite the fact that both the EU and the USA expressed a commitment to a high level of transparency in the conduct of arbitral proceedings and an expressed intent to incorporate the 2014 United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency in Treaty-Based Investor-State Arbitration into the TTIP,[54] ISDS became one of the most controversial issues and one that generally garnered negative feedback from civil society.

After the aforementioned online public consultation on the approach the EU should take on investment protection and ISDS in the TTIP in July 2014, the EU identified that the main public concerns with ISDS included the infringement of governments' legitimate right to regulate in the public interest, secrecy of arbitral proceedings, the bias and conflict of interests of arbitrators, inconsistency of arbitral awards and the review of arbitral awards.[55] Based on the input received in the July 2014 consultation along with input from the European Parliament, Member States and national parliaments, in September 2015, the European Commission approved its proposal for an alternative system for dispute resolution in the TTIP: a public Investment Court System.[56] The Investment Court System, if approved, would replace ISDS in all ongoing and future EU international investment negotiations. The salient features of the Commission's proposed Investment Court System respond in large part to the main public concerns that emerged from the public consultation process: the public appointment of judges with qualification requirements, the publicity of awards and the establishment of an Appeal Tribunal. In a demonstration of the principle of transparency, the Commission's proposal for an Investment Court System was made publicly available at the same time that the proposal was sent to the European Parliament and the Member States.[57]

4 Conclusions and Recommendations

Trade and investment policy in the EU necessarily impacts the public interest and merits therefore a careful accountability for democratic principles by EU institutions. Providing access points for information and participation in the negotiation of international trade and investment agreements is a primordial step, but it is not enough. So as to reinforce the political legitimacy of the Union, EU institutions should proactively facilitate uncomplicated public access to negotiating texts and documents of international trade and investment agreements at each stage of the negotiation so that citizens can be informed and contribute in a timely way. Where the document cannot be made public, the document reference should be made public and accompanied by a justification for its non-disclosure. As concerning direct public participation, attention should be given to both the form and substance of stakeholder input so that it is more than informative but, more importantly, effective in shaping EU policy.

Recommendations:

- EU institutions should *proactively provide uncomplicated, timely and direct access* to information and documents concerning the negotiation of international trade and investment agreements.
- Public participation initiatives to promote stakeholder involvement in the negotiation of international trade and investment agreements should be designed and managed in such a way so as to *ensure that stakeholder input is not only informative but also effective* in shaping EU policy.
- The plurilingualism of the EU should be taken into consideration when formulating public consultation questionnaires.

Notes

1. See generally Paul Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform*, Oxford University Press, Oxford, 2010, ch 5; Zoltán Horváth and Bálint Ódor, *The Union After Lisbon: The Treaty Reform of the EU*, HVG-ORAC Publishing House Ltd., Budapest, 2010, ch 1.
2. European Council Presidency Conclusions, European Council Meeting at Laeken, 14–15 December 2001, Annex I, Laeken Declaration on the Future of the European Union, p. 27, available at: https://www.consil-

ium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/68827.pdf (accessed 17 July 2015).

3. Consolidated Treaty on the Functioning of the European Union (hereinafter "TFEU") published in OJ L C 83/1 on 3 March 2010, Art. 2(1). Under the treaties of the European Union, the EU has legal personality making it therefore a subject of international law capable of negotiating and adopting internationally binding agreements.
4. TFEU Art. 2(2).
5. TFEU Art. 207(1).
6. European Commission, "Public Consultation on Modalities for Investment Protection and ISDS in TTIP", available at: http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf (accessed 17 July 2015).
7. European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, "Towards a Comprehensive European International Investment Policy", 7 July 2010, available at: http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147884.pdf (accessed 17 July 2015). This Communication outlines the European Commission's approach to future investment policy, keeping in line with the Europe 2020 Strategy.
8. Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States, published in OJ L 351 of 40 of 20 December 2012, Art. 8.
9. Regulation (EU) No 1219/2012, *Ibid*., Art. 10.
10. TFEU, Art. 218(2).
11. TFEU, Art. 218(10).
12. European Parliament Committees, "INTA International Trade", available at: http://www.europarl.europa.eu/committees/en/inta/home.html#menuzone (accessed 9 January 2015).
13. While a qualified majority vote is generally allowed for the negotiation and conclusion of agreements, Article 207(4) of the TFEU requires that the Council act unanimously on agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, where such agreements include provisions for which unanimity is required for the adoption of internal rules.

    The Council shall also act unanimously for the negotiation and conclusion of agreements:

    (a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity;

(b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them.

14. See generally Michelle Cini and Nieves Pérez-Solórzano Borragan, *European Union Politics*, 4th ed., Oxford University Press, Oxford, 2013, ch 25 "Democracy and Legitimacy in the European Union".
15. Zoltán Horváth and Bálint Ódor, *op.cit.*, p. 103.
16. Paul Craig, *op.cit.*, p. 67.
17. Horváth and Bálint, *op.cit.*, p. 103. In the pre-Lisbon Treaty era, citizens might have also participated indirectly through the advisory bodies of the Union, the Economic and Social Committee and the Committee of the Regions.
18. Consolidated version of the Treaty on European Union (hereinafter "TEU"), published in OJ L C 83/1 on 3 March 2010, Art. 11(2).
19. TEU Art. 11(3).
20. TEU Art. 11(4).
21. *Ibid.*
22. Remarks by US Ambassador Michael Froman: "Dialogue on the Transatlantic Trade and Investment Partnership", 14 October 2014, available at: http://www.ustr.gov/about-us/press-office/speeches/2014/October/Remarks-by-Ambassador-Michael-Froman-Dialogue-on-the-TTIP (accessed 9 January 2015).
23. European Commission, Directorate General Trade, "Countries and Regions", available at: http://ec.europa.eu/trade/policy/countries-and-regions/countries/united-states/ (accessed 17 July 2015).
24. The directives were declassified on 9 October 2014, available at: http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf (accessed 17 July 2015).
25. Council of the European Union, "Directives for the Negotiation on the Transatlantic Trade and Investment Partnership Between the European Union and the United States of America", 17 June 2013, Arts. 40–41, available at: http://avada.access-info.org/wp-content/uploads/ST_11103_2013_DCL_1_EN.pdf (accessed 19 July 2015). Full text: "40. The Agreement will address issues of transparency. To this end, it will include provisions on:

    – The commitment to consult stakeholders in advance of the introduction of measures with an impact on trade and investment;
    – The publication of general rules and measures with an impact on international trade and investment in goods and services;
    – Transparency as regards the application of measures having an impact on international trade and investment in goods or services.

41. Nothing in this Agreement should affect EU or Member State laws regarding public access to official documents".
26. European Ombudsman, OI/10/2014/RA Opened on 29 July 2014, Decision on 6 January 2015, available at: http://www.ombudsman.europa.eu/en/cases/decision.faces/en/58668/html.bookmark (accessed 19 July 2015).
27. *Ibid*.
28. *Ibid*.
29. *Ibid*.
30. European Commission, C(2014) 9052, "Communication to the Commission Concerning Transparency in TTIP Negotiations" of 25 November 2014, available at: http://ec.europa.eu/news/2014/docs/c_2014_9052_en.pdf (accessed 19 July 2015).
31. *Ibid*.
32. European Commission, Press release, "European Commission Publishes TTIP Legal Texts as Part of Transparency Initiative", 7 January 2015, available at: http://europa.eu/rapid/press-release_IP-15-2980_es.htm (accessed 19 July 2015).
33. See DG Trade TTIP Website http://ec.europa.eu/trade/policy/in-focus/ttip/ (accessed 19 July 2015).
34. See European Commission Transparency Portal http://ec.europa.eu/transparency/index_en.htm (accessed 19 July 2015).
35. See Europa.eu Transparency Website http://ec.europa.eu/transparencyregister/public/homePage.do?redir=false&locale=en (accessed 19 July 2015).
36. As of July 2015, nearly 8000 entities (individuals and organizations) are registered.
37. A list of TTIP stakeholder events available at: http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index_en.htm#_events (accessed 26 September 2015).
38. *Ibid*.
39. See European Commission Directorate General Trade website, available at: http://trade.ec.europa.eu/civilsoc/register.cfm (accessed 26 September 2015).
40. *Ibid*.
41. European Commission, Evaluation of DG TRADE's Civil Society Dialogue: Final Report, July 2014, available at: http://trade.ec.europa.eu/doclib/docs/2014/december/tradoc_152927.pdf (accessed 26 September 2015).
42. *Ibid*., at p. 8.
43. *Ibid*., at p. 8.
44. See European Commission Directorate General Trade website, available at: http://trade.ec.europa.eu/consultations/#_tab_2015 (accessed 26 September 2015). As of September 2015, DG Trade has conducted a total of 13 public consultations on trade agreements and trade policy since 2013.

45. European Commission Report, "Small and Medium Sized Enterprises and the Transatlantic Trade and Investment Partnership", Luxembourg, Publications Office of the European Union, 2014, available at: http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153348.pdf (accessed 19 July 2015).
46. European Commission, Preliminary report (statistical overview), "Online Public Consultation on Investment Protection and Investor-state Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)", July 2014, available at: http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152693.pdf (accessed 26 September 2015).
47. *Ibid*.
48. See European Commission Directorate General Trade website, "Have Your Say", available at: http://ec.europa.eu/trade/policy/in-focus/ttip/have-your-say/ (accessed 26 September 2015).
49. See European Parliament Website, available at: http://www.europarl.europa.eu/meps/en/map.html (accessed 26 September 2015).
50. See Europe Direct website, available at: http://europa.eu/europedirect/index_en.htm (accessed 26 September 2015).
51. See European Commission website, available at: http://ec.europa.eu/yourvoice/consultations/index_en.htm (accessed 26 September 2015).
52. Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, 2nd ed., Oxford University Press, Oxford, 2012, p. 13.
53. European Commission Directorate General Trade, "Investment Protection in TTIP", available at: http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153018.5%20Inv%20Prot%20and%20ISDS.pdf (accessed 26 September 2015).
54. European Commission, "Public Consultation on Modalities for Investment Protection and ISDS in TTIP", available at: http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf (accessed 12 January 2015). (Former Draft Article 33 of the TTIP on the "Transparency of Proceedings" incorporated the UNCITRAL Transparency Rules. In doing so, the TTIP proposed to adopt the transparency measures delineated in the UNCITRAL Transparency Rules, making the following available to the public: the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defense, any further written statements or written submissions by a disputing party, a table listing all exhibits to those documents, if it had been prepared for the proceedings, any written submissions by the non-disputing treaty Party/Parties and by third parties, transcripts of hearings, where available, and orders, decisions and awards of the arbitral tribunal.)

55. European Commission Directorate General Trade, "Investment Protection in TTIP", available at: http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153018.5%20Inv%20Prot%20and%20ISDS.pdf (accessed 12 January 2015).
56. European Commission Draft Text TTIP, September 2015, available at: http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf (accessed 26 September 2015).
57. European Commission Press Release, "Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations", 16 September 2015, available at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1364 (accessed 26 September 2015).

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PART V

Conclusions

CHAPTER 17

Conclusions

Beatriz Pérez de las Heras

This volume has analyzed and assessed the major instruments of citizen participation in the post-Lisbon European political framework. We have described their extent and provided evaluation of their empirical record by assessing the impact on policymakers and citizenry. We have also identified and proposed new forms of citizen involvement, whose introduction should require either Treaty reform or specific legislation. Finally, we have tried to show how recent developments in some EU policies may contribute to extend the EU's democratic model beyond its borders.

Our main aim has been to add to existing knowledge of citizens' role by increasing understanding of how and why the EU responds to citizen disaffection after the Lisbon Treaty in a context of increased social inequality, and highlight the interaction between domestic and international dimensions.

The contributors' answers to the initial research questions formulated in the Preface allow for the following conclusions to be drawn:

1. Citizen participation in European political life has been gradually augmented, taking different forms, such as active involvement in non-governmental organizations and civil society associations,

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which fight for legitimate rights and interests, or the right to complain before the European Ombudsman against the maladministration of the EU institutions and bodies. This growing activism is an indicator of the increased citizens' awareness of the significance of the EU in their lives. But it also signifies that the EU ought to become more responsive to citizens' needs.

2. While the European Citizens' Initiative (ECI) is surely the most innovative aspect in terms of transnational participatory democracy introduced by the Lisbon Treaty, the legislation-initiating function of this tool has not been yet fulfilled. Nevertheless, the ECI is demonstrating the potential to perform several other democratic roles, such as having communication and dialogue-facilitating function, as an awareness-raising tool, agenda-setting mechanism or deliberative and citizen-activating platform. In order to fully exploit its capacity, there is a need of improving and simplifying the ECI, which may require Treaty amendments as well as changes to secondary legislation.
3. National Parliaments are increasingly called to play a relevant role in building a European *demos*. The early warning system for subsidiarity control introduced by the Lisbon Treaty has not met the expectations of bringing the EU closer to its citizens and making the Commission vertically accountable to national parliaments. Instead, the "green card" initiative provides the national legislators with a platform for joint policy proposals, which has the potential of translating the parliamentary engagement into co-responsibility for EU governance. Yet, national parliaments should invest further in translating Europe to their voters, while better complementing the European Parliament's influence in EU policymaking.
4. Civil Society Organizations (CSOs) are increasingly providing structures for citizen groups to interact with EU institutions, by making claims, giving advisory input and by consultancy on assessments and legislative proposals. This stronger cooperation of civil society with European bodies, such as the Fundamental Rights Agency, enhances the EU's democratic legitimacy. Nonetheless, CSOs need to become more independent from EU funding. The creation of an institutional structure such as the civil society platform provides an additional venue for CSOs to not only advance their organizational objectives but also to legitimize their claims.

5. The effective implementation of the EU Charter of Fundamental rights (CFR) by both European institutions and national authorities is instilling a sense of public ownership and European belonging, which contributes to reinforcing the sense of a European identity, while also strengthening the EU's political legitimacy.
6. The EU's accession to the European Convention on Human Rights, as provided by article 6.2 of the TEU, will make the EU more politically accountable to an external judicial institution. If finally achieved, this international monitoring mechanism would reinforce the EU's credibility as a human rights promoter.
7. An EU judicial system of fundamental rights protection is emerging as a result of the increased interaction between national courts and the Court of Justice (CJ) of the EU in the effective application of the CFR. Likewise, the role of the CJ as a noticeable adjudicator of fundamental rights in all areas of EU power is decisively contributing to strengthening the democratic legitimacy of the EU.
8. Promoting European culture, not only through top-down actions but also through efficient bottom-up strategies, emerges as a key tool to counter the influence of current Eurosceptic movements, while contributing to foster citizens' identification with the EU as their future *demos*.
9. A genuine EU economic government should be established and be empowered to address citizens' needs by defining a European employment policy as the first basis for social justice and economic cohesion.
10. The definition of a European social model where equality and non-discrimination may be ensured is deemed as a powerful tool to foster citizens' feeling of belonging to a supranational polity.
11. The new Directive 2015/637/EU on consular assistance does not provide a supranational dimension to citizens' protection outside the EU. By defining a limited role for the European External Action Service, this institutional legal act consolidates the intergovernmental character prevailing in the foreign affairs domain. While awaiting a Treaty reform that may define a genuine common foreign policy, EU Delegations must assume the challenge of highlighting the international relevance of EU citizenship, beyond national citizenships, thereby contributing to fostering a common perception of belonging to an incipient European *demos*.

12. The European Neighborhood Policy (ENP), launched in 2004 and recently adjusted, emerges as a powerful political instrument to promote democracy and fundamental rights in neighboring countries. Through conditionality, the ENP has succeeded in introducing relevant democratic reforms and transformations in the targeted countries. This process of influence reflects an increasing convergence toward the EU political and economic model, although the degree of alignment varies across the EU neighborhood.
13. The EU has become a relevant visible contributor to international peace and security, due to the significant development of the Common Security and Defence Policy (CSDP). Yet, despite being formalized by the Lisbon Treaty, the CSDP still remains under the Member States' power, which impedes the EU from acting as a global actor in the international context. Nonetheless, increased cooperation with other international organizations, such as the UN, NATO or the AU, enhances the EU's projection as a soft power and salient civilian, humanitarian actor.
14. Recent changes regarding the negotiation and the adoption of international trade and investments agreements demonstrate how EU institutions can further democratize and legitimize the procedures of assuming international obligations. This democratization development, which has an international impact, is being made by providing instruments to promote a model for proactive transparency (e.g. publicity of negotiating texts and the EU Transparency Portal and Register), as well as for effective and direct public participation in shaping EU policy (e.g. public consultation questionnaires, Stakeholder Forum and Civil Society Dialogue meetings).
15. The EU is currently the only international organization that has adopted a comprehensive legal asylum system. However, the common architecture is focused on procedural rather than conceptual aspects. Different national approaches, large margins of discretion left to Member States and procedural complexity demonstrate that this relevant achievement does not permit addressing large refugee influxes efficiently, such as the ones currently confronted by the EU. However, the so-called subsidiary protection, introduced by the EU, seems to work as an alternative model for international protection, which is currently being followed by other countries.

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Note: Page numbers followed by 'n' denote notes.

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