Governance and Regulation in the European Union
A Reader
Schriften des
Zentrum für Europäische Integrationsforschung
Center for European Integration Studies
der Rheinischen Friedrich-Wilhelms-Universität Bonn

Edited by
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Volume 77
Christian Koenig/Ludger Kühnhardt (eds.)

Governance and Regulation in the European Union

A Reader

In collaboration with Robert Stüwe

Nomos
Preface

“Governance and Regulation in the EU” frames research and teaching at the Center for European Integration Studies (ZEI – Zentrum für Europäische Integrationsforschung). “Governance and Regulation in the EU” brings together two aspects whose critical interplay shapes the EU, its impact on citizens’ lives and its role globally. Interdisciplinary perspectives on the important relationship between governance and regulation offer greater insight and clarity into the increasingly complex process of European integration.

Governance encompasses a broad assortment of factors involved in the process of governing; how decisions, rules and norms are made and how external actors attempt to influence the process of governing. In comparison, regulation is more tangible and prescribes official methods and standards. Regulation is generated for public interest yet as it profoundly affects citizens, it must be legitimate. Governance gives legitimacy to regulation and regulation is necessary to ensure the functioning of the internal market of the European Union and the larger project of European integration. Regulation is a necessary and important feature of the complex process of governing in the EU.

This dynamic interplay between governance and regulation in the EU is constantly dealt with by distinguished academics and professional experts who form the Faculty of ZEI’s postgraduate “Master of European Studies – Governance and Regulation”. They come together at ZEI’s “Master of European Studies – Governance and Regulation” to share their perspective and knowledge. This Reader provides samples of the profile with which they enrich our postgraduate education program.

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Directors at the Center for European Integration Studies (ZEI)
Bonn, September 2017
Preface 5

Part One: Governance in the European Union 11

A. Foundations 11

I. The Proto-Constitutional Establishment of European Domestic Policy. Germans and the Conditions for Federal Order in Europe
By Ludger Kühnhardt 13

II. Law of the European Union: Institutions and Procedures
By Henri de Waele 27

III. National Representation in Supranational Institutions:
The Case of the European Central Bank
By Volker Nitsch and Harald Badinger 59

B. Multi-Level Decision-Making in the EU 97

I. Enlargements and their Impact on EU Governance and Decision-Making
By Neill Nugent 99

II. European Hesitation: Turkish Nationalism on the Rise?
By Dirk Rochtus 121

III. Limits of Cultural Engineering: Actors and Narratives in the European Parliament’s House of European History Project
By Wolfram Kaiser 129
Table of Contents

C. Governance of External Relations 151

I. Mapping out a Euro-Mediterranean Strategy
   By Stephen C. Calleya 153

II. Transatlantic Leadership in a Multipolar World:
    The EU Perspective
    By Stefan Fröhlich 177

III. International Negotiations: The Foundations
    By René A. Pfommm 195

Part two: Regulation in the European Union 213

D. Legal Pillars 213

I. The Art of Regulation & The Ethics of Competition and State Aid
   By Christian Koenig and Bernhard von Wendland 215

II. The Role of the European Council in the European Union’s
    Institutional Framework
    By Richard Crowe 219

III. Frustration or Success: How to Negotiate EU Law
    By Klaus-Jörg Heynen 235
Table of Contents

E. Sector-Specific Regulation 253

I. Cartels and Restrictive Agreements in the Liberalized Telecommunication Sector – EU and National Competition Law Enforcement
   By Robert Klotz 255

II. Regulating the Railway: Innovative and Competitive Railways in Europe: Infrastructure Usage Charges and the Principle of Non-Discrimination
   By Kristina Schreiber 271

III. Competition and the Water Sector
   By Alexander Gee 281

F. Economic Pillars 287

I. Emerging Varieties of Capitalism in the EU New Member Countries of East Central Europe
   By Ryszard Rapacki and Piotr Maszczyk 289

II. Economic Security - Key Challenge of the 21st Century
   By András Inotai 305

III. Policies for Coherence and Structural Change:
    the Quest for Cohesion
   By Daniel Tarschys 313
Part One: Governance in the European Union

A. Foundations
I. The Proto-Constitutional Establishment of European Domestic Policy. Germans and the conditions for federal order in Europe

By Ludger Kühnhardt

1. Hans-Peter Schwarz, a professor of Political Science and Contemporary History in Bonn, a public intellectual, and as such an institution in Germany’s political culture, concluded his epoch-defining postdoctoral thesis “Vom Reich zur Bundesrepublik” (From Reich to Federal Republic) in 1966 with a sentence that was either defiant or fatalistic, depending on one’s perspective at the time: “Trotz aller Veränderungen, die inzwischen eingetreten sind, unterscheidet sich die Situation, der sich die Westdeutschen in den Jahren 1948 und 1949 gegenüber sahen, nicht grundsätzlich von der des Jahres 1966: sie mussten und müssen in der Westbindung die Außenpolitik erkennen, die auf sie zugeschnitten ist und für die sich keine echte Alternative findet.” [“Despite all the changes that have taken place since then, the situation that faced West Germans in 1948 and 1949 was not fundamentally different from the situation in 1966 – their alignment with the West forced and still forces them to acknowledge a foreign policy that has been tailored to them, and to which there is no true alternative.”]1 The alignment with the West created a European Union that expanded into the east, as well as NATO and its own expansion to the east. Germany carried out its reunification embedded within both institutions. Today, the West continues quite a distance beyond the eastern border of Germany. The optimistic hopes that European norms would be exported across the eastern borders of the EU and NATO, however, through neighborhood policies with the East

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1 Prof. Dr. Ludger Kühnhardt has been Director at the Center for European Integration Studies (ZEI) and Professor of Political Science at the Institute for Political Science and Sociology at the University of Bonn since 1997.

and South, remained ineffective. The calm, magnetic effect of the Western model was more successful than the proactive export of stability and norms across western and southern borders that is repeatedly attempted today. In reality, stability and a reciprocal magnetic bond only exist in the European Union and NATO.

The fact that the European Union is indispensable for Germany is now a given, in every imaginable area. The well-known arguments do not need to be repeated here. But conversely, how much Europe can Germany handle? To put it more bluntly, the European Union – almost too self-sufficient – still has not really arrived in Germany. Many Germans know what they think of Europe, but they do not consistently see themselves as a part of that Europe – a Europe that does not become the Europe we value for its freedom, diversity, and opportunities to live in peace until we also acknowledge all of its facets, contradictions, oppositions and tensions. For a while now, Europe has largely been seen as an intruder in Germany. One reason for this has to do with shifts in Germany’s political culture. In the bygone days of the Bonn Republic, young people could not live without politics. It held together a fragmented, polarized discourse about the same basic questions: who was responsible for the course of German history in the first half of the 20th century. Today, young people no longer need to be interested in politics in order to live well. The authority of politics has dwindled.

Starting in 1989/90, Germany was very focused on itself, but in reverse order of priority compared to previous decades. Until reunification, the goal was to rehabilitate Germany, which saw others’ feelings and sensitivities in reference to itself. Today the focus is on a republic of well-being, which is self-referential rather than making its discussions more European and broadening its perspective to include the common good in Europe. Europe, from the perspective of the Other in Europe, is kept at a distance. After all, to put it polemically, people are speaking German in Europe again, which some consider sufficient (one-sided) proof of a network (and a sign of where the action is). Otherwise, Europe is seen as a bureaucracy, remote from the citizens and nebulous. In reality, the population is cheated of a true European discourse, especially during the European Parliament elections. As long as the politicization of European domestic policy is not reflected in European political parties, in Europe-wide talk shows on our public television networks, and by including others’ arguments in German debates over well-being, Europe will remain the Other, the counterpart. The German political culture of “we prefer to remain self-sufficient” is only expanded to include Europe whenever we in Germany delightedly note that someone in Europe is following German standards.
In brief, and somewhat more soberly: public life in Germany and our socioeconomic processes are all too often still counter-cyclical to the rest of Europe. To others, Germany’s reunification was the reunification of Europe. Post-reunification Germany saw itself as the “sick man of the Rhine and Spree rivers,” without adequately understanding the drastic, wide-ranging reforms taking place in other post-Communist societies. And yet the Germans, too, were a post-Communist society. Hartz IV, a reform act by the West German social state, took place before the other Western Europeans slid into a crisis. Their crisis in turn was also considered a successful German export, something that Germans do not like to hear. Soon, young Spaniards and well-educated Greeks came to Germany – and still hardly anyone wondered what would happen to those countries’ own economies, which needed educated young people just as badly. Germans can unilaterally shut down nuclear power plants, but they forget to talk with the Greeks and Portuguese, Spaniards and Italians to explore how sunshine could become an export product for these low-export countries. The country has emancipated itself from the old political class of the Bonn Republic, including through scandal-mongering of various kinds, but it remains unclear whether the new political class of the Berlin Republic is really more compatible with Europe than its predecessors before 1990.

Above all, many Germans now often like to observe that others in Europe view them with disdain – partly out of envy, partly out of arrogance, partly out of rancor. Germans want to be loved. Highly sensitive foreigners are sometimes surprised that Germans are so dogmatic, even in areas where they identify themselves as good Europeans. Recently, a central European ambassador complained that he could no longer stand all the talk of Europe among the German classe politique. He was starting to find it threatening when his German neighbors in Berlin continued to insist that they were in favor of Europe and wanted more Europe – without any interest in hearing what others in Europe thought about it, or how they hoped to construct this shared Europe. The Berlin Republic – and this is an unpopular view in Germany – frequently stands out in other countries because of its strange combination of self-deprecation and arrogance. Ultimately, Europe has not fully arrived in the Berlin Republic – and the other way around, too: Germany has not fully arrived in Europe, has not become European in earnest. Even so, the others do not mean this in a bad way, especially those who are in fact in earnest. Radoslaw Sikorski, Poland’s former Foreign Secretary, posited a European Federation and said he was not afraid of Germany as a
leader, but rather of a Germany that refused to lead.³ But how can it lead when it approaches Europe like a hot potato that it would rather let cool in its skin? Wanting to lead means thinking ahead. But that means breaking down the boundaries that are still used to define Europe. Wanting to lead means thinking about Europe in terms of its opportunities and tasks as well as its global possibilities. But who still does that outside the habituated, well-established discourses in our country? Three arbitrarily chosen examples give us little reason to hope that a European or even cosmopolitan Germany is emerging:

First, German President Joachim Gauck, at the start of the Munich Security Conference in 2014, announced that they would be taking more global responsibility. But when asked about the use of European battle groups, the response from the operational policy side was an immediate no. Sweden’s Foreign Secretary Carl Bildt correctly pointed out that if people did not want these battle groups, which had finally been established in 2007 after years of discussions, they should be suspended.⁴ With great effort, the dissolution of the German-French brigade was finally prevented by sending it on a joint training assignment in Mali. Germany’s “strategic community” is invoked year after year at the same Munich Security Conference, but otherwise it has a low profile – very different from the situation in Paris, London, and increasingly also Brussels.

Second, waves of migrants are putting pressure on Europe’s borders, and most obviously in places where the border is the closest: in the South and the East. For instance, Malta has taken in seven times more refugees than Germany in terms of the overall population. However, since the number is relatively small – 18,356 people landed in Malta between 2004 and 2014 – it only seems large to the 300,000 Maltese citizens. Sharing the burden in solidarity was not part of Germany’s refugee policies in the EU for a long time. In Malta, 4,525 people applied for asylum in 2011 to every million residents; in Germany, it was 255 per million residents. At that point, people were already asking what would happen in Germany if two or three million people in inflatable boats suddenly washed up on the banks of the Rhine. At the time, no one in Germany wanted to hear such questions. European solidarity was only demanded in Germany when nearly a million refugees

literally marched into the country on foot in 2015. Europe has not truly arrived as a place of reciprocal solidarity – not with the oft-criticized Central Europeans, and not in Germany – let alone in Europe’s treatment of Africa.

Third, 2020 will mark the end of the Cotonou Agreement, which defines Europe’s relationships with eighty states in Africa, the Caribbean and the Pacific region. Occasionally, some development or trade expert addresses this issue in Germany. But no one is talking strategically about the future of these relationships with a quarter of all the nations on earth – in the sense that they give the EU an enormous, mature field of potential cooperation partners that could be useful for developing a new multilateralism in the future, or even just for Germany’s lobbying ambitions in the United Nations.

Mediation and intellect will continue to define Germany’s position in Europe, mediating and thinking one step ahead – because acting as a mediator represents intellect. It is difficult to find the appropriate balance, and it often only works to a certain extent. However, in places where this character – of mediation and intellect – can be found in Germans’ lives within Europe and in those of other Europeans within Germany, operational policies can plausibly answer this question in both directions. At those points, the Germans cannot do without the European Union, nor the European Union without the Germans.

2.

One of the noteworthy changes in definition that took place in the course of the euro rescue policies was the redefinition of the term “political union.”

When the term was introduced into euro-speak with the Maastricht Treaty (in effect since November 1, 1993), it referred to the decision-making body of the EU institutions in contrast to the simultaneously approved concept of the economic and monetary union. It involved majority decisions that were intended to give the European Parliament a role equal to that of the European Council, and to create a common foreign and security policy for the EU. Today when reference is made to a “political union,” it often means what the EU actors call a “genuine economic and monetary union.”

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6 When looking at opinion leaders in publishing, one might at times gain the impression that the euro is beyond remedy and the EU itself is about to collapse. Here it is worth mentioning three especially prominent French, British and German voices: François Heisbourg, La fin du rêve européen, Paris: Edition Stock, 2013; David Marsh, Beim Geld hört der Spaß auf. Warum die Eurokrise nicht lösbar ist,
This may be because the term is an empty catchphrase that any interested party can fill with convenient content. The matter itself disappears in this conceptual fog. At the same time, the EU has transformed itself as a result of the previous euro rescue policy. Without changing the European Treaties, it established new objectives in the eurozone, to some extent based on new opportunities from the Treaty of Lisbon but also, in addition to the treaty, taking the traditional path of international law – in other words an intergovernmental approach. The breadth of these objectives ranges from gentle “coordination” all the way to stronger forms of “control.” In order to realize them, new instruments had to be invented, from non-binding “recommendations” and stricter “sanctions” to nebulous “measure recommendations to be followed.” All of this organically generated new forms of the EU’s self-concept. Now more than ever, this concept is influenced by the executive dominance of the activities of the European Council and the European Central Bank. This executive-dominated further development of the eurozone into a “political union,” however, brings up the question of democratic legitimacy and the location of power in the EU. First of all, though, it is probably necessary to regain some clarity about the terms and their political content – a clarity that is currently threatening to be obscured by all the technical “euro-speak.”

During the first phase of the euro rescue policy, which extended from 2009 to 2011, there was great confusion in the EU over the basic question of whether a European economic government needed to be or should be established. In the midst of the mutual accusations of having caused the “euro crisis” (which was actually never a crisis of the euro itself), even the inclusion of Estonia on January 1, 2011, ended up in the cross-fire of criticism. At the time, some said the expansion was too early because all of the existing euro states needed to meet their self-established stability criteria first. As a result of marathon crisis meetings between the state and government leaders, the European Council, led by Belgian Council President Herman Van Rompuy, became the most important coordinating body for the crisis policy. Soon the European Council itself appeared to be the embodiment of the European economic government. At the same time, the European Central Bank – despite all the public objections to bailout practices that were allegedly in violation of EU treaties – began buying up loans starting in May 2010, under the leadership of its President Jean-Claude Trichet. The European Central Bank became an increasingly strong political actor,
and it played a key role in calming the markets, but it was also criticized by economists in particular.

The political aspect of the debate remained relatively bland. In the midst of various relief measures for Greece and political disputes over the proper balance between consolidating the budget and returning to a path of growth, the language of political elites shifted. Throughout the European Union, the technical language of the financial markets largely replaced the political language of regulatory policies. At the same time, there was a gradual transfer of sovereignty, also shaped by the executives, when it came to budget-law issues. The central elements of this “key right” of the parliaments were transferred from the euro states to the level of the European Union. The European Council’s resolutions on the “European semester” (an early, fixed-sequence review of national draft budgets by the EU Commission before they are approved by each national parliament; in effect since January 2011), on the even less specific-sounding “Six-Pack” (six EU legal acts to promote the reduction of public deficits and greater budget discipline in all of the eurozone countries; in effect since December 13, 2011), and on the bafflingly named “Two-Pack” (even more intense controls of all national draft budgets by the EU Commission; in effect since May 30, 2013) were all used to adapt the 1997 stability and growth package that continued to apply as EU law. De jure, these technical-sounding resolutions contain stricter review and sanction mechanisms in order to prevent violations of the stability and growth package in the future. De facto, these linguistically vague measures aim to regulate national budget policies more strongly than ever before. Meanwhile, it is probably appropriate to speak of a divided budget sovereignty between the EU Commission and the parliaments and/or governments of the member states.7 National politicians do not like to hear this – the myth of national budget autonomy persists, even in Germany.

During the second phase of the euro rescue policy in 2012 and 2013, the focus was no longer on the basic question of whether establishing a European economic government was appropriate or not. Now the only question was how such a European economic government – which the EU state and government leaders implicitly supported – was to be realized. The European Stability Mechanism (ESM, signed on February 2, 2012, by the countries in

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the eurozone, and in effect since September 17, 2012, as a public agency headquartered in Luxembourg), a permanent crisis mechanism, is complemented by the establishing of stricter euro rules, including national debt limits, by way of the treaty on stability, coordination and controls in the economic and monetary union (in euro-speech: the Fiscal Pact, signed on March 2, 2012, by 25 EU member states, in effect as of January 1, 2013, after its ratification in 23 EU member states).

If it had been approved by all of the EU member states, a simplified form of the Fiscal Pact would have become part of the EU treaty system. However, Great Britain rejected the simplified treaty reform, and the government in Prague subsequently rejected the contents of the intergovernmental agreement under international law, which includes sanctions against countries that break the stricter budget rules in the future.

It was the dispute with Great Britain (and to some extent with the Czech Republic), not the often-cited fiscal and economic differences between North and South in the eurozone, that revealed the true fault line in Europe’s institutional structure. Given the lack of consensus among all the EU member states, intergovernmental emergency measures had to be taken in the face of the crisis that weakened the EU’s community system. The goal was to integrate the ESM and the Fiscal Pact into the EU Treaty by 2018. In 2017, the EU was still wary of amending the treaty in a way that euro-skeptical populists could immediately use to reinforce their polemics.

The European Council of June 28/29, 2012, did manage to create a consensus among all of the participating actors in the EU that the causes of the sovereign debt crisis were systemic – they are based on an imbalance between the communitized monetary policy and the economic and fiscal policy, which had not previously been communitized. In June 2012, in response to this unevenness, Council President Van Rompuy presented an initial draft of building blocks for a “genuine economic and monetary union.” This was followed by a report that Van Rompuy, Commission President Barroso, EZB President Draghi and eurozone head Juncker presented to the European Council in October of 2012. Incidentally, this was the 22nd “summit meeting” that had focused on Greece since the crisis broke out in 2009. Step by step, the European Council moved into terrain that lent substance to its self-concept as a European economic government, seconded by the group of eurozone finance ministers.

The ECB was further reinforced during this time. Under the Securities Market Program, a bond buyout plan introduced by then-ECB President Jean-Claude Trichet, his successor Mario Draghi announced further buyout programs for government bonds (Outright Monetary Transactions, OMT)
on August 2, 2012, in order to safeguard the euro under any circumstances. Draghi’s announcement alone calmed the markets, although the debate over whether the measures were treaty-compliant continued among economists and legal experts. Political, economic and legal logic will probably continue to clash in the future as well.

The third phase, whose implementation lasted beyond the European elections in May of 2014, mainly focused and still focuses on the last unresolved questions about what euro-speak calls the “Banking Union.” After all, the first pillar of the Banking Union was established on September 12, 2013, when the European Parliament approved the uniform European banking oversight negotiated between the Parliament and the European Council. It was the first important step toward re-regulating the banking sector – starting in September 2014, around 130 of the largest European banks in the eurozone were placed under the oversight of the EU. However, battles continued to be waged between the eurozone states and the Parliament over the design of the second and third pillars of the Banking Union. Above all, this involved the process for liquidating insolvent banks and designing the guarantee for bank deposits.

The Parliament was incensed because the eurozone governments wanted to block the involvement of European Parliament members through intergovernmental regulation of the processing mechanism (the “single-resolution mechanism”). However, since there is essentially no discontinuity principle in the European Parliament – unlike the German Bundestag – the matter could also have been further negotiated after the new European Parliament elections. In the worst case, it could even have called on the European Court of Justice to make a decision. After a negotiating tour de force, a compromise was reached on March 20, 2014, between the European Parliament and the Council of Ministers.

On this issue, too, the structural opposition between the German government and the European Parliament was apparent. As with the subsidy lawsuit over renewable energy and the issue of data retention, the most powerful opposition to the strong Berlin coalition of Merkel/Gabriel is clearly located in Brussels (European Commission, European Parliament) and/or Luxembourg (European Court of Justice) at the moment.

Many politicians seem to be satisfied with the fact that a so-called banking union accomplishes the essential regulatory work and prevents a return to the crises surrounding national debt, competitive weaknesses and liability issues. Still, the process is by no means complete, and has not even been tested yet. Nonetheless, various parties are already debating which further
integration step will be next, should be next, or is to be prevented. People are already talking about budget unions and social unions without a clear understanding of what exactly that means.

For this reason, too, the political debate surrounding the design of the European Union must find its way back to political forms and a political language as soon as possible – but in a manner that accounts for the institutional balance between the EU bodies, including the council of governments of the EU member states. The largely executive-level EU crisis management seen in past years led to a stealthy, but quite substantial (and fundamentally correct) strengthening of integration. These proto-constitutional developments – taking place in multiple phases and often accompanied by great public lament over the crisis – almost unintentionally made important contributions to establishing a genuine European domestic policy. At the same time, however, their technocratic executive-heavy focus obscured questions about European power and drained the policies of their actual content.

What was still a philosophical discussion when the Maastricht Treaty was developed in 1990/1991 has long since become a political reality: the question of power and politics in the European Union. The path toward European integration is more advanced than many want to acknowledge – and at the same time it has become more urgent than ever to clarify the location of European politics and how power is organized in European domestic politics. Only cooperative collaboration between the European bodies can create and preserve legitimacy.

It was this excessive “flexibility” in dealing with mutually agreed rules that led to the economic crisis of the past few years. The crisis cannot be overcome with renewed flexibility. The executive method that some governments currently prefer in the European Council ultimately creates more opacity and deparliamentarization. The solution lies in the only appropriate method: a balance between the member states and all of the EU bodies, without tricky measures to blockade the European Parliament and without a constant disregard for European law. Such an institutional balance is the true method for a union.

The now 19 governments in the eurozone include 48 political parties. The 2014 European Parliament elections did not make it any easier to gain an overview of members’ political preferences. The overall structure of the EU only works as a supersized coalition – both with regard to political preferences and in light of countries’ general interests. Striking this balance is thus more than just an election promise. It would be logical if crisis management in the coming years fed into the constitutional act of establishing
a genuine economic and monetary union, through a democratically legiti-
mized and transparent process, as an element of a political union. Thus this
is the goal of the current European Commission. In the end, however, it
would require the Treaty of Lisbon – the current legal basis for the EU – to
be carefully explored and further developed by a European Convention. The
prospect of a European constitution would once again be imminent.

A balance can only be created between those who want either “more” or
“less” Europe if a pragmatic sense of what will create a “better” Europe can
prevail. Some of the things that will need to be renegotiated in the EU in
the coming years are already apparent. For one thing, this will involve re-
viewing European competences (and, even more urgently, their national im-
plementation!) in a whole range of fields relating to internal market regula-
tion components where bureaucracy runs wild. However, it would also be
desirable to concentrate the EU’s tasks and instruments in areas that have
previously been weakly defined: EU tax jurisdiction, uniform (and not just
shared) EU foreign and security policy, and a more efficient institutional
structure with a shared Commission and Council President as well as mov-
ing the Parliament headquarters to Brussels. In these areas, “more” Europe
would be “better.”

In the meantime, the entwining of the national and European level to cre-
ate a European domestic policy structure continues, both de facto and prac-
tically.8 This creates resistance that, if it were consistent, would necessarily
lead to a return of autonomous national politics. Since this path would be
self-destructive for all of the participants, most of the actors currently prefer
tiny, technical-seeming steps and deceptive, thin-lipped metaphors about
the virtual transfer of power at the EU level. In times of extreme pragma-
tism, with the vanishing of substantive political debates and the associated
camouflaging of power relationships, clear words and concepts are appar-
tently frowned upon. At the same time, irrationality is becoming all the more
dominant, embodied by euro-skepticism and anti-EU populism of all kinds.
If the approach were rational, it would be fundamentally different: the po-
litical debates in the European Union would need to once again become
appropriate for their content and above all for the circumstances – more
European, more focused on the union. But politics have rarely been rational.

8 More on this: Ludger Kühnhardt, European Union – The Second Founding. The
Changing Rationale of European Integration, Baden-Baden: Nomos, 2010 (second
revised and expanded edition).
After 1945, the European movement – which must be understood to include very disparate schools of political thought and groups – celebrated some major successes. The unified German state is now restored, and it remains integrated (perhaps even more than integrated) at the European and Atlantic levels. And today, in a shift that goes beyond Germany, the Rhenish federalists’ post-1945 goal still applies: a federation is the best organizational form to account for Europe’s diversity. It is worth citing a 1966 idea from Bonn historian Hans-Peter Schwarz in its entirety:

“To the ideologues of Rhenish federalism, autonomism and the principle of subsidiarity were unquestionably identical. They believed it gave them ‘a social perspective [that was] all of a piece’ (Albert Lotz, 1946) in which the entirety of social life, from family to the world of states, could find a fixed place. In a social cosmos whose basic unit is the person and whose uppermost unit is the world of states, nations had relatively low significance. From this perspective, the international community, especially the European family of nations, represented a reference unit that was at least as significant as Germany. Early on, this group also showed a tendency to equate the new federal order in Germany with that in Europe.”

According to Schwarz, Konstantin Frantz, acting as a “key witness,” argued “für die These, dass die allgemeine Föderation als Endziel europäischer Politik anerkannt werden müsste.”

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10 ibid.
the general federation must be acknowledged as the ultimate goal of European politics.”

History since 1945 made federalism a European success, since federal, subsidiary ideas never applied in just one direction. They were never simply a shield for the individual, for the small unit, for the small, dispersed German tribes. Subsidiary, federal ideas also always provided an organizational frame for large liberal structures. Federalism is nothing more than the territorial version of pluralism. In this sense, today’s European Union is a specific form of federal structural order. What in the past was called alignment with the West is now known as pan-European integration. The national and European elements are becoming more and more interrelated in the EU, creating a Europeanized domestic policy. The discussion and decision-making processes are often intertwined, and sometimes also Byzantine and unsatisfactory. But the structure and process must be distinguished from one another. What the Rhenish federalists hoped for in Germany after 1945 is now the realized in the structure of the European Union, between its member states and the bodies of the EU: a federation constantly seeking to balance out interests in its tension-filled processes.

In the battle to re-establish a liberal federal German state and bring about the corresponding European unification, federalists after 1945 drew on tried and true ideas from conceptual history and political philosophy: Catholic natural law, personalism, the principles of subsidiarity and solidarity, but also society and community, human dignity and pluralism. In today’s European Union, it is difficult to discover even trace elements of such depth of thought in the current political debates. However, this does not change the fact that the structure around today’s superficial political activities is fundamentally federalist. Above all, it requires others to think in terms of the European Union, of a connected Europe, even in places where this is met with skepticism. The new euro-skepticism, currently so virulent, is not the same skepticism that comes from the ancient tradition, where it was lived out in more depth than is seen among the fashionable euro-skeptics of our own day. What is new about the current euro-skepticism is that the real existing European Union has become a reference point for a way of thinking, as was formerly the case for the national state.

11 ibid.
Rhenish federalists were accused of particularism, but this accusation overlooked the fact that the true core of the idea was not the Rhenish angle, but the concept of a federal integration. Rhenish federalism was West German and West European, while today’s EU federalism is pan-German and pan-European. In this regard, it has in fact expanded its Rhenish beginnings to a European level, even if it does not fully execute them and sublates them in a Hegelian sense. The battle over the structure of the EU has been decided. The sophistic debate surrounding the terms confederation, association of states, and federal state is academic in the negative sense of the word. The quarrels over the many-layered processes of government and regulation in the federal European Union will and must continue. For nothing is as incomplete as a rightly understood federation that sees freedom, even the freedom to object, as its essence.

The European Union, this constantly changing but genuine European federation, is indispensable for Germany, in particular because of its location and economic power, its population structure, its culture and its history, and for the sake of its future. Germany is just as indispensable for the European federation, with all its diversity and contradictions. The old theoretical scholarly debates still survive in this perspective – it is not about an antithesis, to paraphrase Alan Milward, about rescuing either the national state or Europe. Rather, as we can see at every fork in the road and in every crisis, only strong states can constitute a strong Europe – and conversely, a strong Europe needs strong states.


II. Law of the European Union: Institutions and Procedures

*By Henri de Waele*

1. Introduction

The law of the EU is not only shaped by the Member States in their capacity as ‘*Herren der Verträge*’, but in practice also by the various institutions that they have set up to establish, expand and enforce common rules and policies. While these institutions deserve to be thoroughly examined from up close, still today, some political scientists and public administration scholars display a tendency to overlook or underappreciate the impact of the European Court of Justice (hereinafter: the ECJ). The current contribution deliberately zooms in on this institutional actor, so as to provide the reader with a well-rounded picture of the dynamics underlying and driving the supranational integration process. It should also help to place analyses of the other (legislative and decision-making) processes in proper perspective. Some thirty years ago, the ECJ was first accused of being an excessively

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activist judiciary.\textsuperscript{2} Several new rounds of debate on the issue have followed.\textsuperscript{3} The current contribution attempts to present a snapshot of the Court’s practice, discussing whether the ECJ can indeed be said to have overstepped the line or not – thus seeking to either substantiate or disprove the claim that it has ever genuinely exceeded the limits of its judicial function.\textsuperscript{4} Earlier attempts at providing a rock-solid critical assessment of the ECJ’s demeanour have themselves been the subject of hefty criticism.\textsuperscript{5} Thus, the debate could be considered to have been satisfactorily concluded already, culminating, at the turn of the last century, in a victory for the apologists of the Court. As will be argued below however, many of the contra-arguments invoked to justify the ECJ’s performance may well be dismantled in turn.


\textsuperscript{4} The role and performance of the Court of First Instance will not be addressed, as it remains a relatively young creature which has, for the longest time, only had limited competences, and is at present still subservient to the ECJ in many respects. \textit{Mutatis mutandis}, the same holds true for the newly created Civil Service Tribunal.

\textsuperscript{5} See the publications referred to \textit{supra}, fn. 1 and 2.
In what follows, we will first take stock of the available evidence and go through relevant case-law samples of ECJ activism, selected from the past decades, and distributed evenly across the various sub-domains of EU law (paragraph 2). Intentionally, a broad brush-approach will be employed, as readers might already be familiar with (the upshot of) these judgments. Next, we shall look at earlier critiques and defences, and subject the available arguments pro and contra the Court’s *modus operandi* to close scrutiny (paragraph 3). Where the results of previous polemics are found wanting, rejoinder arguments are provided, seeking to settle the score and establish which of the opposing sides can lay the strongest claim to truthfulness. Hereafter, we will highlight the most problematic aspects of the ECJ’s role and practise one more time, and go through the main objections lodged against its past performance (paragraph 4). The final part draws the preceding line together and reflects on the importance of a consistent, authoritative jurisprudence, while pointing to the hopeful signs that may be read into a series of more recent rulings (paragraph 5). As a veritable ‘learning institution’, the Court may thus be nicely on track to redeem itself from unwarranted scepticism, and vindicate its past achievements.

2. Placing the Cards on the Table: A Sample of Rulings from Previous Decades

2.1 The Twin Milestones

However trite and predictable it may have become, fifty years *ex post facto*, any account of the more audacious jurisprudence of the ECJ still ought to set off in the early 1960s. After all, the judgments in *Van Gend & Loos* (1963) and *Costa/ENEL* (1964) are universally thought to be the twin pristine heralds of a court treading higher ground, leaving behind traditional conceptions of what international judges do and are capable of. Although

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6 Demonstrating the complete one-hundred-percent veracity of these arguments is, *ratio disciplinis*, as impossible here as it is in all legal scholarly writing. After all, academic discourse and research in the field of law is wholly distinct from that in the ‘real’ sciences, where claims to truthfulness can be empirically tested.

7 Case 26/62, NV Algemene Transport en Expeditie Onderneming Van Gend & Loos v Nederlandse Administratie der Belastingen; Case 6/64, Flaminio Costa v ENEL.
both judgments play a vital proof-furnishing role for complainants of an ECJ running wild, it may nonetheless be questioned whether these judgments truly deserve the revolutionary epithet that has so often been ascribed to them. After all, in Van Gend & Loos, the Court did not launch an entirely new doctrine, as in truth, direct effect is not a phenomenon exclusive to EC law. Under different guises, and especially manifest in the form of ‘self-executing provisions’, it is also well-known in international law.\(^8\) At the same time, the move of the Court does retain a bold flavour, since by creating the possibility to invoke rules of a supranational origin before the national courts in all of the EC Member States, it coolly pierced through the vested monism/dualism dichotomy, and decommissioned the relevant applicable rules in the various constitutions. Likewise, Costa/ENEL initially does not seem to provide for that great a novelty: after all, a cardinal principle of international law is its supremacy over national law.\(^9\) A sharp divide remains nonetheless between the international and the national plane: although the former assumes itself hierarchically superior, most states in their national legal systems do not actually accord supremacy to international rules of law.\(^10\) Since 1964, owing to Costa/ENEL, European law is markedly different, in that national legal systems in case of conflict are obliged to always award absolute priority to the applicable supranational rules. As

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\(^9\) See e.g. the Advisory Opinion of the Permanent Court of International Justice in the case of the Greco-Bulgarian Communities, Publications of the PCIJ 1930, Series B, no. 17, p. 32: “[I]t is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty”, as well as the Advisory Opinion of the International Court of Justice with regard to the Applicability of the obligation to arbitrate under section 21 of the United Nations Headquarters Agreement of 26 June 1947, ICJ Reports 1988, p. 34, par. 57: “It [is] sufficient to recall the fundamental principle of international law that international law prevails over domestic law.” Implicitly, it also flows from article 27 of the 1969 Vienna Convention on the Law of Treaties.

such then, the judgments on supremacy and direct effect carry an indelibly activist mark, as the doctrines launched, not enshrined in the Treaties themselves, are products of judge-made law, created purely for the benefit of the *effet utile* of EU law. Thence, the subsequent case-law, expanding the scope and gist of these notions further, carries an activist stamp as well.\textsuperscript{11}

2.2 Strengthening the Constitutional Edifice

With the passing of time, the ECJ has become the architect of ever more numerous institutional innovations, transforming and constitutionalising the Treaty architecture, and amending both the horizontal (inter-institutional) and the vertical (EC – Member States) division of powers in equal measure. *Les Verts* (1986), *Chernobyl* (1990) and *Francovich* (1991) represent some of the well-known, more modern paradigm cases.\textsuperscript{12} Again, little or no foothold was to be found in the Treaties for any of the decisions reached. In *Les Verts* and *Chernobyl*, Article 173 (now 230) EC contained an exhaustive list of ‘active’ and ‘passive’ litigants, yet the Court single-handedly decided to pry open this provision and broaden the catalogue, under the cloak of preserving the rule of law in the erstwhile Community, respectively, owning up to the supposed overriding requirements of the principle of institutional balance. *Francovich* then delivered the famous sermon from mount Kirchberg regarding the liability of Member States for violations of EC law. All previous attempts at codifying such a rule having failed,\textsuperscript{13} the ECJ was happy to proclaim it a principle actually already ‘inherent’ in the Community legal order, reining in the various particular (and often divergent) national rules that regulated the matter up until then.

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Court’s fundamental rights jurisprudence forms another renowned contribution to the constitutionalisation process. Again, even though the Treaties originally contained not a single line on the subject, the ECJ progressively fleshed out a ‘bill of rights’ in cases such as Stauder (1969), Hauer (1979) and Omega (2004), which is still waiting to be incorporated in binding rules of law at the present day and time. In 2007, in Segi and Advocaten voor de Wereld, the ECJ effortlessly extended its preliminary reference competence in the ‘Third Pillar’ (Title VI of the EU Treaty). Two years before, in Pupino, by exporting the doctrine of indirect effect from the First Pillar to the Third, it had already brought a strong supranational flavour to this predominantly intergovernmental domain. In the ECOWAS-case, the ECJ broke yet newer ground and extended its jurisdiction into the ‘Second Pillar’: it boldly declared itself competent to review the legality of instruments adopted within the scope of the Common Foreign and Security Policy, despite its formal exclusion from that domain ex Article 46 EU. True, it may

14 Case 26/69, Stauder v Ulm; Case 44/79, Hauer v Land Rheinland-Pfalz; Case C-36/02, Omega Spielhallen und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn.


17 Case C-91/05, Commission v. Council (ECOWAS). The implications of this judgment may be spectacularly wide indeed: according to Hillion and Wessel, “the Court is confirming that its jurisdiction in the context of the operation of Article 47 EU is not limited to actions based on Article 230 EC, and thus restricted to the two months time limit. On the contrary, it is as wide as that envisaged by, and exercised in the context of the EC Treaty. In other words, the complete system of judicial remedies which the Court forcefully put forward in its Kadi judgment is as complete in the context of Article 47 EU.” (Christophe Hillion and Ramses A. Wessel, ‘Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness?’, (2009) 46 C.M.L.Rev., pp. 551-586, at 571.)
not be that easy to question the legitimacy of this case-law, at least when keeping in mind the leitmotiv of recognising inalienable rights of individuals, and of ameliorating their legal position when faced with governmental acts that would otherwise remain non-reviewable. Nonetheless, all these judgments do neatly fit an activist bill – after all, the ECJ proprio motu laid down new legal rules and principles, largely of its own devising. It thus bears the sole responsibility for the changes to the European edifice, constitutionalising and supranationalising its architecture ever more gradually, even when some of these decisions were codified in rules of primary and secondary law afterwards.18

2.3 Entrenching the Internal Market

The internal market would definitely never have been what it is right now without the relevant case-law from Luxembourg, irrespective of whether one looks at free movement or competition law. Now surely, key provisions like Article 28, 39, 49 and 81 EC should not have remained a dead letter, but at the same time, they might as well have been interpreted in slightly more limited fashion. In the free movement of goods for example, the prohibition on quantitative restrictions and measures having an equivalent effect did not need to receive the spectacularly broad reading given in Dassonville (1974) and Cassis de Dijon (1976).19 The same goes for Article 49 EC and the Court’s stern construction thereof in Säger (1990).20 Similarly, those seeking to avail themselves of the Treaty rules on free establishment

18 The Court’s judicial amendment of Article 230 EC (ex Article 173) in Les Verts and Chernobyl was finally endorsed by the Member States at the Maastricht IGC. Also, they have progressively given their blessing to the Court’s fundamental rights jurisprudence, e.g. by the insertion of what is currently Article 6 EU, and by the adoption of the Union’s Charter of Fundamental Rights. The Francovich principle has, however, not (yet) been taken up in the same way and/or copied into primary law (cf. supra, fn. 12).
19 Case 8/74, Procureur du Roi v Dassonville; Case 120/78, Rewe-Zentral AG v Bundesmonopolver-waltung für Branntwein.
20 Case C-76/90, M. Säger v Dennemayer & Co. Ltd.. One may here also point to the groundbreaking case-law on patient mobility, sparked by the Court’s grand conception of what constitutes a service; see inter alia Case C-120/95, Nicolas Decker v Caisse de maladie des employés privés; Case C-158/96, Raymond Kohll v Union des caisses de maladie; Case C-372/04, Yvonne Watts v. Bedford Primary Care Trust.
were aided quite generously by landmark rulings such as *Reyners* (1974), *Gebhard* (1994) and *Centros* (1999). The liberal approach to the concept of ‘worker’ also continues to be striking, evident from cases such as *Levin* (1982), *Kempf* (1986), *Steymann* (1988) and *Trojani* (2004), encompassing situations in which one might seriously question the genuine and effective character of the employment activity pursued. For the relatively new rules on EU citizenship, the Court has been willing to blaze a trail with most remarkable fury, creating residence rights as well as entitlements to social welfare on startlingly feeble grounds, *e.g.* in *Martínez Sala* (1998), *Grzelczyk* (2001) and *Baumbast* (2002). Almost undreamt of was the brazen rhetoric with which the ECJ, in these and other cases, declared Union citizenship “destined to be the fundamental status of nationals of the Member States” – stilted words, undoubtedly fit for use in visionary speeches of politicians, but possibly somewhat out of place when employed amidst legal vernacular. Finally then, in EC competition law, the Court did not shun an activist stance either, though the exact dosage has varied through the years. Yet, the judgment in *Continental Can* (1975), though decidedly dated nowadays, provides singularly important evidence of judges that do not necessarily feel constrained by a lack of black-letter law when it comes to furthering “une certain idée de l’Europe”. In the case in point, the absence

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21 Case 2/74, *Reyners v Belgium*; Case C-55/94, *Gebhard v Consiglio dell’Ordine degli Avvocati e Procuratori di Milano*; Case C-212/97, *Centros Ltd v Erhvervs-og Selskabsstyrelsen*.  
24 The phrase has nonetheless been repeated in a plethora of subsequent cases: Case C-224/98, *d’Hoop v Office National de l’Emploi*, para. 28; Case C-413/99, *v Secretary of State for the Home Department*, para. 82; Case C-148/02, *Avello v Belgium*, para. 22; Case C-138/02, *Collins v Secretary of State for Work and Pensions*, para. 65; Case C-200/02, *Zhu and Chen v Secretary of State for the Home Department*, para. 25; Case C-209/03, *R v London Borough of Ealing & Secretary of State for Education ex parte Bidar*, para. 31; Case C-76/05, *Schwarz and Schwarz-Gootjes v Finanzamt Bergisch Gladbach*, para. 86; Case C-50/06, *Commission v Netherlands*, para. 32.  
of any specific rules regarding merger control in the Treaty or anywhere else, presented no bar to the creation of adventurous judge-made law on the subject.

2.4 Declaring Full-Scale Independence, Or: Autonomy Mk. II

*Van Gend & Loos* has already been touched upon, yet, apart from the introduction of direct effect, it is of course also legendary for proclaiming the existence of a ‘new legal order of international law’. One year later, in *Costa/ENEL*, the Community was even pronounced to be a new legal order – period, and the law stemming from Treaty (“an independent source of law”) as being of a “special and original nature”. For a long time, speculation has been rife on the exact meaning of these phrases. Various authors have questioned the EC’s specificity and its alleged uniqueness. A number of them negated the possibility of a truly autonomous system, immune to the general rules and distinct from its siblings in international law. See e.g. Derrick Wyatt, ‘New Legal Order, or Old?’, *E.L.Rev.* 1982, pp. 147-166; Theodor Schilling, ‘The Autonomy of the Community Legal Order – An Analysis of Possible Foundations’, (1996) 37 *Harvard International Law Journal*, pp. 389-409; Trevor C. Hartley, ‘International Law and the Law of the European Union – A Reassessment’, *B.Y.I.L.* 2001, pp. 1-35.

Scholars have pointed to the fact that the international legal order is actually host to many sub-systems, and that there is nothing revolutionary in creating an organisation for unlimited duration, with its own institutions, competences and legal personality. In similar vein Bruno de Witte, ‘Retour à Costa. La primauté du droit communautaire à la lumière du droit international’, *R.T.D.E.* 1984, pp. 425-454, at 446.

The Court has nonetheless repeatedly stressed the supposed autonomy of the legal order, and denounced multiple rules and conventions that threatened to clash with, cloud or pollute the Union’s *sui generis* system. Still, as long as the basis of the EU structure continues to

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28 E.g. Opinion 1/76, *Draft Agreement establishing a European laying-up fund for inland waterway vessels*.; Opinion 1/91, *Draft agreement relating to the creation of the European Economic Area*; Opinion 1/00, *Proposed agreement on the establishment of a European Common Aviation Area*. 

https://doi.org/10.5771/9783845286723

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be located in a traditional treaty arrangement, both entities remain firmly rooted in international law, and seem unable ever to break free and live the dream of a self-contained, uniquely autonomous legal order.

As theoretically sound as the latter considerations may have been, they discounted or underestimated the willingness of the Court to explode the linkages with international law at long last. In the *Kadi* judgment, the true ambit of the pronouncements in *Van Gend & Loos* and *Costa* has been clarified.\(^29\) In its ruling (on appeal from a CFI ruling), the Court dealt the final blow to the idea of an only *quasi-*separate, limited, unoriginal ‘new legal order’. In effect, it considered the general principles of EU law hierarchically superior to international legal rules, denounced the unquestionable overriding authority of the UN Charter and UN Security Council Resolutions, and discarded the convoluted and double-hearted approach the CFI had earlier adhered to.\(^30\) In so doing, the ECJ daringly went where no national or international court has gone before, put the independent character of the Union legal system beyond doubt, and underscored the unprecedented nature of European law once and for all. For sure, it had been a rather long time in waiting – but perhaps all preceding cases served as some mystical form of preparation, to amass the courage to deliver this landmark ruling.

### 3. Earlier Justifications

The Court has on multiple occasions been attacked for its activism (commonly taken to mean: its zealously pro-integrationist stance), and for its many rulings that go beyond the wording, the scope and underlying intentions of the relevant provisions. The general tenor of the criticism is that it has often redrawn the rules in the name of interpreting them, and has attached a disproportionate amount of importance to their necessary effectiveness, to the detriment of all other interests. In the past, four main arguments have been advanced to justify the performance of the ECJ. These will

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\(^29\) Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi* and *Al Barakaat International Foundation v Council and Commission.*

be analysed in turn below. As will be demonstrated, although most of these justifications can lay claim to a certain degree of accuracy, none of them succeed entirely in vindicating the Court’s past conduct.

3.1 The Set-Up of the Treaties Makes Activism Unavoidable

In defence of the Court, a commonplace and often-repeated argument is that the set-up of the Treaties makes judicial activism unavoidable: after all, the EC Treaty is a ‘traité-cadre’ or framework treaty, which regulates few topics in exhaustive detail.31 In addition, treaties as such are said to be a most particular genre, products of protracted and laborious negotiations. The end-result of such negotiations is usually a vague and open-ended patchwork, replete with delphic formulas that reflect hard-wrought compromises.32 In conjunction, some authors point to Article 19 TEU (formerly Article 220 TEC), which is believed to contain an exceptionally broad mandate for the Court to lay down rules of law in accordance with its own preferences: the Court was actually expected to come up with solutions to legal controversies that the negotiating parties had failed to address. Thus, the fact that something is not mentioned, or not fully covered by treaty provisions, should in itself never be considered decisive: this is meant to leave room for detailed new rules that the ECJ may rightfully bring into being.33 On top of


32 Philip Allott has even gone so far as to describe treaties as ‘disagreement reduced to writing’ (‘The Concept of International Law’, (1999) 10 E.J.I.L., pp. 31-50, at 43).

33 Or in the words of Pescatore, cited approvingly in Arnull, The European Union and its Court of Justice, Oxford: OUP 1999, p. 77: “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 concerned should be left outside the Treaty’s ambit, but simply a lack of consensus among the Member States at the time the Treaty was drafted on whether, and if so how, that matters should be dealt with. (…) A contrario reasoning (…) should thus be used with extreme caution in interpreting the Treaty.”
all this comes the aspect of multilingualism: the Treaties, as well as many of the instruments of secondary law, are available in a plethora of languages, which are all considered equally authentic. When provisions are not phrased in identical or even similar wording, the Court employs a number of techniques to try to seek out the framers’ common intention, but is often left no other choice than to craft a solution of its own. Keeping all this in mind, the Court’s activism is thought to become wholly understandable, quia inevitable.

In essence, there is much truth to these arguments. First, the wording of many provisions is indeed terse and laconic, and this naturally allows for an interpretation that judges consider best, trying to find the ‘best fit’ in light of the existing rules and the legal system as a whole. This means that, in cases such as Dassonville and Säger for example, where the Court was approached to speak out on the reach of the free movement provisions, it was perfectly entitled to decide the way it did. At the same time however, there are several cases in which the provision at stake is clear and unambiguous, and does not support construction in the mode preferred by the Court. Of course, many volumes have been written on the art of interpretation, and there is no general theory readily available that is perfectly suited to the ECJ and the European context. This does however not entail that the Court is permitted to twist or distort the plain meaning of words and phrases (prime specimens of which are e.g. Defrenne, Busseni and Grzelczyk). Indeed,

34 For an extensive discussion of the various theories of interpretation regarding treaties drafted in more than one language and a defense of the ECJ’s approach, see Geert Van Calster, ‘The EU’s Tower of Babel – The Interpretation by the European Court of Justice of Equally Authentic Texts drafted in more than one Official Language’, Y.E.L. 1997, pp. 363-393, and Arnulf, op. cit. (fn. 32), at 522-525.

35 After all, the idea that a literal interpretation of words always provides us with a pure and unequivocal meaning, which judges should adhere to at all times, has been proven to be fallacious long ago. Likewise, the impossibility for legislators to codify the rules, their objectives and scope of application in exhaustive detail is nowadays well beyond dispute.


37 The discussion on the role of the Court cannot be reduced to a simple clash between ‘literalists’, who hold that constitutional documents must be interpreted strictly, and ‘interpretivists’, who hold that such interpretation is evolutionary and can
Article 19(1) TEU does provide for a broad mandate: it instructs the ECJ and the GC to ensure that in the interpretation and application of this Treaty ‘the law’ is observed. Thence, perhaps everything the Court says ought to be accepted as inherently just, and virtually immune to criticism. But, on this view, Article 220 would amount to a ‘blank cheque’-provision. It could, at the same time, very well be seen as a neutral competence clause, confirming the institutional existence of the Court, and attributing it a general, but not unlimited power. Moreover and significantly, Article 19(1) admonishes the ECJ and GC expressis verbis to ensure the observance of the law ‘within their own jurisdiction’. This delineates their task quite neatly, and appears to militate against judgments such as Chernobyl, Segi and ECOWAS, in which the Court wilfully expanded its own competence, so as to hear claims, review acts, and receive preliminary questions outside and beyond the field chalked out by the explicit jurisdiction clauses in the Treaties. This is actually also excruciatingly hard to reconcile with the principle of attributed powers, the cornerstone of all civilised legal communities that base themselves on the rule of law, and which, in the EU, is thought to be firmly entrenched in Article 5 EC. Finally, indeed, the Union’s convoluted language regime may at times bring considerable hardships for judges in search of the proper meaning of a word or phrase. But this may, again, not serve as a ‘blanket excuse’, and will only validate those judgments where interpretation proved difficult due to this particular aspect. None of the rulings discussed above, and arguably, few of the landmark cases overall, fall within this category.

3.2 The Court is Obliged to Promote Further Integration

Naturally, the Court does not operate in a vacuum, and the Treaties do provide numerous clues as to the general direction in which the law should be developed. The judges can draw from the preamble and the first articles of the EC and the EU Treaty, which globally elaborate upon the objectives and change over time (cf. Ian Ward, A Critical Introduction to European Law, Cambridge: CUP 2009, p. 80). One need not be a die-hard literalist to question some of the remarkably creative solutions crafted by the Court. Conversely, a pure ‘interpretivist’ would give the Court carte blanche; there is then no reason why it (or any court for that matter) should ever adhere to the applicable written rules, and the purpose for which they were created; they could then do just as they please and bend rules and phrases in any desired direction, whenever they think it right.
the means to those ends. Moreover, besides Article 19, there is Article 7 TEU, mandating the Court to carry out the tasks entrusted to the EU, proving for some that it has indeed been granted a wide remit to preserve and uphold the rule of law. An evergreen opinion in European legal doctrine takes this position one step further, and contends that the Court is in fact legally obligated to steer a pro-integration course, and required to always deliver judgments that strengthen and expand the Union legal order. The shortcomings of the institutional architecture, where progress is easily stalled if institutions do not follow-up on each others’ actions, as well as the all-too lengthy and cumbersome legislative process, would even demand such a *habitus*: for the process of European integration was meant to continue incessantly, entailing that any inaction from the side of the other actors (Commission, Council, Parliament) compels the Court to interpret rules of primary and secondary law as boldly and as expansively as possible: by and large, it was the “most-favoured one” to do so.

This line of reasoning has through the years been advanced by a plethora of authors. Historically, Robert Lecourt, who was president of the ECJ from 1962 until 1976, appears to have been the first to voice it. It was subsequently adopted by his successor, Hans Kutscher, who was president from

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1976 until 1980. During their times of office, the EC witnessed its most flagrant period of inter-institutional lethargy and stagnation, with the judiciary, in the meanwhile, establishing crucial doctrines in judgments such as *Reyners*, *Continental Can* and *Cassis de Dijon*. The idea of both former presidents was that the Court ought to ‘compensate’ for legislative inertia. The underlying reasoning is nonetheless essentially circular: for, the ECJ must act to counter any (threatening) stagnation, because, if it itself would remain idle, stagnation would follow. Though based on essentially flawed argumentation, the ‘most favoured-rationale’ has become a dogma ever since.

Indeed, the initial Community suffered from a fundamentally defective design: a parliamentary assembly whose members were not democratically elected, lacking legislative competences (or, for that matter, any significant competences) – coupled with a Commission that commanded (not overly impressive) executive powers, whose hands were also rather tied by virtue of the fact that, in most domains, it could only propose and not promulgate legislation itself – coupled with a Council that, as a general rule, could only adopt acts by unanimity. In view of this historical constellation, the spurious reasoning was developed that, when certain rules were needed for the good functioning of the supranational franchise, the Court could deliver, and simultaneously lay claim to just as much legitimacy at that as the other institutions. Yet, with equal force one could posit that the system functioned precisely the way it was designed, and that it should not be considered problematic if there is little regulatory progress in a particular domain: it is natural for many a legislative apparatus to find itself in a muddle of stagnancy once every while. In reality, the claim that the European construct ‘demands’ continuous progress comes down to a political statement, not a legal principle. Moreover, an absence of judicial intervention would not unquestionably have resulted in permanent stagnation. From a democratic perspective, it would anyhow have been sounder if the political institutions had taken the lead in furthering the cause of integration, even if, on occasion, it would have taken them quite some time to get their act together. In fact, it could even be that a more patient and restrained approach of the Court


Henri de Waele

would have given a greater boost to the supranational experiment than its activist stance did: the latter posture might well have imbibed the other institutions with a desire for deliberate stalling.\textsuperscript{42} So what the aforementioned doctrinaire evergreen opinion does is distil a ‘\textit{sollen}’ from a ‘\textit{sein}’, confuse an ‘ought’ with an ‘is’.

Unquestionably, the activist stance of the ECJ has borne great fruit in the past, and much of the success of the EU project can be attributed to it. Nonetheless, the system has witnessed many changes in the past decades, the efficiency has increased, and the other institutions have much improved their democratic record. There is little need anymore for the Court to play the part of the ‘locomotive of European integration’. It is, moreover, the least democratic institution nowadays. Any remaining gridlocks are the result of the system as it is – even if the cards ever lay differently, nowadays, the ECJ need no longer ‘remedy’ or ‘compensate’ for that.\textsuperscript{43}

Of course, the basic argument that we started off with above still stands: the Treaties themselves do appear to point out the direction in which the law should be developed. Obviously, the European construction was not created for nothing, and it was supposed to produce a number of tangible results. So then, the judges of the ECJ can happily take their cue from the preamble and the first articles of the Treaties; and if then they are accused of having a particular agenda of promoting integration, the rebuttal must be that this agenda is actually one that was set by the authors of the Treaties, and which is firmly rooted therein.\textsuperscript{44} Allegedly, a certain judicial ‘pro-inte-

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\item \textsuperscript{42} Thus speculate Mauro Cappelletti & David Golay, ‘The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration’, in: Mauro Cappelletti, Monica Seccombe, J.H.H. Weiler (eds.), \textit{Integration Through Law - Europe and the American Federal Experience} (Volume I, Book 2), Berlin: Walter de Gruyter 1986, p. 348-9: “[I]t seems reasonable to conjecture that the Member States might, for example, have permitted the Council to adopt policy more frequently by majority or qualified majority voting if there had been developed no such sweeping doctrines as those of the direct effect, supremacy and pre-emption of Community law.” This hypothesis has also been given some credit by J.H.H. Weiler, \textit{op. cit.} (fn. 40), at 35-6.
\item \textsuperscript{44} Arnull, ‘The European Court and Judicial Objectivity: A Reply to Professor Hartley’, \textit{L.Q.R.} 1996, pp. 411-423, at 413: “If there is an agenda pursued by the Court,
transformation’ prejudice is thus inherent to the system. Against this, one may argue that, for all the clues in the Treaties, the true objectives of the integration process remain lavishly vague: politicians have already been debating for generations on the exact ‘finalité’, the (federal, non-federal, continuously hybrid?) destination the Union and its Member States are, or should be heading for.\footnote{Moreover, as argued by Giandomenico Majone in his \textit{Dilemmas of European Integration} (Oxford: OUP 2005), the model of a United States of Europe, which the ECJ seems to subscribe to in its leading cases (\textit{e.g.} the citizenship judgments), is as such bound to fail, not just due to lack of popular support, but because it finds itself unable to deliver the public goods which Europeans expect to receive from a fully fledged government. Equally unconvincingly though, Majone contends that the present EU ought to mutate into an atypical, yet effective, confederation, built on the foundation of market integration. For critical analysis, see the review essay by Michael Dougan, ‘And Some Fell on Stony Ground...’, (2006) 31 \textit{E.L.Rev.}, pp. 865-878.} A former judge of the Court has himself admitted that the policies in the Preamble and first few Articles of the Treaties are more notable for their generality than their clarity.\footnote{Claus Gulmann, cited in Stephen Weatherill \& Paul Beaumont, \textit{EU Law}, London: Penguin 1999, p. 191.} Indeed, they are so extremely general in scope and silent on detail that one is hard-pressed to infer concrete solutions to legal problems from them. Even if judges may roughly base a decision strengthening and expanding the European legal order on ‘the system-at-large’, it may be sincerely doubted whether it justifies those judgments in which the ECJ does not take small steps in the general direction, but leaps unexpectedly fast forward: cases like \textit{Defrenne}, \textit{Grzelczyk} and \textit{Pupino} spring to mind here. In all then, perhaps the Court is to a certain extent supposed to act partisan, and rule in favour of the successful development of the supranational plane on most occasions. But again, there is no compelling reason why it should at any time provide for an \textit{extra} impetus that exceeds the ordinary levels of toleration, and knowingly accelerate and intensify the integration process.

3.3 Criticisms Are Selective: Activism Only Occurs in a Minority of Cases

Much of the criticisms against the Court are believed to be unfounded, as they are based on a selective analysis: the critics bring examples of judicial...
Henri de Waele

activism to the fore, but they commonly ignore the many examples of judicial restraint. Moreover, the critics have usually chosen only a small number of decisions from the Court’s vast case-law to substantiate their accusation that it indulges in overly creative jurisprudence. If, however, the entire corpus of decisions would be taken into account, a much more balanced and truly nuanced picture would emerge, as for any case that can be labelled (excessively) activist, there is another one that can be considered its counterpart.47

This might strike the reader as a pithy and, at first sight, convincing justification. Yet, one may draw an analogy with a physician who, in alternation, heals and kills patients: the latter action does not become any more acceptable or soothing because of the former. Judgments in which the ECJ has been excessively activist, in which clear and unequivocal rules are excessively bended or stretched, remain eo ipso reprehensible, even if they would indeed make up only half (or much less) of all decided cases overall. Secondly, if one seriously professes to adhere to a social science-type methodology, one would have to study and classify every single judgment since 1954 in order to prove the hypothesis that statistically, there is nothing wrong with the Court’s conduct, that no inequality exists in its administration of justice, and that the evidences of activism and restraint weigh up against one another. Such an inquiry would be daunting and inconceivably complicated in nature, as the ECJ has rendered several thousands of judgments up to the present day. Nonetheless, in the absence of such scientifically valid, 100% certain research, the studies that claim that there is a counterpart to each and every activist case base themselves just as much on a selective analysis as the critics they aim to rebuff. It is patently true that the Court does not appear to indulge in activism in every single case. Those conversant with the Court’s jurisprudence will nonetheless agree that a global tendency can be discerned, in which in the majority of cases, the decision will be to the detriment of Member States trying to preserve certain of their sovereign rights or interests, to the detriment of the Council putting its foot down in a certain matter and / or attempting to uphold a piece of legislation, or to the detriment of individuals that seek to challenge EC legal

instruments they consider unlawful. In the decisive ‘constitutional’ cases, restraint seems to be the exception rather than the rule. Moreover, even if restraint is displayed, the Court often makes up for this single step backwards by taking two steps forward in a later case. A new doctrine is often introduced gradually, through ‘salami-tactics’ (one slice at a time): in early cases, a doctrine is launched, but it may be not (yet) applied and subjected to various conditions; then, in a later case, it can nonetheless be relied upon as an established precedent, and the earlier qualifications can be diluted or erased. Admittedly, this too is conjecture, and impossible to prove with one-hundred-percent accuracy, but for ECJ-watchers, it will be a recognisable and instinctively true supposition.

For sure, it is definitely not suggested here that the Court never exercises restraint. At the same time however, it can be blatantly inconsistent in the practise thereof. In some cases for instance, it goes through fire and water to guarantee (access to) a judicial remedy and protection of basic rights (e.g. Factortame, Les Verts, Francovich); yet, on other occasions where the same issues were at stake, it has been willing an extreme reluctance without a

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48 Cf. T.C. Hartley, The Foundations of European Community Law, 5th Edition, Oxford: OUP 2003, p. 80: “One of the distinctive characteristics of the European Court is the extent to which its decision-making is based on policy. By policy is meant the values and attitudes of the judges – the objectives they wish to promote. The policies of the European Court are basically the following: 1. strengthening the Community (and especially the federal elements in it); 2. increasing the scope and effectiveness of Community law; 3. enlarging the powers of Community institutions. They may be summed up in one phrase: the promotion of European integration.” Hartley may be slightly overstating the point, but see also H.G. Schermers, ‘The European Court of Justice: Promoter of European Integration’, American Journal of Comparative Law 1974, pp. 444-464.

49 This strategy has been observed and criticised by Weatherill & Beaumont, op. cit. (fn. 45), p. 196, and Hartley, op. cit. (fn. 47), pp. 81-2.

50 It receives further credit through the findings of an author who has researched all the Court’s case-law in the field of EU external relations, and established that the ECJ has so far always rejected direct reliance on norms of an international law origin when invoked so as to set aside or invalidate secondary norms of Community law, but that it has permitted this course of action in every single case before it when this served to set aside conflicting rules of a Member State origin. See Mario Mendez, The Legal Effects of EU Agreements, Oxford: Oxford University Press 2013.
hitch (e.g. UPA, Segi, Spain/Eurojust). The general argument fails anyhow: the Court’s activism cannot be justified by virtue of the fact that there is sufficient evidence of restraint as well.

3.4 Few of the Court’s Rulings Have Ever Been Reversed

A final justification sets off by asking the following question: if the ECJ is truly going too far, why then have so few of the Court’s rulings ever been reversed? If indeed many of its judgments should be considered excessively activist, the Member States are unlikely to have resigned sheepishly; they would surely have corrected any erroneous decisions and curtailed the Court’s powers. Rather, they have only rarely done so, and even extended its competences at several IGCs. This goes to show that there is nothing intrinsically wrong with the past jurisprudence of the ECJ, and that its integrationist zeal is shared and welcomed by the Herren der Verträge, the Member States of the EU themselves.

The great failing of this argument lies in the fact that it takes little account of the complexity of the Treaties’ amendment regime. In accordance with Article 48 EU, the Treaties can only be amended when all Member States agree to this, and any amendments can only take effect when all Member

51 Case C-50/00 P, Union de Pequenos Agricultores v Council (no locus standi in Luxembourg for individuals adversely affected by EC law, thus leaving them without an effective remedy); Case C-355/04 P, Segi and Others v Council (principle of damages liability does not apply where it concerns EU acts); Case C-160/03, Spain v Eurojust (no action for annulment possible against adopted acts of Eurojust, notwithstanding their essentially legal character).

52 The most notable instances of reversal have been the inclusion of the Grogan Protocol at Maastricht, to accommodate the fears of the Irish government following the ECJ’s ruling in Case C-159/90, SPUC v Grogan; the adoption of the Barber Protocol so as to counteract the effects of the Court’s judgment in Case C-262/88, Douglas Harvey Barber v Guardian Royal Exchange Assurance Group. Over time, ECJ judgments have also occasionally been reversed by secondary EC acts, e.g. so as to neuter the effects of the rulings in Case C-450/93, Kalanke v Freie Hansestadt Bremen, and in Case 117/77, Bestuur van het Algemeen Ziekenfonds Drenthe-Platteland v Pierik. Deirdre Curtin read the Treaty on European Union of 1992 as a grand attempt to curtail the powers of the Court, by excluding it from the Second and Third Pillar, in her famous exposé ‘The Constitutional Structure of the Union: a Europe of Bits and Pieces’, (1993) 30 C.M.L.Rev., pp. 17-69. In recent times, the Court’s powers were, on the whole, nonetheless visibly strengthened in the Amsterdam, Nice and Lisbon Treaties.
States have ratified them in accordance with their national constitutional provisions. Thence, if a judgment of the ECJ interprets a rule in any of the Treaties in an awkward or misguided way, unanimity is required among the Member States in order to reverse it: one lone dissenting voice is enough to uphold the unwanted judgment and the eventual undesired consequences thereof. So, ordinarily, unanimity is required to change the Treaties, but if the Court through its verdict *materially* amends them, unanimity is required to reverse this. Moreover, due to the fact that every Member State needs to ratify an amendment reversing a Court judgment successfully, and considering that the EU has been absorbing numerous new members in the past decade (a process likely to continue in the coming years), it appears increasingly unlikely that the Treaties will be amended ever again after the envisaged entry into force of the Lisbon Treaty. Therewith, a poignant lack of checks and balances, essential to the proper functioning of any constitutional system, looms large. Due to the cumbersome nature of the amendment regime, and the great uncertainty regarding the eventual success of this procedure, Member States are ever less likely to set it in motion.

As one scholar has pointed out, there is moreover the political cost / benefit calculation that comes into play here. For, those who have the power to destroy or cripple institutions will ordinarily only do so if the marginal gains exceed the marginal costs of doing so. They will balance the particular costs imposed by the Court on a specific Member State against the potential costs in disturbance to the Union architecture as a whole by moving against the Court. Only then if the Court conducts itself in a way as to suggest that it

53 Secondary law can of course often be adopted by a qualified majority of the Council. Due to the hierarchy of norms, such rules are however of little use when the desire is to counter unwelcome ECJ interpretations of primary law. Moreover, the Commission would have to propose such measures, Parliament would have to approve as well, and the attainment of even a qualified majority can still prove rather difficult. The hardships experienced in the attempted adoption of a new Working Time Directive, necessitated by the Court’s judgment in *Case C-151/02, Landeshauptstadt Kiel v Norbert Jaeger*, illustrate the general point. See also Karen J. Alter, ‘Who Are the “Masters of the Treaty”? European Governments and the European Court of Justice’, *International Organization* 1998, pp. 121-147, at p. 136: “EC law based on regulations or directives can be rewritten by a simple statute that, depending on the nature of the statute, requires unanimity or qualified majority consent. A few of the Court’s interpretations have been rewritten in light of their decisions, though surprisingly few. This is because ECJ decisions usually affect member states differently, so there is not a coalition of support to change the disputed legislation.”
will consistently pile up ever greater costs against one Member or set of Member States, the cost / benefit calculus will turn against it. But, the ECJ’s case-by-case method of decision-making makes it difficult for any Member State to anticipate whether its long-term losses from the Court are at any time greater than its long-term gains. This allows the Court to tinker constantly with its cost-benefit yield to each member, so as to avoid any of them concluding that it is clearly worthwhile to initiate decisive action against the Court.\(^5^4\) But even then, because of the rigidity of the amendment regime, the political threat to correct the Court’s decisions – and possible even weaken its role – is usually not credible, so that the Court may assume that political controversy will rarely or never translate into an attack on its institutional standing.\(^5^5\)

Now of course, there is reason and purpose behind this rigidity, which also known to other constitutional systems.\(^5^6\) The concept of the rule of law and the general philosophy of constitutionalism presuppose that the legislator is bound by a selection of basic rules, and prescribe that its decisions and the legal instruments adopted should be susceptible to judicial review. The control by an independent judiciary, whose decisions are not easily reversed, aims to avoid an absolute tyranny of those who happen to be in power, stamping out the notion that ‘might’ equals ‘right’. As history has taught, this prevents or counters legislation that assails basic rights and fundamental principles, particularly where minorities are concerned: for in a democracy, a majority should not be left unchecked, as it will possibly further only its own causes, to the detriment of those who do not command large numbers. Therefore, the easier it is to tinker with a community’s constitutional charter, the greater the risk that democratic rights and fundamental legal principles will be set aside by the governing majority, without the judiciary being able to stop it. Likewise, when a constitutional charter is


\(^5^5\) Alter, op. cit. (fn. 53), p. 138.

\(^5^6\) In the US, amendments to the Constitution are only adopted when they have been proposed by two-thirds of the members of Congress or two-thirds of the states, and when three-quarter of the states (or of special conventions of the states) are willing to ratify them. In Germany, a proposed amendment to the Basic Law requires the support of two-thirds of the members of the Lower Chamber (the Bundestag) and of the Upper Chamber (the Bundesrat). The Constitution of India contains articles that can be amended by simple majority, those that can be amended by a two-thirds majority with a special quorum, and articles which pertain to specific federal matters and require the consent of (at least) half of the states and territories.
rather difficult to amend, judges play a most useful role, since through their judgments, they can bring the rules up-to-date with the prevailing sentiments and convictions of what the rules should be like.

Indeed, a high hurdle for amendments to the constitutional charter ensures the preservation of basic rights and fundamental legal principles. However, the European Treaties contain a great number of provisions that can be interpreted in differing and conflicting ways, without posing any ethical or moral problems, or harming particular minorities. Arguably, if the constitutional charter is easy to amend, the judiciary can play an active role in expounding the document, but it should refrain from doing so when it is characterised by rigorous rules of change – except when there is an overriding ethical or moral reason to steer a different course. Again, this can hardly be said to have been the situation in the cases mentioned above. By amending the Treaties through judicial decision, the Court actually risks harming the position of one type of minority, or at times even a majority: the (groups of) Member States that prefer a different construction of a particular rule, that are unable to let their views prevail due to the unanimity requirement.

But what then to make of the extension of the competence of the ECJ, at subsequent IGCs? Apparently, all Member States were in agreement when various of the Court’s judgments were incorporated into the Treaties (e.g. the Chernobyl-ruling at the Maastricht IGC), and when it was officially given jurisdiction in the Third Pillar, Title VI EU (at the Amsterdam IGC). Some authors however follow a contrary argument, and contend that the Court is actually obliged to be activist in pursuing the Treaties’ objectives, since they are so difficult to update through ordinary amendment. Hartley, op. cit. (fn. 2), has rightly rejected such reasoning: “[I]t is the whole point of the Community system as it exists at present. The Community was created by a set of Treaties and this is the foundation on which it rests. It was intended that its constitution could be amended only with the unanimous consent of all the Member States: this follows from its basic nature as an entity created by a group of sovereign states.” The Court’s decisions in the Chernobyl and Les Verts cases were indeed endorsed by the Member States, as evident from the new phrasing of Article 230 EC; similarly, the revolutionary ‘unreasonable burden-test’, applied by the Court in the Grzelczyk-case was later explicitly adhered to in Art. 6 and 14 of the new Citizenship Directive (2004/38). However, the supposed subsequent political approbation still does not do away entirely with the original argument that the Court nonetheless has overstepped the line: the judgments have only been approved of ex-post, whereby it should be remembered that Member States and their representatives did not face any real alternatives. In any case, they never made a truly voluntary choice as regards the policy to be pursued; the Court’s decisions had already set out the
One explanation is a lack of awareness of the Court’s role and power among politicians. Also, those politicians that did entertain doubts about certain judgments, often have had to hoard their sentiments, while waiting for a next round of Treaty amendments. Therewith, the critical momentum and sense of urgency may have subsided come the IGC, as a judgment, by then, had already deployed its full effects.  

Moreover, there is the usual political horse-trading during such Conferences that enables consensus to emerge on a topic – such as the broadening of the jurisdiction of the judiciary – so long as the hitherto sceptical Member States grabs some alternative (and possibly much more coveted) prizes in return. Indeed, at some points in time, Court judgments have been reversed, and its jurisdiction curtailed. But the rarity thereof can be directly attributed to the amendment regime, and emphasises the main point of its excessive rigidity.  

In the European legal community, more awareness of the gravity of this almost complete lack of checks and balances would be both apt and welcome. Instead of profiting gloriously from this situation, the severely limited constraints on its actions call for severe moderation from the side of the Court.

course, defined the law as it stood, and were nigh impossible to overturn. Thus, the provisions subsequently agreed by the political bodies may equally be read as attempts to conserve the status quo in the fields concerned, and prevent any further judicial leaps in the near future.

The aforementioned cost/benefit calculus involved may render the Member States hesitant to try to force the convening of an IGC immediately after an unwelcome judgment comes into being.

Of course, the unanimity requirement is common in all treaty-based organisations in international law. However, in comparison, EU law has an extremely broad scope and covers an unprecedented number of domains; by consequence, the powers of the judiciary are much greater there than anywhere else. Besides, the main argument emphasised in the foregoing, that a high hurdle for treaty amendment ought to encourage judges to be reticent with ‘judicial amendments’, may equally apply in other international organisations.

An alternative would be to strengthen those constraints, and enable better checks and balances. Former A-G Walter van Gerven, in The European Union. A Polity of States and Peoples, Oxford: Hart Publishing 2005, at p. 150-1, has proposed to alter the Treaties’ amendment regime, which also to his mind is overly rigid: “[T]he existing procedure in the European Union for the amendment of the founding treaties is clearly too inflexible. (…) Although that procedure may be adequate for major changes to the treaties, or for enlargement of the Union with new states, it is too inflexible to be used to reverse judicial interpretations of existing treaty revisions. To perform the latter function, a “fast track” amendment procedure would be advisable. Such a procedure should involve representatives of the Union institutions and of national parliaments meeting in an assembly. It should provide

50

Henri de Waele
4. Why Concerns about Judicial Activism Do Remain Valid

Despite much ink having been spilt on the topic, it still is not crystal-clear why one should be concerned about judicial activism, especially when performed within a supranational frame. Hence, it may be worthwhile to rehearse the three main reasons once more. None of these are specific to the European context, but some of them do apply there with particular force.

4.1 The Drawbacks Inherent to Judge-Made Law

Court rulings, when compared to statute law, have a few obvious weaknesses: when they set general rules and precedents, they could contain less coherency and clarity than when a legislative body would have drafted and adopted them. This may also be due to the fact that judgments are often concocted in the ‘pressure cooker’, whereas statutes may be meticulously prepared and thoroughly reconsidered and revised, before they are officially presented and eventually attain binding force of law. As the judicial decision-making process is ordinarily shrouded in secrecy, those who cherish the idea of transparency are right to object to large doses of judge-made law.

When courts engage in (periods of) activism, these weaknesses ever more intensely make their presence felt. The more frequently judges deliver judgments that contain far-reaching and unexpected interpretations of the law, the stronger the need is for these judgments to be clear and consistent – and the more essential it will be that judges have had sufficient time for reflection on their possible ramifications. More likely than not however, these rulings will be marred by deficiencies as regards clarity and consistency. Yet, once judges lay down strikingly novel rules that have a great societal impact, the inherent lack of transparency in the formative process becomes

for decision-making procedures that would make ratification by the Member States superfluous if a decision is made by consensus.” Unfortunately, the Treaty of Lisbon has alleviated the rigidity only to a limited extent: after its eventual entry into force, Article 48 EU paragraphs 6 and 7 would provide for a ‘simplified revision procedure’, in which the European Council would be able to revise Treaty provisions through a unanimous decision, an Intergovernmental Conference would not have to be convened, and no national ratifications would be required. However, this simplified revision procedure may only be employed for alterations to Treaty on the Function of the Union, and is, moreover, restricted to amendments to Part Three of that Treaty.
even more acutely problematic. Courts do not always have the necessary information at their disposal to deliver a ruling that truly does justice to a case, and to any similar cases in the future.

Naturally, by no means are legislators always able to see the big picture with full accuracy, to investigate all dimensions of the topic to be regulated, and to take note of all the possible hazards and pitfalls. Yet, where it concerns cases in which judges leave their usual frame of reference, and arrive at the desired solutions only by applying methods of construction that are improbable, or plainly faulty, it would appear more appropriate for them if they would follow a minimalist approach, and leave the heart of the matter to be principally regulated by the legislator. The activist court that takes no heed of this precept, and proceeds at any time to impose revolutionary solutions resting on shaky and doubtful foundations, does not realise that it unavoidably falters, and will be imposing imperfect rules and principles, due to the aforementioned drawbacks that beset all judges in equal measure. As outlined above, many ECJ cases show signs of a court happily pushing forward, arriving at creative solutions that, on more than one occasion, are only remotely connected to the existing regulatory framework. Some of the past judgments have shortcomings that could well have been avoided, if the Court had been more aware of the fact that some decisions should perhaps not be taken by judges at all – or at least, not in the chosen form, or with the broad scope they gave them.

On occasion, the Court does revert to this strategy, as evident from cases such as C-50/00 P, Union de Pequenos Agricultores v Council, para. 41, and Opinion 2/94, Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms, para. 30. Most peculiar is however the inconsistency prevailing in these judgments: in UPA, the Court feigned its inability to provide effective judicial protection, as in order to do so, it claimed it would have had to interpret the text of Art. 230 EC beyond its textual remit – while the only thing truly standing in its way was the Court’s own inflexible interpretation of that provision, dating back to Case 25/62, Plaumann & Co. v Commission. In Opinion 2/94, the Court interpreted both Art. 308 and the objectives of the EC Treaty in a most disingenuous and restrictive manner, so as to deny competence to accede to the ECHR – while Art. 308 could very well have served as the required legal basis, had the Court been willing to follow its earlier expansive readings of that article, and had it been willing to show the same stridency and commitment as in the past, where a system of optimal observance of fundamental rights was concerned (as e.g. in Case C-260/89, Elliniki Radiophonia Tileorassi AE v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas).
4.2 A Weakening of Judicial Authority

A second reason why judicial activism may be considered reprehensible is that, potentially, it undermines judicial authority. After all, judges develop the rules, but any functioning legal system presupposes that judges are bound by the rules as well. Therefore, the more they distance themselves from the rules set down by the legislator, and come up with solutions that radiate their own tastes and preferences, the less authority the eventual judgments will have.

Plausible as this theoretical argument may seem, scholars have pointed out before that the experiences with activist courts have in reality been rather different. In the past century, despite hefty periods of activism, both the US Supreme Court and the European Court of Justice have actually gained in stature and public approval, and the authority of their pronouncements has increased rather than declined. For the ECJ, it is indeed true that more and more national courts have come to accept its guidance and leadership, and that the high-tide of revolt and obstruction appears to be long over. One may speak of an overall ‘habit of obedience’ to EU law. Historically, only a few notorious exceptions have arisen, and these pockets of resistance mostly evaporated in the mid-1990s.

This should still not spell the death of the theory that activism weakens authority altogether. Though the general picture is indeed one of obedience, few proper statistical inquiries have been conducted, and too little is known of cases where Union law has not been applied where it should have been applied. It may be far-fetched to presume that, under the surface, there exists a wide-spread practise of non-compliance (whether inadvertently, due to


64 The history of the opposition to EC law supremacy and direct effect in Germany and France is well known, and has been excellently recounted by Karen Alter, Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe, Oxford: OUP 2001. Recently however, judges in the Slovakia, Germany and Poland displayed a palpably hostile attitude. In the past, national supreme courts in e.g. Italy, Poland and the Czech Republic have taken a similarly reticent stance.
lack of awareness of a European dimension to a dispute, or on purpose), numerous national cases are known in which preliminary questions have not been raised when they should have been raised. Apart from this, as an earlier author has remarked, a few pathological cases or catastrophes may well be capable of ruining an otherwise sound structure completely and swiftly, and many instances of non-compliance, seemingly insignificant when taken individually, together may prove to be as crucial as one or two blatant instances of revolt, by slowly eroding judicial authority and legitimacy and building up pressure for court-curbing initiatives. As such, extreme activism of the ECJ could in the long run still prove seriously detrimental to its authority – and should thus still be advised against.

4.3 The Democratic Argument

The democratic argument against judicial activism is plain and simple: how can it be so, that as few as twenty-seven individuals, however wise and well-trained, exert such a great influence on the development of the Union and on the speed and direction of the integration process? Nowadays, judgments may even be delivered by a Chamber with only three or five judges. This is


67 Cf. Samantha Currie, ‘Accelerated Justice or a Step Too Far? Residence Rights of Non-EU Family Members and the Court’s Ruling in Metock’, (2009) 34 E.L.Rev. pp. 310-326, at 326 (referring to Case C-127/08, Blaise Baheten Metock and Others v Minister for Justice: “Metock may prove to be the straw that broke the camel’s back. The dissatisfaction and threats of rebellion expressed in the aftermath of Metock may be just as much a response to the cumulative build-up of judgments on the free movement entitlement of Union citizens (and their codification in Directive 2004/38) as it is a reaction to the specific judgment itself. In this regard, tensions are clearly running high and the Court may need to tread carefully in future if it wishes to avoid the risk of further uprising; and, moreover, thinking too of the procedural dimensions, of seriously undermining its own credibility as a judicial authority.”
terrific for efficiency’s sake – yet, should such a handful of lawyers really be allowed to determine the fate of 500 million EU citizens?

Now of course, the inherent undemocratic nature of all judicial decision-making is one of the feeble and perennial problems of public law. The counter-argument usually goes that it simply is the price to pay for judicial independence: the whole point of a judiciary is to have persons at the ready to solve disputes and deliver opinions without any form of bias or outside interference. Moreover, the concept of democracy should not be applied too rigorously here, as if only directly elected officials should be allowed to govern and legislate, and all other persons and institutions should not be permitted to do so. Rather, in a world that has grown accustomed to the idea of representative democracy, there are many entities and bodies that wield a considerable decision-making power over large groups of individuals, without being directly elected. The rules and decisions they make cannot so easily be disqualified just because they are undemocratic; these should be considered acceptable, as long as the deciding persons or institutions enjoy indirect democratic legitimacy, which entails they are subjected to some form of control by or on behalf of ‘the people’. For the judges of the most powerful courts and tribunals, this is assured by their appointment ordinarily being conditional upon approval by a democratic assembly.68

At the same time, the democratic argument still appears to carry significant force where the role of the ECJ in the integration process is concerned. Firstly, although it is true that judicial independence is an equally great feature of the European legal order, this should not serve as a carte blanche or va banque notion that legitimises all judgments of the Court, and renders them wholly immune to criticism. Once it can be asserted that the content or purport of a ruling does not chime with the prevailing sentiments of what the law should be and of how a certain rule should be interpreted, judges may still rightly be accused of encroaching upon the legislator’s prerogatives. Secondly, in modern day society, numerous rules and decisions are indeed taken by persons who enjoy indirect democratic legitimacy, which is rightly thought to be principally acceptable. However, one may still rightly prefer that decisions that are of the utmost weight and significance

68 *Inter alia* in the United States, where (in accordance with Article II, section 2, of the Constitution) judges to the Supreme Court and other federal courts have to be approved by a majority of the Senate; the Federal Republic of Germany, where (in accordance with Article 95 of the *Grundgesetz*) a special committee of elected representatives (the *Richterwahlausschuss*) is involved in the appointment to of judges to the *Bundesverfassungsgericht* and the other federal courts.
will only be taken with a maximum of support and input from the people affected by them. The fact that there are real and, admittedly, inevitable limits to the democratic character of the legislative and the executive process should not justify the conclusion that no continuous effort should be made to preserve as much democratic legitimacy and representativeness as possible in any form of law-making, including that of courts.\textsuperscript{69} The judges in the ECJ are not subjected to any form of control, and enjoy only an extremely weak indirect democratic legitimacy. They are nominated by Member States and appointed by the Council, without any representative assembly having a say on the candidate.\textsuperscript{70}

On top of this comes the ‘multiplier-effect’ that the democratic argument against judicial activism undergoes in the context of international and supranational organisations. For the amount of influence that non-elected judges can exert in the framework of such organisations is comparatively larger than within a statal framework, whereas the system of checks and balances is much more weakly developed there. The member countries have all become part of a larger whole and individually, they can no longer steer the organisations in a certain direction. But, this remains comparatively easy for the judicial organ, which is as said hard, or even impossible to curb. The democratic argument against judicial activism may thus carry even greater weight within the particular context of the EU, where it remains the least accountable and least representative institution of all. It can then justifiably be criticised when its unwarranted judge-made law pushes the integration process that little bit further ahead.

5. Conclusion

As the recent Brexit vote underlines, the EU continues to suffer from a lack of legitimacy in various quarters. To some Member States and their courts, the authority of the Union’s rules and structures is still not self-evident, de-


spite (or perhaps also because of) the many innovations the Court has supplied or encouraged through the years. The present article did not seek to promote any sort of ‘conspiracy theory’, as if a judicial fringe society in Luxembourg has been furtively attempting to impose its grand design upon the peoples of Europe. It appears misguided to try to accuse the ECJ of an everlasting prejudice in the vein of ‘When in doubt, opt for Europe’, as it is highly implausible that a permanent majority of ECJ judges could have been consciously promoting their cause since 1962. Yet, the remarkable outcomes of many of the resolved cases do speak for themselves, and reveal an inconvenient truth with regard to the Court’s role and practise in at least its first forty years.

Undoubtedly, the Court always attempts to do justice, and strike the right balance between the interests of the European legal order, the institutions and citizens, and the rightful claims of the Member States that seek to avoid an uncontrolled growth and development of the EU. Also, a case like Förster proves that the Court is very well capable of restraint and of giving in to the wishes of the Member States and the European legislator, as long as the latter are persistent and unequivocal as regards the (interpretation of the) rules they consider correct.71 Yet, the assurance that the Member States remain the Herren der Verträge can still prove deeply misleading. In the absence of a fast-track amendment regime, in practise it is rather the ECJ that calls the final shots: unanimity amongst the supposed Masters of the Treaties is not so much required to countenance, as to counteract its wheeling and dealing. In this respect, the Treaties appear to be as firmly entrenched as a constitution, and the ECJ would seem to have some right in considering itself an equal of the US Supreme Court or German Bundesverfassungsgericht. Nevertheless, however one should qualify the current EU from a legal institutional perspective, we can at least say with certainty what it is not: a (federated) nation-state. To some, this remains a lofty ideal, something to seek after with full vigour. It should be admitted though that,

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71 Case C-158/07. Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep. In this case, the Court upheld the Dutch condition of 5 year lawful residence in a Member State before an entitlement to student maintenance grants comes into being. This outcome chimes perfectly with the newly created rules (Directive 2004/38, Art. 24), even though the latter did not fully apply to the case at hand. Moreover, the Court was willing to depart from its previous bold ruling in Bidar (supra, fn. 23), which contained a much more contentious and doubtful interpretation of the (then) applicable rules.
with the large number of Member States that are keen to retain their cultural, social and political diversity, this goal has become terribly unrealistic.

One could claim that for the ECJ, there is no alternative but to subscribe to the visions of the pères-fondateurs; that it has, in a Dworkinian sense, always sought to guarantee ‘integrity’, and that its solutions still suit the ‘rationality’ and ‘public morality’ of the community within which it operates best. Yet, this underplays the amount of discretion that the ECJ actually has, in every single case that lands on its docket. Thankfully, in recent years, there are signs that the Court is becoming ever more aware of this discretion itself, showing a readiness to backtrack on earlier bold pronouncements where politically desirable and/or strategically sensible. In so doing, it demonstrates a laudable and most welcome sensitivity to the wider institutional environment within which it operates.

This is a reprint of an article entitled ‘The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment’, which the author published in the open access journal Hanse Law Review, Volume 6, 2010, pp. 3-26. The original text was largely kept intact, but condensed, modified and updated in some respects.

73 See e.g. Case C-333/13, Elisabeta Dano and Florin Dano v Jobcenter Leipzig, a judgment inverting the core of the EU citizenship case law discussed above in paragraph 2.3.
III. National Representation in Supranational Institutions: The Case of the European Central Bank

By Volker Nitsch\textsuperscript{1} and Harald Badinger\textsuperscript{2}

Abstract\textsuperscript{3}

Supranational institutions face an important trade-off when hiring personnel. On the one hand, hiring decisions are based, as in most organizations, on a candidate's professional qualifications. On the other hand, supranational institutions often aim for broad national representation. Reviewing evidence from the European Central Bank, we show that nationality is indeed relevant for both hiring and decision-making. Specifically, we find a disproportionately narrow spread of national representation in the top management of the ECB. Further, there is evidence for the existence of national networks between adjacent management layers. Finally, monetary policy decisions seem to be linked to national representation in the core business areas of the ECB. Examining a sample of 27 European countries over the period from 1999 to 2008, we estimate Taylor rules for alternative sets of euro area aggregates derived from different weighting schemes of national macroeconomic data. Our results indicate that weights based on national representation in the mid-level management of the ECB's core business areas best describe the central bank's interest-rate setting behavior.

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\textsuperscript{3} We thank Helge Berger, Petra Gerlach-Kristen, Jan-Egbert Sturm, Peter Tillmann, anonymous referees and participants at presentations in Darmstadt, Frankfurt, Osnabrück, Portland, Vienna and Zurich for helpful comments and suggestions. Michael Kuhn provided able research assistance.
1. Introduction

In central banking, the geographical background of decision-makers and staff is often an issue of considerable relevance. Some central banks require that its staff members have the nationality of the home country. The central bank of the Philippines, for instance, requires that applicants for employment must be Filipino citizens. Other central banks have established monetary policy decision-making bodies in which, by law, (some) seats are explicitly allocated by region. In Pakistan, for instance, the central bank’s central board of directors comprises one director from each of the provinces.

Having no firm basis in theory, the focus on geographical representation has, in practice, both benefits and costs. Governments and central banks that implement such rules generally aim to improve decision-making and credibility, two important conditions for the success of monetary policy. Specifically, it is argued that regional representatives bring with them specific knowledge of local conditions, thereby allowing to collect and process a broader range of information. Also, regional representatives are able to communicate decisions to a wider public. At the same time, however, when the geographical background of an individual is taken explicitly into consideration, other potential criteria, most notably a candidate’s professional

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4 See http://www.bsp.gov.ph/about/recruitment.asp. Citizenship is a requirement that is occasionally even included in the central bank law, typically for influential positions such as board members or shareholders. For instance, for members of the Monetary Committee, Article 16 of the Bank of Israel law stipulates that "[a] member from amongst the public shall be qualified for appointment if he is a resident of Israel" (see http://www.bankisrael.gov.il/dept-data/pikuah/bank_hakika/eng/new_law_2010_eng.pdf). The South African Reserve Bank Act requires, in Article 4, that "[n]o person shall be appointed or elected as or remain a director if he or she is not resident in the Republic" (see http://www.reservebank.co.za/internet/Publication.nsf/LADV/7DC59462E47AFDDF42256ED60038AE5C/$File/S+A+Reserve+Bank+Act.pdf). The State Bank of Pakistan Act notes that "no person shall be registered as a shareholder [...] who is not a citizen of Pakistan" (see http://www.sbp.org.pk/about/act/SBP-Act.pdf).

5 See http://www.sbp.org.pk/about/act/SBP-Act.pdf. In similar fashion, the central board of directors of the Reserve Bank of India comprises one director from each of the four local boards (see http://rbidocs.rbi.org.in/rdocs/Publications/PDFs/RBIA1934170510.pdf). Central banks that aim for broad regional representation in their supervisory bodies include Danmarks Nationalbank and the Swiss National Bank.

6 See, for instance, Goodfriend (1999) for a more detailed discussion.
qualifications, automatically become relatively less important for appointment and promotion.

In this paper, we examine empirically issues related to the geographical representation of personnel in central banks. Analyzing the composition of the management team at the European Central Bank (ECB), we ask whether regional features matter for employment. We also search for evidence of networks among staff members along regional lines. Finally, we examine whether the regional composition of central bank staff has a measurable impact on policy-making.

The focus on the ECB has, for our purposes, a number of useful features. First, the ECB is a multinational institution, such that nationality is a reasonable approach to differentiate geographical background. Also, nationality is a personal characteristic that is easily observed, both internally and externally. Second, the ECB is a young institution. Having been officially established in 1998, it had to build up its staff quickly from virtually zero so that there are hardly persistence effects in recruiting. Third, the ECB is an institution of great policy relevance. The ECB is not only the largest European Union financial body, it also has financial and organizational autonomy. Given the ECB's genuine powers, governments of euro area member states should have a strong incentive for national representation in this institution. Fourth, in contrast to other policy areas in the European Union, monetary policy directly affects economic conditions in all euro area member countries, thereby providing another strong incentive for national representation.

In our analysis, we focus particularly on national representation at the management level of the ECB, a choice that is motivated by a large organizational literature. For instance, Pfeffer (1985, p. 68) argues that "organizations are full of people. It often seems only natural and appropriate to analyze and manage organizations using individuals as the units of analysis." Thereby, we go substantially beyond previous work with a focus on national representation in the ECB's decision-making body, the Governing
Instead of examining de jure representation of countries as defined in political documents, we analyze de facto presence of nationals in the institution. Specifically, we estimate panel data models for staff shares of the 27 member states of the European Union (EU) in the top management of the ECB over the period from 1999 through 2010.

Previewing our results, we find that a nation's share of ECB managers is reasonably explained by country-level determinants of job applications (such as a country's distance from the ECB headquarter) rather than broad geographical representation. This finding seems to indicate that hiring decisions are generally made on the basis of a candidate's professional qualifications. Still, national background also seems to matter for recruitment. There is evidence that strong national representation at a particular management level is typically associated with similarly strong national presence at the subordinate management layer. Finally, based on Taylor rule estimates to describe the ECB's interest-rate setting behavior, we find that monetary policy decisions are most closely linked to national representation in the core business areas of the ECB.

The remainder of the paper is organized as follows. Section II reviews the relevant literature. Section III provides some institutional background on the European Central Bank, followed by a description of the data in section IV. The heart of the paper is section V which presents our empirical model and the estimation results. Section VI briefly summarizes our findings.

2. Related Literature

Our paper is related to various strands of the literature. There has been extensive work, for instance, on regional representation in a central bank's main decision-making body, the monetary policy committee. Specifically, a number of studies have examined to what extent the presence of regional representatives in the board has affected monetary policy decisions. Reviewing the voting records of individual board members, there seems to be consistent evidence that regional economic conditions help explain dissent voting of regional representatives. Berger and De Haan (2002), for example, argue that economic differences across German states translated into differ-

10 Examples include, among others, Heinemann and Huefner (2004) and Belke and von Schnurbein (2012).
ences in voting behavior in the Bundesbank's Governing Council (Zentralbankrat) in which all German state central banks held voting rights. Similarly, Gildea (1992), Meade and Sheets (2005), and Chappell Jr., McGregor and Vermilyea (2008), among others, find that members of the Federal Open Market Committee in the US are influenced in voting by economic conditions in the regions that they represent. None of these papers has considered regional representation at the staff level.

A sizable body of work is concerned with the design of central bank committees more generally. With reference to regional representation, Berger, Nitsch, and Lybek (2008) find that politically fragmented countries typically have larger monetary policy committees. Berger and Nitsch (2011) show that central banks with required regional representation tend to achieve, on average, lower inflation.

Another relevant strand of the literature focuses on the effects of individuals in organizations. In an interesting study, Bertrand and Schoar (2003) find that corporate managers measurably affect firm behavior and economic performance. Moreover, they identify differences in "styles" across managers which can then be linked to observable managerial characteristics. For instance, Bertrand and Schoar (2003) note that executives from earlier birth cohorts seem to be on average more conservative, while managers with an MBA degree tend to follow more aggressive strategies. For central banks, Göhlmann and Vaubel (2007) find that board members who were previously member of the central bank staff prefer significantly lower inflation rates than former politicians do. In similar fashion, Dreher, Lamla, Lein, and Somogyi (2009) argue that heads of government who are former entrepreneurs are more likely to implement market-liberalizing reforms; Besley, Montalvo and Reynal-Querol (2011) find that more educated political leaders generate higher economic growth. While we are generally sympathetic with the finding that individuals have an effect on organizational outcomes, we deviate from this literature in various respects. For one thing, our focus is exclusively on the regional background of individuals instead of their educational and professional qualifications. More importantly, we examine a much broader group of individuals. Instead of examining the role of leaders, we cover in our analysis the (various) top management levels of an organization.

11 While it would be interesting to also analyze personal characteristics of managers other than nationality, relevant data for such a large and diverse group of people is almost impossible to obtain.
In this respect, our approach is also related to an interesting literature, mainly in management science, on the demographic structure of organizations. This literature refrains from the analysis of individual features and emphasizes, in contrast, the compositional aspects of organizations. Pfeffer (1985, p. 79) argues, for instance, that "[t]he difficulty with this [individualistic] approach is its neglect of the interdependence and relationships that are the essential, indeed defining, characteristic of organizations."

3. The ECB

The process of European integration is characterized by a delegation of functions, in a growing number of policy areas, from the national level to the European Union. In many instances this has led to the establishment of new multi- and supranational institutions. The European Central Bank is a particularly important case in point. When the decision was taken to complete the Single Market with a single currency, responsibilities for monetary policy needed to be centralized. As a result, the ECB was created, which forms, along with the national central banks of the euro area member countries, the monetary policy-making authority in the euro area, the Eurosystem. The official agreements about the establishment of the ECB date back to the Treaty on European Union ('Maastricht Treaty'), which was signed in Maastricht on 7 February 1992. The Treaty defined the monetary policy

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12 As a result, there are, in the meantime, many EU institutions, agencies, bodies, commissions and committees. An early example is the EURATOM Supply Agency, founded in 1960 and headquartered in Luxembourg, which is responsible for the regular and equitable supply of nuclear fuels for Community users. A very recent example, in contrast, is the European Banking Authority, established on 1 January 2011 and headquartered in London, which is a regulatory agency for the financial sector. See http://europa.eu/institutions/inst/index_en.htm for an overview.

13 Baldwin and Wyplosz (2009, p. 495) note: "Each member [country] still comes equipped with its own central bank, the last remaining vestige of lost monetary sovereignty. No matter how daring the founding fathers of the EMU were, they stopped short of merging the national central banks into a single institution, partly for fear of having to dismiss thousands of employees."
framework in the economic and monetary union; it also contained the Statute of the European System of Central Banks (ESCB) and of the ECB which was attached as a Protocol to the Treaty.\textsuperscript{14}

For the immediate preparatory work, the European Monetary Institute (EMI) was established as a transitory body on 1 January 1994.\textsuperscript{15} The objective of the EMI was, among other things, to specify the regulatory, organizational and logistical framework necessary for the ESCB to perform its tasks. Based on the EMI's conceptual design, the ECB was finally established on 1 June 1998, while the EMI went into liquidation. Seven months later, on 1 January 1999, eleven EU member states adopted the euro as their common currency, and the ECB took over responsibility for conducting the single monetary policy in the euro area.

As liquidator of the EMI, the ECB inherited the EMI infrastructure. Scheller (2004, p. 25) argues that the infrastructure included "a body of staff which had been prepared to undertake its duties at the ECB". Most of the EMI staff, however, were on fixed-term contracts, so that the ECB faced effectively no restrictions from the past in setting up management and staffing structures.\textsuperscript{16} More importantly, staff size of the ECB has quadrupled after establishment, rising from a permanent staff of 407 on 31 May 1998 to a full-time equivalent number of 1607 at the end of 2010. Over the same period, the number of managerial positions has increased by more than factor three, rising from 45 to 156. In sum, the ECB can be plausibly described as an institution, which had to build up its staff from virtually zero after creation.

\textsuperscript{14} Article 105(2) of the Treaty notes: "The basic tasks to be carried out through the ESCB shall be: to define and implement the monetary policy of the Community[...]." Article 106 notes: "(1) The ESCB shall be composed of the ECB and of the national central banks. (2) The ECB shall have legal personality." See http://www.ecb.int/ecb/legal/pdf/maastricht_en.pdf.
\textsuperscript{15} The EMI replaced the Committee of Governors of the central banks of the member states, as specified in Article 109f(1) of the Treaty. Operationally, the EMI started with the 28 staff members of the secretariat of the Committee of Governors in Basle.
\textsuperscript{16} The Annual Report of the EMI for 1994 states (p. 66): "Members of staff have generally been appointed on three-year fixed-term contracts."; see http://www.ecb.int/pub/pdf/annrep/ar1994en.pdf. The view of no contractual restrictions is confirmed in the Annual Report of the ECB for 1998, noting (p. 145): "Most EMI staff contracts were due to expire at the end of 1998. By the date on which these statements were drawn up, 322 permanent staff had transferred to the ECB under new contracts."; see http://www.ecb.int/pub/pdf/annrep/ar1998en.pdf.
For the employment decisions of the ECB, there are no political, administrative or other external constraints. Partly reflecting the institution's independence, Article 36.1 of the Statute of the ESCB and the ECB stipulates that "[t]he Governing Council [of the ECB], on a proposal from the Executive Board, shall lay down the conditions of employment of the staff of the ECB". The conditions were then fixed in the Rules of Procedure at the ECB, adopted by the Governing Council, and turn out to be very general principles. Article 20.2 of the Rules states that "[m]embers of staff shall be selected, appointed and promoted with due regard to the principles of professional qualification, publicity, transparency, equal access and non-discrimination."  

The selection process was further specified in Administrative Circular 5/2004 which contains detailed rules for recruitment. Apart from the general rule that the ECB appoints only nationals of European Union member states, which seems to be in line with the Staff Regulations of officials of the European Communities, this document lays down additional rules on nationality. Specifically, recruitment at the ECB is directed at the broadest possible geographical representation, without imposing a specific national quota. Article 5.4 of the Circular explicitly states: "In the event that candidates have equal qualifications for a position, gender and/or nationality may be used as additional criteria for the selection decision with a view to achieving a balanced representation of gender and/or nationalities." In the following, we examine national representation at the ECB at various levels of hierarchy in more detail.

4. Data

At the heart of our paper is a newly compiled panel data set on the nationality of top managers at the European Central Bank. In contrast to previous studies which often focus on a central bank's monetary policy committee,

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19 Article 5.2 notes: "Without prejudice to the principle stated above, the selection process shall also be directed to securing the broadest possible geographical basis from among nationals of Member States of the European Union. No nationality quota shall apply and no vacancy shall be reserved for a specific nationality." See http://www.ecb.int/ecb/jobs/pdf/recruitmentrules.pdf.
we cover all management layers of the ECB, including the heads of directorates, divisions and sections. Our data set is based on the organizational charts of the ECB. The ECB regularly publishes charts of its organizational structure along with the names (but not the nationalities) of the responsible managers, in the most current version, on its website. We have compiled the charts for the period from 1999 to 2010; the data is on an annual basis and refers to the organizational structure at the beginning of each year.\(^{20}\)

In total, the ECB has appointed, since its establishment, 210 individuals on managerial positions (including deputies). For each individual, we aim to identify the nationality. To do so, we use a variety of sources, including internet search, newswire reports and personal communication. Overall, we were able to confirm the nationality of 190 individuals, except for a few managers of mainly technical and administrative divisions. In our analysis, we deal with those missings in three ways. As our baseline approach, we impose nationality based on the name of the individual. This procedure is relatively straightforward and simple; it also allows us to analyze the full sample. Alternatively, we drop individuals without proper information on nationality. Finally, we focus our analysis on the divisions of key importance for the operations of the ECB (core business areas), thereby reducing the number of individuals with missing nationality.

The top decision-making body of the ECB is the Governing Council, which comprises the Presidents/Governors of the national central banks of the member countries of the euro area and the 6-member Executive Board. Given the politically-determined composition of this body (with members being appointed at the level of heads of state or government), our focus is on the remaining levels of management. The ECB’s organizational structure below the Governing Council initially consisted of two management levels; i) the directorates general or directorates, and ii) divisions. After a period of strong growth of the institution, sections were introduced as third management level in 2003. Table 1 describes the evolution of the number of (filled) management positions at the ECB over time. In addition, there is, for each position, the option of establishing a deputy head. In our empirical analysis, we experiment with both groups of managers, heads only and heads and deputies combined. Fortunately, our results turn out to be generally consistent across samples.

Our central bank data is augmented with data from a number of standard sources, including the IMF’s International Financial Statistics, the World

\(^{20}\) We are indebted to the ECB’s Press Division for the kind provision of missing information.
Bank's World Development Indicators and OECD statistics. A detailed list of variables and sources is provided in an appendix. Our sample covers the 27 member countries of the European Union. Since 12 of these countries have entered the European Union during the sample period, the panel is unbalanced. We only include countries which, as members of the EU, have subscribed to the capital of the ECB.\textsuperscript{21}

\textsuperscript{21} In practice, the ECB has started recruiting from accession countries more than a year before entry into the European Union (that is, immediately after the treaty of accession to the EU was signed). For our analysis, however, this difference is without relevance.
Table 1. *The ECB: A Growing Institution*

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*Notes:* The table lists the number of managers at different ECB management levels (no deputies). The data refer to the beginning of the year.

1 Governors of national central banks of euro area member countries who are automatically member of the ECB Governing Council

2 End of previous year. 3 Full-time equivalent positions

*Sources:* Own compilations; various issues of the ECB’s annual report.
5. Empirical Analysis

5.1 Who Gets Appointed?

We begin our empirical analysis by examining patterns of national representation in the management of the ECB. Specifically, we aim to identify to what extent the ECB's aim of "broadest possible geographical representation" indeed matters for recruitment. Our empirical approach is straightforward. To quantify potential country biases in the ECB's hiring policy, we examine the extent to which the national distribution of management positions is described by the following two (benchmark) principles:

- **Equal representation** $(E)$, or representation with parity, which implies that each member state holds the same percentage of the ECB's top management staff such that $S_{i,t}^E = S_t^E = 1/N_t$, where $i$ is the country index and $N_t$ is the number of EU member states in year $t$.22

- **Proportional representation** $(P)$, which implies that the staff share of each member state corresponds to the country's share in the ECB's capital (and, thus, reflects its relative demographic and economic size), which we refer to as $S_{i,t}^P$.23

If candidates are mainly selected according to their professional qualifications, we would expect that the share of top positions filled by nationals of a member state is largely determined by the available supply of qualified candidates. More explicitly, the probability of a perfect fit of an applicant's personal profile with the requirements of an open position is higher for nationalities with a large pool of applicants. As a result, since the ECB is likely to receive a larger number of applications from individuals of more populous countries, these countries should be disproportionately strongly represented in the ECB. By assumption, our default distribution of candidates is given by the capital subscription key of the ECB. In fact, to the extent that the qualification profiles of applicants are equally distributed across EU

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22 Since citizens of all EU member states are eligible for employment with the ECB (see http://www.ecb.int/ecb/jobs/apply/html/index.en.html), we use the number of EU countries rather than the number of euro area countries, but we control for euro area membership later on.

23 Capital shares are determined (and regularly recalculated) based on a country's total population and GDP (in equal weightings). The shares currently range from 18.94% for Germany (Deutsche Bundesbank) to 0.06% for Malta (Central Bank of Malta); see http://www.ecb.int/ecb/orga/capital/html/index.en.html. In practice, our measure of proportional representation based on capital shares corresponds very closely to an alternative formulation of the measure based exclusively on the economic weight of countries.
member states (a strong assumption that will be relaxed below), national staff shares in the ECB should fit perfectly with the national capital share.

Broad representation of nationalities, in contrast, would imply that the selection decision for hiring or promotion is largely based on an individual’s national background. Consequently, qualifications become less relevant for appointment, biasing the distribution towards countries with few(er) representatives. In the extreme, each country has the same share of representatives in the management of the ECB.

We start our investigation by using a highly parsimonious model specification which includes only our two benchmark distributions; that is, we estimate regressions of the form:

\[ R_{i,t}^\ell = \eta_E S_{i,t}^E + \eta_P S_{i,t}^P + \varepsilon_{i,t}, \]  

(1)

where \( R_{i,t}^\ell \) is country \( i \)'s share of representatives at management level \( \ell \) in year \( t \), \( S_{i,t}^E \) and \( S_{i,t}^P \) are the equal and proportional representation staff shares (as defined above), and \( \varepsilon_{i,t} \) is a country-specific error term. The main advantage of this reduced-form regression specification is that it allows to identify directly the weight of the two principles of national representation in the management of the ECB. As \( S_{i,t}^E \) and \( S_{i,t}^P \) sum to one over all countries, the estimates of \( \eta_E \) and \( \eta_P \) are, by least squares algebra, also required to sum to one.²⁴²⁵

In our empirical implementation, we estimate equation (1) separately for individual management levels \( \ell \), using an (unbalanced) panel of 27 EU member states over the period from 1999 to 2010 (with a total of 248 observations²⁶). Moreover, to ensure the robustness of our results, we analyze national staff shares at various levels of aggregation. For instance, in addition to individual management layers, we consider the overall share of countries in the management of the ECB as well as a weighted average of

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²⁴ Note that \( N_t \bar{R}_{i,t}^\ell = N_t \bar{S}_{i,t}^P = 1 \), where the bar denotes cross-section averages, while \( S_{i,t}^E \) is a time-specific (rescaled) constant. Since \( S_{i,t}^E = 1/N_t \), it holds for all \( t \) (and, therefore, also for the pooled model) that \( \bar{\eta}_E = N_t (\bar{R}_{i,t}^\ell - \bar{\eta}_P \bar{S}_{i,t}^P) = 1 - \bar{\eta}_P \).

²⁵ An alternative approach to examine the role of nationality in employment is to test for the (joint) significance of country dummies, holding constant for variables which can reasonably be expected to affect representation without disrespecting the treaties (such as economic size or education). The main drawback of this approach is that the country dummies also capture the effects of time-invariant labor market characteristics (such as, for instance, a country’s distance to Frankfurt).

²⁶ For sections, which were introduced in 2004, sample size reduces to 173 observations.
managers across all management levels.\footnote{27} In another exercise, we restrict our analysis to the share of representatives in the ECB's (self-defined) core business areas. These functional units are of particular interest and relevance as they are directly involved in the formulation and implementation of the ECB's monetary policy.\footnote{28} Table 2 presents the results. The table contains three panels. The upper panel reports estimates for our baseline measure of national representation in the management of the ECB (based on the nationality of the heads of all the respective units); the remaining two panels tabulate analogous results for alternative representation measures. Across columns, the regressand varies along another dimension, the management level. Specifically, we start our investigation by examining country shares for heads of directorates, divisions and sections (columns 1-3), followed by an exploration of aggregate measures as described (columns 4-5). In total, the table reports (paired) coefficient estimates of $\eta_E$ and $\eta_P$ for 15 different measures of country representation in the ECB.

Reviewing the results, two observations are particularly noteworthy. First, the estimated coefficients on the capital share sizably and consistently exceed the corresponding estimates on the parity benchmark. While the point estimates of $\eta_P$ are always statistically highly significant and take values close to one, the $\eta_E$ estimates are typically much smaller in magnitude and often statistically indifferent from zero at conventional levels of significance. These findings indicate that the geographical patterns of top-level staff employment at the ECB rarely deviate from proportional representation; the majority of positions are filled with nationals from countries with the largest contributions to the ECB’s capital. Provided that our (working) assumption is correct that the supply of (qualified) applicants is roughly in proportion to the size of a country, professional qualifications clearly seem to dominate the national background in hiring.

\footnote{27} We assign a weight of 1 for directorates, 0.5 for divisions and 0.25 for sections. Since sections were first introduced in 2004, weighted aggregates for the period before are calculated based on directorates and divisions only to avoid losing observations.

\footnote{28} The ECB has defined as its core business areas: Banknotes; Economics; Financial Stability; International and European Relations; Legal Services; Market Operations; Payments and Market Infrastructure; Research; Statistics; the Target2-Securities Program; and the ECB Permanent Representation in Washington, DC. Supporting business areas are: Counsel to the Executive Board; Administration; Communications; Human Resources, Budget and Organization; Information Systems; Internal Audit and Secretariat and Language Services. See http://www.ecb.int/ecb/educational/facts/orga/html/or_005.en.html.
Reviewing the results, two observations are particularly noteworthy. First, the estimated coefficients on the capital share sizably and consistently exceed the corresponding estimates on the parity benchmark. While the point estimates of $\eta_P$ are always statistically highly significant and take values close to one, the $\eta_E$ estimates are typically much smaller in magnitude and often statistically indifferent from zero at conventional levels of significance. These findings indicate that the geographical patterns of top-level staff employment at the ECB rarely deviate from proportional representation; the majority of positions are filled with nationals from countries with the largest contributions to the ECB’s capital. Provided that our (working) assumption is correct that the supply of (qualified) applicants is roughly in proportion to the size of a country, professional qualifications clearly seem to dominate the national background in hiring.

Second, the estimates of $\eta_E$ turn out to be positive, economically relevant and statistically significant (with a t-statistic of around 3) for the highest level of management and responsibility in the organizational structure of the ECB, the heads of directorates and directorates general. The weight assigned to $S^E$, the equal representation share of countries, is about 0.2 for these top positions; the top (directorate) level also appears to measurably affect the results for our aggregate measures of national representation. A plausible explanation for this finding is that the director position is highly competitive, allowing to recruit qualified candidates from a broad range of countries.\(^29\)

Our reduced-form regressions implicitly assume that a constant fraction of a country's population is seeking employment at the ECB; a national staff share close to the country's capital share is interpreted as evidence of proportional representation. In practice, however, the supply of qualified candidates is unlikely to be uniformly distributed across EU member states. For instance, employment at the ECB may be particularly attractive for individuals from economically well-educated and geographically close countries. Therefore, to deal with this issue, we augment equation (1) by adding a host of other factors that might affect a country's supply of labor (suitably trained for employment at the ECB):

\[
R_{i,t}^\ell = \eta_E S^E_t + \eta_P S^P_{i,t} + x_{i,t} \beta + \epsilon_{i,t}. \tag{2}
\]

\(^{29}\) For the Governing Council and the Executive Board, the point estimates of $\eta_P$ are 0.71 and 0.30, respectively. As argued above, however, the estimation results for these politically-determined executive management layers should be interpreted with caution.
In particular, we employ the following set of (time-variant) country-specific control variables ($x_{it}$): a binary dummy variable which takes the value of one if country $i$ is a member of the euro area at time $t$ (and zero otherwise); the length of $i$'s membership in the euro area in years; the log of distance between the national capital of $i$ and Frankfurt (Germany), the location of the headquarter of the ECB; a dummy variable which takes the value of one if $i$ has a common land border with Germany (and zero otherwise); the share of the population with upper and tertiary education; the number of staff of the national central bank relative to population size; and the share of the population speaking the German language.
Table 2. Who Gets Appointed? Benchmark Results

<table>
<thead>
<tr>
<th>Head</th>
<th>Directorates</th>
<th>Divisions</th>
<th>Sections</th>
<th>Total</th>
<th>Weighted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Equal share ($S^E$)</td>
<td>0.214***</td>
<td>0.037</td>
<td>-0.043</td>
<td>0.084</td>
<td>0.112**</td>
</tr>
<tr>
<td>Capital share ($S^P$)</td>
<td>0.786***</td>
<td>0.963***</td>
<td>1.036***</td>
<td>0.915***</td>
<td>0.888***</td>
</tr>
<tr>
<td>R²</td>
<td>0.528</td>
<td>0.762</td>
<td>0.589</td>
<td>0.761</td>
<td>0.752</td>
</tr>
<tr>
<td>SEE</td>
<td>0.047</td>
<td>0.034</td>
<td>0.048</td>
<td>0.032</td>
<td>0.032</td>
</tr>
<tr>
<td>Obs</td>
<td>248</td>
<td>248</td>
<td>173</td>
<td>248</td>
<td>248</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Head and deputies</th>
<th>Directorates</th>
<th>Divisions</th>
<th>Sections</th>
<th>Total</th>
<th>Weighted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Equal share ($S^E$)</td>
<td>0.195***</td>
<td>0.037</td>
<td>-0.043</td>
<td>0.087*</td>
<td>0.113**</td>
</tr>
<tr>
<td>Capital share ($S^P$)</td>
<td>0.805***</td>
<td>0.963***</td>
<td>1.036***</td>
<td>0.912***</td>
<td>0.886***</td>
</tr>
<tr>
<td>R²</td>
<td>0.561</td>
<td>0.795</td>
<td>0.589</td>
<td>0.779</td>
<td>0.759</td>
</tr>
<tr>
<td>SEE</td>
<td>0.045</td>
<td>0.031</td>
<td>0.048</td>
<td>0.031</td>
<td>0.031</td>
</tr>
<tr>
<td>Obs</td>
<td>248</td>
<td>248</td>
<td>173</td>
<td>248</td>
<td>248</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Heads, core business areas</th>
<th>Directorates</th>
<th>Divisions</th>
<th>Sections</th>
<th>Total</th>
<th>Weighted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Equal share ($S^E$)</td>
<td>0.244***</td>
<td>0.093</td>
<td>0.044</td>
<td>0.147**</td>
<td>0.164***</td>
</tr>
<tr>
<td>Capital share ($S^P$)</td>
<td>0.756***</td>
<td>0.907***</td>
<td>0.956***</td>
<td>0.853***</td>
<td>0.836***</td>
</tr>
<tr>
<td>R²</td>
<td>0.426</td>
<td>0.662</td>
<td>0.443</td>
<td>0.653</td>
<td>0.658</td>
</tr>
<tr>
<td>SEE</td>
<td>0.056</td>
<td>0.041</td>
<td>0.060</td>
<td>0.039</td>
<td>0.038</td>
</tr>
<tr>
<td>Obs</td>
<td>248</td>
<td>248</td>
<td>173</td>
<td>248</td>
<td>248</td>
</tr>
</tbody>
</table>

Notes: Dependent variable is the share of representatives from country $i$ at time $t$ at the respective ECB management layer ($R^E_f$). Robust standard errors in parentheses. ***, *, and * denote significant at the 1%, 5%, and 10% level, respectively.
Table 3. Who Gets Appointed? Adding Country Controls

<table>
<thead>
<tr>
<th></th>
<th>Directorates</th>
<th>Divisions</th>
<th>Sections</th>
<th>Total</th>
<th>Weighted</th>
<th>Exec. Board</th>
<th>Gov. Council</th>
</tr>
</thead>
<tbody>
<tr>
<td>Equal share (S_E)</td>
<td>0.379***</td>
<td>0.128***</td>
<td>0.001</td>
<td>0.178***</td>
<td>0.225***</td>
<td>0.530***</td>
<td>0.878***</td>
</tr>
<tr>
<td></td>
<td>(0.049)</td>
<td>(0.039)</td>
<td>(0.078)</td>
<td>(0.037)</td>
<td>(0.034)</td>
<td>(0.072)</td>
<td>(0.027)</td>
</tr>
<tr>
<td>Capital share (S_P) Restr.</td>
<td>0.621</td>
<td>0.872</td>
<td>0.999</td>
<td>0.822</td>
<td>0.775</td>
<td>0.470</td>
<td>0.122</td>
</tr>
<tr>
<td>Euro area member</td>
<td>0.019***</td>
<td>-0.004</td>
<td>-0.013</td>
<td>0.000</td>
<td>0.005</td>
<td>0.046***</td>
<td>0.062***</td>
</tr>
<tr>
<td></td>
<td>(0.006)</td>
<td>(0.005)</td>
<td>(0.010)</td>
<td>(0.006)</td>
<td>(0.005)</td>
<td>(0.013)</td>
<td>(0.005)</td>
</tr>
<tr>
<td>Length of membership</td>
<td>0.006***</td>
<td>0.003***</td>
<td>0.001</td>
<td>0.003***</td>
<td>0.004***</td>
<td>0.005***</td>
<td>0.002***</td>
</tr>
<tr>
<td></td>
<td>(0.001)</td>
<td>(0.001)</td>
<td>(0.002)</td>
<td>(0.001)</td>
<td>(0.001)</td>
<td>(0.002)</td>
<td>(0.001)</td>
</tr>
<tr>
<td>Distance</td>
<td>-0.014***</td>
<td>-0.006***</td>
<td>-0.006**</td>
<td>-0.007***</td>
<td>-0.009***</td>
<td>-0.003</td>
<td>-0.006***</td>
</tr>
<tr>
<td></td>
<td>(0.002)</td>
<td>(0.001)</td>
<td>(0.003)</td>
<td>(0.001)</td>
<td>(0.001)</td>
<td>(0.004)</td>
<td>(0.001)</td>
</tr>
<tr>
<td>Border</td>
<td>0.020***</td>
<td>-0.014***</td>
<td>-0.052***</td>
<td>-0.015***</td>
<td>-0.005</td>
<td>-0.011</td>
<td>-0.007**</td>
</tr>
<tr>
<td></td>
<td>(0.006)</td>
<td>(0.005)</td>
<td>(0.007)</td>
<td>(0.005)</td>
<td>(0.004)</td>
<td>(0.008)</td>
<td>(0.003)</td>
</tr>
<tr>
<td>Staff NCB</td>
<td>0.079***</td>
<td>0.057***</td>
<td>0.055***</td>
<td>0.055***</td>
<td>0.061***</td>
<td>-0.008</td>
<td>0.006</td>
</tr>
<tr>
<td></td>
<td>(0.013)</td>
<td>(0.010)</td>
<td>(0.020)</td>
<td>(0.009)</td>
<td>(0.009)</td>
<td>(0.023)</td>
<td>(0.008)</td>
</tr>
<tr>
<td>Education</td>
<td>0.078***</td>
<td>0.012</td>
<td>0.025</td>
<td>0.028**</td>
<td>0.038***</td>
<td>-0.013</td>
<td>0.003</td>
</tr>
<tr>
<td></td>
<td>(0.021)</td>
<td>(0.011)</td>
<td>(0.024)</td>
<td>(0.011)</td>
<td>(0.012)</td>
<td>(0.035)</td>
<td>(0.012)</td>
</tr>
<tr>
<td>German</td>
<td>-0.025**</td>
<td>0.072***</td>
<td>0.117***</td>
<td>0.057***</td>
<td>0.039***</td>
<td>0.007</td>
<td>-0.006</td>
</tr>
<tr>
<td></td>
<td>(0.011)</td>
<td>(0.011)</td>
<td>(0.017)</td>
<td>(0.011)</td>
<td>(0.010)</td>
<td>(0.020)</td>
<td>(0.007)</td>
</tr>
<tr>
<td>R²</td>
<td>0.790</td>
<td>0.901</td>
<td>0.811</td>
<td>0.894</td>
<td>0.900</td>
<td>0.821</td>
<td>0.554</td>
</tr>
<tr>
<td>SEE</td>
<td>0.032</td>
<td>0.024</td>
<td>0.035</td>
<td>0.023</td>
<td>0.022</td>
<td>0.020</td>
<td>0.053</td>
</tr>
<tr>
<td>Obs</td>
<td>212</td>
<td>212</td>
<td>152</td>
<td>212</td>
<td>212</td>
<td>212</td>
<td>212</td>
</tr>
</tbody>
</table>

Notes: Dependent variable is the share of representatives from country i at time t at the respective ECB management layer (R_i^t). Robust standard errors in parentheses. ***, **, and * denote significant at the 1%, 5%, and 10% level, re-
Moreover, in order to ensure comparability with the results from our baseline specification, we impose the restriction that $\eta_E = (1 - \eta_P)$, without loss of generality.\footnote{Under the null hypothesis that $\eta_E = 0$, the restriction implies a simple rescaling of $\eta_P$ to which least squares estimation is invariant.}

Table 3 presents the results. As before, the columns tabulate coefficient estimates for individual management levels and aggregate representation shares. In addition, we provide, for completeness, results for national representation in the Governing Council of the ECB.

The key parameter of interest to us is (again) $\eta_E$, the estimated parameter on the benchmark share of equal representation. As shown, the point estimates of $\eta_E$ generally increase in both magnitude and significance, after controlling for a broad(er) range of factors potentially affecting the national number of applicants. Although the weight assigned to $S^E$ is still relatively moderate, there is clear evidence that the ECB's appointment decisions tend to bias the national staff shares towards a "broad geographical representation", once we take (properly) into account that the pool of candidates for employment at the ECB varies across countries. Further, it is interesting to note that this pattern holds particularly for the upper layers of management, confirming our earlier findings.\footnote{Without taking the precise results too literally, it seems reassuring that the largest estimates of $\eta_E$ are obtained for the composition of the Governing Council and the Executive Board.}

While the control variables are not of direct interest, the results turn out to be reasonable and significant. For instance, the availability of qualified personnel seems to matter for representation beyond a country's capital share: Countries with a larger (relative) staff size of the national central bank generally have more representatives in the management of the ECB. Also, it seems easier to find and attract promising candidates for the filling of positions if they are already close to Frankfurt. In contrast, only for top management positions at the ECB, membership in the euro area is significantly (positively) associated with national representation, possibly reflecting the ECB's aspiration to document its EU-wide recruitment seems to be most easily possible and justifiable for less influential management positions. There are similarly mixed results for other country features, such as familiarity with the German language. Overall, the regressions fit the data well; more than three-fourths of the variation in national representation is explained by our model.
<table>
<thead>
<tr>
<th>Variable</th>
<th>Confirmed nationality only</th>
<th>Heads and deputies</th>
<th>Core business areas</th>
<th>Core business areas, heads and deputies</th>
<th>Germany dropped</th>
</tr>
</thead>
<tbody>
<tr>
<td>Equal share (S_E)</td>
<td>0.193***</td>
<td>0.192***</td>
<td>0.240***</td>
<td>0.235***</td>
<td>0.333***</td>
</tr>
<tr>
<td></td>
<td>(0.034)</td>
<td>(0.035)</td>
<td>(0.053)</td>
<td>(0.050)</td>
<td>(0.033)</td>
</tr>
<tr>
<td>Capital share (S_P) (η_p = 1 − η_E)</td>
<td>0.807</td>
<td>0.808</td>
<td>0.760</td>
<td>0.765</td>
<td>0.667</td>
</tr>
<tr>
<td>Euro area member</td>
<td>0.004</td>
<td>0.005</td>
<td>0.018**</td>
<td>0.022***</td>
<td>0.009**</td>
</tr>
<tr>
<td></td>
<td>(0.005)</td>
<td>(0.005)</td>
<td>(0.008)</td>
<td>(0.008)</td>
<td>(0.004)</td>
</tr>
<tr>
<td>Length of membership</td>
<td>0.002***</td>
<td>0.003***</td>
<td>0.002</td>
<td>0.002*</td>
<td>0.001*</td>
</tr>
<tr>
<td></td>
<td>(0.001)</td>
<td>(0.001)</td>
<td>(0.001)</td>
<td>(0.001)</td>
<td>(0.000)</td>
</tr>
<tr>
<td>Distance</td>
<td>-0.007***</td>
<td>-0.009***</td>
<td>-0.006***</td>
<td>-0.008***</td>
<td>-0.006***</td>
</tr>
<tr>
<td></td>
<td>(0.001)</td>
<td>(0.001)</td>
<td>(0.002)</td>
<td>(0.002)</td>
<td>(0.001)</td>
</tr>
<tr>
<td>Border</td>
<td>-0.017***</td>
<td>-0.009**</td>
<td>-0.021***</td>
<td>-0.011*</td>
<td>0.002</td>
</tr>
<tr>
<td></td>
<td>(0.005)</td>
<td>(0.005)</td>
<td>(0.006)</td>
<td>(0.006)</td>
<td>(0.004)</td>
</tr>
<tr>
<td>Staff NCB</td>
<td>0.054***</td>
<td>0.061***</td>
<td>0.038***</td>
<td>0.055***</td>
<td>0.025***</td>
</tr>
<tr>
<td></td>
<td>(0.010)</td>
<td>(0.009)</td>
<td>(0.013)</td>
<td>(0.013)</td>
<td>(0.006)</td>
</tr>
<tr>
<td>Education</td>
<td>0.021*</td>
<td>0.037***</td>
<td>0.018</td>
<td>0.034*</td>
<td>0.025***</td>
</tr>
<tr>
<td></td>
<td>(0.011)</td>
<td>(0.011)</td>
<td>(0.014)</td>
<td>(0.013)</td>
<td>(0.008)</td>
</tr>
<tr>
<td>German</td>
<td>0.067***</td>
<td>0.046***</td>
<td>0.032**</td>
<td>0.020</td>
<td>0.012</td>
</tr>
<tr>
<td></td>
<td>(0.011)</td>
<td>(0.010)</td>
<td>(0.015)</td>
<td>(0.014)</td>
<td>(0.007)</td>
</tr>
<tr>
<td>R²</td>
<td>0.902</td>
<td>0.900</td>
<td>0.787</td>
<td>0.803</td>
<td>0.873</td>
</tr>
<tr>
<td>SEE</td>
<td>0.022</td>
<td>0.022</td>
<td>0.032</td>
<td>0.031</td>
<td>0.015</td>
</tr>
<tr>
<td>Obs</td>
<td>212</td>
<td>212</td>
<td>212</td>
<td>212</td>
<td>200</td>
</tr>
</tbody>
</table>

Notes: Dependent variable is the share of representatives from country i at time t at the respective ECB management layer (R²). Robust standard errors in parentheses. ***, **, and * denote significant at the 1%, 5%, and 10% level, respectively.
As before, we have performed extensive robustness checks. To economize on space, Table 4 presents a subset of the results of those exercises, tabulating estimates for the specification with the total number of representatives only. We modify our sample along various dimensions. In the first column, we examine a sample when individuals for which we have no confirmed information on nationality are dropped. Our baseline results remain basically unchanged for this perturbation. Next, we examine pooled information on the department heads and their deputies, again producing essentially similar results. In another exercise, we restrict our analysis on managers in the ECB's core business areas. Interestingly, for the core areas, membership in the euro area seems to become an important precondition for appointment. In contrast, knowledge of the German language becomes less relevant than for the sample of all organizational units. A plausible explanation may be that it is especially in supporting business areas (such as infrastructure), where interactions with local businesses (and, thus, the ability to properly communicate with locals) are particularly important. Again, none of our results are changed when we additionally take ECB managers with deputy function into consideration. Finally, our baseline results are basically confirmed when Germany is dropped from the sample, though the results for the German language and neighboring countries appear to be somewhat driven by German nationals in the ECB.

5.2 Does Presence in Top Management Matter for Appointment?

In a next step, we explore the possible existence of national networks in the ECB. Specifically, we analyze whether national presence at top management levels also affects national representation at lower management levels. It could be argued, for instance, that, after a change in the ECB's top management, nationals of other countries are targeted for lower-level positions in order to achieve broad geographical representation within a given business area; that is, there should be a gradual replacement at lower management levels (to the extent individual contracts allow for such behavior\textsuperscript{117}). Alternatively, nationals at the top level may act as a door-opener for fellow

\textsuperscript{117} Changes in the responsibilities of senior managers in the ECB are indeed "in accordance with its policy to promote mobility within the ECB, which is aimed at strengthening the efficiency and effectiveness of the organization"; see http://www.ecb.int/press/pr/date/2006/html/pr060803_2.en.html.
nationals. Specifically, given that in the day-to-day business, personal interaction is often crucially important, there may be a tendency to select subordinates that share the same language and culture.

To analyze these issues empirically, we (further) augment our baseline regression framework by measures of national presence in higher management levels. That is, we estimate variants of the following augmented version of equation (2):

\[
R_{i,t} = \kappa_P P_{i,t} + \kappa_{VP} VP_{i,t} + \kappa_{E} EB_{i,t} + \kappa_{E'} E'_{i,t} + \eta_E S_E^E + \eta_P S_P^P + x_{i,t} \beta + \epsilon_{i,t}.
\]

(3)

where \(P\) is a binary dummy variable that takes the value of one if the President of the ECB is from country \(i\) (and zero otherwise), \(VP\) and \(EB\) are analogous variables for the Vice President of the ECB and other Executive Board members, respectively, and \(R_{i,t}^{E'}\) is the share of national representation at management level \(E'\) superior to the management level of the regressand \(E\). (For sections, these are the directorates and divisions; for divisions, these are directorates only.) Overall, we consider this a very demanding specification since we already control for patterns of country representation at the management level.

Estimation results for equation (3) are presented in Table 5. While all regressions include our benchmark distribution shares and the full set of controls \(x\), only the estimates of the \(\kappa\)'s are tabulated for the sake of brevity. In addition, we note that none of our previous estimates of \(\eta_E\) and \(\eta_P\) is sizably affected by adding information on superior management levels.

As before, we proceed sequentially, beginning with the most senior management level (directorates) on the left of the table. The results in the first column indicate that individuals who share the nationality of the president are indeed more likely to be appointed as head of directorate/directorate general, holding constant other country-specific determinants for representation in the top management of the ECB. As noted before, however, this observation may be not particularly surprising, given that there are some sensitive positions (such as head of communications) where cultural differences between individuals should be avoided. There is no measurable effect, in contrast, for other members of the Executive Board, including the Vice President.

The next column presents analogous results for the second management level, heads of divisions. The results are virtually identical, except for the effect of Vice Presidency. The (negative) coefficient implies that fellow nationals face a disproportionately low probability of appointment at this
level. When we extend our analysis to also include the share of representatives at the level of directorates (column 3), the coefficient on this variable takes a positive value but is statistically indistinguishable from zero.

There is more weak evidence on national network effects between adjacent management layers at the lowest ECB management level, sections. The results for alternative regression specifications are tabulated in the last four columns on the right of Table 5. While the estimation results for the various levels of senior management are mixed, with a slight overrepresentation of the home country of the President among section heads and a disproportionately low presence of the nationality of the Vice President and other Executive Board members, the national presence at the division level (i.e., the direct supervisor) has a measurable positive effect on representation at the section level. Overall, our findings suggest that there is a positive association between national representation shares at adjacent management levels, indicating the existence of national network effects.
Table 5. Does Presence in Top Management Matter?

<table>
<thead>
<tr>
<th></th>
<th>Directorates</th>
<th>Divisions</th>
<th>Divisions</th>
<th>Sections</th>
<th>Sections</th>
<th>Sections</th>
<th>Sections</th>
</tr>
</thead>
<tbody>
<tr>
<td>President</td>
<td>0.013***</td>
<td>0.014***</td>
<td>0.013***</td>
<td>0.024***</td>
<td>0.027***</td>
<td>0.022***</td>
<td>0.025***</td>
</tr>
<tr>
<td></td>
<td>(0.003)</td>
<td>(0.003)</td>
<td>(0.003)</td>
<td>(0.005)</td>
<td>(0.005)</td>
<td>(0.005)</td>
<td>(0.005)</td>
</tr>
<tr>
<td>Vice President</td>
<td>0.024</td>
<td>-0.026***</td>
<td>-0.029***</td>
<td>-0.067***</td>
<td>-0.062***</td>
<td>-0.062***</td>
<td>-0.048**</td>
</tr>
<tr>
<td></td>
<td>(0.018)</td>
<td>(0.008)</td>
<td>(0.008)</td>
<td>(0.017)</td>
<td>(0.018)</td>
<td>(0.020)</td>
<td>(0.023)</td>
</tr>
<tr>
<td>Other Member Executive Board</td>
<td>-0.005</td>
<td>-0.008</td>
<td>-0.007</td>
<td>-0.017**</td>
<td>-0.019**</td>
<td>-0.013*</td>
<td>-0.010*</td>
</tr>
<tr>
<td></td>
<td>(0.005)</td>
<td>(0.005)</td>
<td>(0.005)</td>
<td>(0.008)</td>
<td>(0.008)</td>
<td>(0.006)</td>
<td>(0.006)</td>
</tr>
<tr>
<td>Directorate</td>
<td></td>
<td></td>
<td>0.084</td>
<td>-0.221**</td>
<td></td>
<td>-0.404***</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(0.071)</td>
<td>(0.108)</td>
<td></td>
<td>(0.146)</td>
<td></td>
</tr>
<tr>
<td>Division</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>0.219</td>
<td>0.531*</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>(0.250)</td>
<td>(0.294)</td>
<td></td>
</tr>
<tr>
<td>R²</td>
<td>0.795</td>
<td>0.898</td>
<td>0.900</td>
<td>0.815</td>
<td>0.821</td>
<td>0.834</td>
<td>0.795</td>
</tr>
<tr>
<td>SEE</td>
<td>0.032</td>
<td>0.025</td>
<td>0.025</td>
<td>0.035</td>
<td>0.035</td>
<td>0.034</td>
<td>0.032</td>
</tr>
<tr>
<td>Obs</td>
<td>212</td>
<td>212</td>
<td>212</td>
<td>152</td>
<td>152</td>
<td>152</td>
<td>212</td>
</tr>
</tbody>
</table>

Notes: Dependent variable is the share of representatives from country \(i\) at time \(t\) at the respective ECB management layer (\(R_f^i\)). Other regressors, analogous to the specification in Table 3, included, but not reported. Robust standard errors in parentheses. *** *, **, and * denote significant at the 1%, 5%, and 10% level, respectively.
5.3 Monetary Policy Effects of National Representation

5.3.1 Empirical Strategy

Finally, we ask: Does national representation in the ECB affect monetary policy decision-making? Previous studies have strongly focused on the national distribution of votes in the ECB decision-making body, the Governing Council.\textsuperscript{118} We examine the association between national representation in the ECB's top management and monetary policy decision-making.

To analyze this issue, we estimate Taylor-type interest rate rules which specify the nominal interest rate as a function of inflation and the output gap; Taylor rules are typically found to describe actual monetary policy reasonably well. For the ECB, whose monetary policy is targeted at the euro area, the variables of interest for policy-making are country-size weighted averages of national data from euro area member countries. Consequently, we would expect that a Taylor rule specification for euro area aggregates of inflation and output based on the economic weight of member countries best describes the ECB's monetary policy behavior. Possible effects of national representation on policy-making are then identified by investigating the empirical fit of Taylor rules based on alternative weighting schemes for national data, using a country's staff share in the ECB rather than its economic weight to compute euro area aggregates. Since a comparison of the fit of different models does not allow rigorous statistical inference with respect to superiority of one model, we consider the results mainly as indicative.\textsuperscript{119}

\textsuperscript{118} For instance, Berger and Mueller (2007) argue that the pattern of over- and under-representation of member countries in the ECB Council might be extreme. Hayo and Méon (2011) examine empirically the effect of the national composition of the Governing Council on decision-making.

\textsuperscript{119} There are also other reasons for a cautious interpretation of the results. Taylor rules focus on only one aspect of monetary policy, the key interest rate, thereby ignoring other policy measures taken by central banks; these measures (such as the outright monetary transactions program of the ECB) have recently gained in importance for policy-making. Another potential concern is that Taylor rules, while providing an empirically reasonable (ex post) description of monetary policy, often do not turn out as optimal prescriptive rule for monetary policy in theoretical models.
5.3.2 Model Specification and Data

Our baseline specification follows English, Nelson and Sack (2003), who use a Taylor rule specification that allows for both partial adjustment of the actual to the target interest rate and for serial correlation in the error term. These two features are considered as relevant in explaining deviations of the actual interest rate from the rate implied by a standard (static) Taylor rule.\(^{120}\)

The full model is made up of three equations. Consider a forward-looking Taylor rule in which the target interest rate \(i^*_t\) is described as a function of the deviation of future expected inflation \(\pi^e_t\) from its target \(\bar{\pi}_t\) and the change in the output gap, i.e., the deviation of expected output growth \(\Delta \ln y^e_t\) from (expected) growth of potential output \(\Delta \ln y_t\):\(^{121}\)

\[
i^*_t = \alpha + \beta (\pi^e_t - \bar{\pi}_t) + \gamma (\Delta \ln y^e_t - \Delta \ln y_t),
\]

so that \(\alpha\) denotes the neutral nominal interest rate, i.e., the interest rate, when inflation is at its target and output growth is equal to trend growth.

In practice, it seems reasonable to assume that the actual interest rate \(i_t\) is adjusted only gradually to its target level so that:

\[
i_t = \rho i_{t-1} + (1 - \rho) i^*_t + \theta_t
\]

where \((1 - \rho)\) is the speed of adjustment parameter. Finally, the error term is allowed to exhibit first order serial correlation:

\[
\theta_t = \delta \theta_{t-1} + \varepsilon_t
\]

Using then a Cochrane-Orcutt transformation and rewriting the equation in first differences, we obtain (see English, Nelson, and Sack, 2003):

\[
\Delta i_t = \rho \Delta i^*_t + \rho (1 - \delta) (i^*_{t-1} - i_{t-1}) + \rho \delta \Delta i_{t-1} + \varepsilon_t
\]

which is our benchmark empirical model.

In our empirical implementation, we use the ECB's main refinancing rate as dependent variable. The main refinancing rate is the key interest rate, set by the Governing Council, and assumed to reflect directly the ECB's monetary policy setting behavior. In extensive robustness checks, we also experiment with market-based interest rates, such as the 3-month Euribor and Eonia.

\(^{120}\) For recent applications of this approach, see Gorter, Jacobs and de Haan (2008) and Sturm and de Haan (2011).

\(^{121}\) In the empirical literature, it has become standard practice to use the change in the output gap rather than its level. Walsh (2003) advocates the use of such a modified Taylor rule in the presence of uncertainty about the output gap; see also Orphanides (2003). For a discussion of the advantages of using growth rates rather than levels, see Sturm and Wollmershäuser (2008, p. 4).
We estimate our model using monthly data for the period from January 1999 to June 2008. Data on expected inflation and output growth are obtained from Consensus Economics. Following the literature, we use the professional forecasts of inflation and output growth in the current and the following year to construct monthly measures of real-time expectations for the key macroeconomic variables. The series for the euro area are then obtained as weighted averages of the country values, i.e.,

$$\pi_{t,m}^e = \sum_{i=1}^{N_t} \omega_{i,t} \pi_{i,t,m}^e \text{ and } y_{t,m}^e = \sum_{i=1}^{N_t} \omega_{i,t} \Delta y_{i,t,m}^e$$

(8)

where, in our benchmark specification, the weight $\omega_{i,t}$ is country i’s share in the real GDP of the euro area in year $t$ and $N_t$ is the (time-variant) number of euro area member countries. Finally, in order to quantify macroeconomic conditions as deviation from medium-term targets, we set target inflation to 2%, based on the ECB’s definition of price stability, and assume potential output growth of 2.25%, using the mid-point of the interval given by the ECB.

122 Extending the sample to also include more recent months would bias the Taylor rule estimate towards the output gap at the expense of the inflation rate (which becomes insignificant). This result is not too surprising, given that the ECB interest rates have been at record lows during times of financial crisis.

123 More specifically, we compute the weighted average of the Consensus forecasts for the current year (c) and the following year (f). Expected inflation for country $i$ in year $t$, month $m$ is then given by $\pi_{i,t,m}^e = \frac{13-m}{12} \pi_{i,t,m}^c + \frac{m-1}{12} \pi_{i,t,m}^f$, where $\pi_{i,t,m}^c$ and $\pi_{i,t,m}^f$ denote Consensus forecasts for country $i$ in year $t$, month $m$ for the rate of inflation (in percent) in the current and following year, respectively. An analogous procedure is used to compute expected output growth, where $\left[\frac{13-m}{12} \Delta \text{ln} y_{i,t,m} + \frac{m-1}{12} \Delta \text{ln} y_{i,t,m}^f\right] \times 100$, with $\Delta \text{ln} y_{i,t,m}^c$ and $\Delta \text{ln} y_{i,t,m}^f$ denoting Consensus forecasts for GDP growth (in percent) in the current and the following year, respectively; see also Gorter, Jacobs and de Haan (2008).

124 All shares are defined with respect to the current size of euro area at time $t$ (that is, the shares always sum to one). Cyprus, Malta, and Luxembourg are dropped from our sample, because survey data from Consensus Economics is not available.
5.3.3 Estimation Results

Table 6 presents estimation results for various specifications of the Taylor rule. We proceed stepwise. In the first three columns of the table, we tabulate results when a country's real GDP is used as weight $\omega_{i,t}$ to aggregate national data.\(^{125}\) Across these columns, we vary both the regression specification and the estimation technique, without much effect. The remaining seven columns report analogues, for our preferred specification, when national representation shares at ECB management levels (instead of economic size) are used as weights. Our measure of interest is the goodness of fit of the Taylor rule specification; we use the $R^2$, which corresponds to the squared correlation between the predicted values from the empirical model and the actual main refinancing rate. The first column reports parameter estimates for the full model with no restrictions. As shown, the AR parameter $\delta$ is insignificant in our sample, which may be explained by the smooth time series properties of the main refinancing rate. In the next (and the following) column(s), therefore, we tabulate results for a specification when $\delta = 0$. For this modification, the parameter estimates slightly decrease in magnitude, but the overall results remain essentially unchanged. Most notably, the point estimates of the parameters for expected inflation and the expected change in the output gap turn out to be virtually identical. The estimates imply that an increase in expected inflation (the expected change in the output gap) by 1 percentage point induces an increase in the ECB's main refinancing rate by 1.9 percent (that is, the expected real interest rate increases after an upsurge in inflation expectations).\(^{126}\) Also, interest rates display a high degree of persistence; the point estimate of $\rho$ indicates that about 10 percent of the difference between the actual rate and the target rate is closed each month. Finally, in light of the fact that the model is specified in first differences, the empirical fit of the regression is satisfactory, with an $R^2$ of 0.231. For comparison, the implied squared correlation between the actual and predicted values of the level of the interest rate amounts to 0.857.

Next, to address potential endogeneity concerns, we re-estimate the model by two stages least squares (2SLS), using the first and second time lag of the explanatory variables as instruments.

\(^{125}\) Results turn out to be virtually identical when a country's capital subscription key in the ECB is used as weight; the results are not reported for the sake of brevity.

\(^{126}\) The finding of symmetric weighting of inflation and economic growth in the ECB's monetary policy is a remarkable result, although not new to the literature. Sturm and Wollmershäuser (2008, p. 13) conclude that "the ECB takes movements in real variables at least as serious as movements in inflation".
Table 6. Taylor Rule Estimates for the Euro Area Using Alternative Weighting Schemes

<table>
<thead>
<tr>
<th>Economic weight</th>
<th>Representation weight</th>
</tr>
</thead>
<tbody>
<tr>
<td>Real GDP</td>
<td>Real GDP</td>
</tr>
<tr>
<td>Constant</td>
<td>3.623**</td>
</tr>
<tr>
<td></td>
<td>(0.199)</td>
</tr>
<tr>
<td>Inflation gap (β)</td>
<td>1.977**</td>
</tr>
<tr>
<td></td>
<td>(0.508)</td>
</tr>
<tr>
<td>Output gap (γ)</td>
<td>1.923**</td>
</tr>
<tr>
<td></td>
<td>(0.314)</td>
</tr>
<tr>
<td>Speed of adjust-ment (ρ)</td>
<td>0.900**</td>
</tr>
<tr>
<td></td>
<td>(0.029)</td>
</tr>
<tr>
<td>AR parameter (δ)</td>
<td>-0.111</td>
</tr>
<tr>
<td></td>
<td>(0.056)</td>
</tr>
<tr>
<td>Estimation method</td>
<td>OLS OLS 2SLS OLS OLS OLS OLS OLS OLS OLS</td>
</tr>
<tr>
<td>R²</td>
<td>0.244</td>
</tr>
<tr>
<td>Obs</td>
<td>112</td>
</tr>
</tbody>
</table>

Notes: Dependent variable is the (change in the) main refinancing rate. Heteroskedasticity and autocorrelation robust standard errors in parentheses. ** denotes significant at the 1% level.
For this estimation technique, the point estimates of the response parameters are virtually unchanged; moreover, a Hausman-type test cannot reject the null hypothesis that the least squares estimates and the 2SLS estimates are identical. Overall, we consider the (restricted) model in the second column of Table 6 as our preferred specification of the Taylor rule. In the following, we apply this specification to estimate Taylor rules based on alternative weighting schemes for national data to compute euro area aggregates of the inflation gap and the output gap. As argued above, if monetary policy is directed more strongly towards the macroeconomic conditions in countries that are well represented in the ECB management, we would expect that Taylor rule specifications that use national representation as weights to aggregate national data provide a superior empirical fit than our default specification based on economic weights. Our benchmark value for the $R^2$ (correlation) is 0.231 (0.481). We begin, mainly for completeness, with the results for national representation in the Governing Council and its two subgroups, the Executive Board and the group of the Governors of national central banks (with each Governor having a single vote in the Council). Reassuringly, given that Council members are expected to make decisions exclusively based on information for the euro area aggregate, national representation in the Council has no measurable effect on the appropriateness of ECB monetary policy for individual countries as measured by the empirical fit of the Taylor rule; the $R^2$ decreases from 0.23 to about 0.20. We then turn to the two top management layers of the ECB, directorates/directorates general and divisions.\textsuperscript{127} As shown in column 7, the point estimates of the coefficients slightly differ from the regression based on economic weights; the estimated $\beta$ coefficient on the inflation gap even becomes insignificant, which casts some doubt on this specification. Moreover, the $R^2$ falls notably to 0.184 when national representation at the directorates level of the ECB is used to aggregate national macroeconomic data. While the findings for divisions display a much better empirical fit, the $R^2$ of 0.229 is basically identical to the baseline model with economic weights.

Finally, we use aggregate measures of national representation in the ECB management (which also cover sections after their establishment in 2004). When a country's share in the total number of managers is used as weight, the empirical fit of the regression is slightly better than in the baseline ver-

\textsuperscript{127} We do not consider national shares at the level of sections, which would reduce the time period with available data for the time series model to merely four and a half years.
sion of the Taylor rule; the $R^2$ increases to 0.235. For national representation shares in the ECB’s core business areas, the results turn out to become even more remarkable; the $R^2$ jumps to 0.248, an increase by 8 percent in relative terms compared with the specification in column 2. Without taking the precise estimates too literally, the results clearly indicate that national representation in ECB’s key units for business operations have an effect on the formulation of ECB monetary policy.\textsuperscript{128} In extensive sensitivity analyses, we examine the robustness of our results. Specifically, we experiment with three perturbations of our underlying empirical model. First, we examine the subsample stability of our estimation results. In particular, we rerun the regressions for shorter sample periods, starting in 2000:1, 2001:1, 2002:1, and 2003:1 respectively (all samples end in 2008:6). Second, we replace the ECB’s main refinancing rate as dependent variable affects our results, using the 3-months Euribor and the Eonia as alternative measures. Finally, we extend our list of weighting schemes to combine national economic data. In addition to the (eight) weights reported in Table 6, we examine national representation among heads and deputies of the ECB (separately for directorates, divisions and total) as well as national representation among heads of core business areas (again separately for directorates and divisions).

\textsuperscript{128} We also perform a more rigorous statistical assessment of the (non-nested) models, using the Davidson and McKinnon J-test. This exercise yields generally inconclusive results. Adding the fitted interest rate from the Taylor rule for economically-weighted data (column 2) to the specification for representation weights (column 10) yields a $p$-value of 0.83; and while the $p$-value of adding the fitted value from column 10 to column 2 is lower (0.60), it is still far away from conventional significance levels. Hence, the test does not allow us to reject one model against the other.
In total, we explore 195 (= 5 periods × 3 policy measures × 13 weighting schemes) different regression specifications of the Taylor rule. Table 7 summarizes the results. Instead of reporting the full set of estimated coefficients, we focus on the statistical parameter of interest, the empirical fit of the regressions. Specifically, we tabulate the average (minimum, maximum) rank of the $R^2$ of the baseline specification of the Taylor rule when national data are combined in proportion to the economic weight of the country along with complementary findings for two other selected specifications. As shown in the left panel of the table, it seems remarkable that the specification of the Taylor rule for economically-weighted data never performs best; its average rank is 7 (out of 13 different weighting schemes). Similarly, we replicate our earlier finding that Taylor rules tend to display, not surprisingly, a particularly poor empirical fit for weighting schemes based on national representation in management areas with a strong egalitarian composition, such as the Governing Council, the Executive Board, the Governors of national central banks ('equal weighting'), and the heads of directorates. On average, a Taylor rule specification for euro area aggregates into which national data enter fully symmetrically ranks ninth (out of 13), although with a somewhat wider distribution. In contrast, Taylor rules turn out to describe the ECB’s interest rate setting behavior particularly well for aggregates based on national representation among the heads of divisions and the

<table>
<thead>
<tr>
<th>Economic weight</th>
<th>Equal weight</th>
<th>Representation weight (Total, core)</th>
</tr>
</thead>
<tbody>
<tr>
<td>$rk R^2$</td>
<td>$rk of R^2$</td>
<td>$\Delta R^2$ (relative in %)</td>
</tr>
<tr>
<td>Average Min. Max.</td>
<td>Average Min. Max.</td>
<td>Average Min. Max.</td>
</tr>
<tr>
<td>Main refinancing rate</td>
<td>7 7 10</td>
<td>9 3 11</td>
</tr>
<tr>
<td>3-month Euribor</td>
<td>7 5 8</td>
<td>9 6 12</td>
</tr>
<tr>
<td>Eonia</td>
<td>7 3 9</td>
<td>5 4 12</td>
</tr>
</tbody>
</table>

*Notes:* The table reports the rank of the $R^2$ of the Taylor rule out of 13 specifications. $\Delta R^2$ refers to the relative difference of the $R^2$ to the Taylor rule specification using economic weights.
ECB management in general, especially if the analysis is additionally restricted on representation in the core business areas. Overall, national representation shares in the ECB’s core business areas provide the best empirical fit of the Taylor rule in almost every specification. The three columns on the extreme right of Table 7 report the relative increase in the $R^2$ relative to the baseline Taylor rule with economic weights. Depending on the specification, the differences range from 6 to 22 percent (in relative terms), indicating that the estimates reported in Table 6 (with a difference of about 8 percent) are rather at the lower bound.

To further assess the effects of differences in weighting schemes, we examine hypothetical interest rate paths. Specifically, we ask: Would monetary policy have been fundamentally different if the ECB had followed the Taylor rule with economically-weighted data? For this purpose, we replicate the interest rate setting behavior of the ECB using the best-fitting Taylor rule (based on the number of heads in the core business areas) and simulate the interest rate path when the representation-weighted euro area aggregates are replaced with their size-weighted values. While the correlation between both weighting schemes is strong, with about 0.90, the implied differences in monetary policy also depend on the degree of business cycle synchronization across countries.\(^{129}\) Figure 1 illustrates the results of this simulation exercise, comparing actual and predicted interest rates (using dynamic forecasting, carrying forward the discrepancy) over the sample period. The difference turns out to be of sizable economic importance. If the ECB’s monetary policy had been appropriately applied on national economic data in proportion to the economic size of the euro area member countries, the main refinancing rate would have been lower by, on average, about 0.31 percentage points. For subperiods, the deviation of the hypothetical interest rate even increases to about 0.61 percentage points. In sum, the results clearly indicate that even moderate differences in weighting schemes can have sizeable consequences for the outcome. Overall, we find that Taylor rules taking into account national presence in the key policy-making positions of the organization tend to outperform specifications purely based on economic weights. National representation in the ECB may well exert a measurable influence on the conduct of monetary policy.

\(^{129}\) For the extreme case of perfectly correlated business cycles, the weighting of national data would be irrelevant.
6. Conclusions

Supranational institutions face an important trade-off when hiring personnel. As in most organizations, hiring decisions are mainly based on a candidate’s professional qualifications. In addition, however, supranational institutions often aim for broad national representation, for various reasons. Potential benefits include greater diversity of personal backgrounds and access to local knowledge which may help implement policies (potentially leading to broader acceptance). At the same time, however, cultural issues may also become a hindrance to organizational success. Possible costs include forgoing talent for geographic variety, network effects and a national bias in decision-making.

Looking at the European Central Bank, we show that nationality is indeed relevant for both hiring and decision-making. We find a disproportionately narrow spread of national representation in the top management of the ECB. Further, there is evidence for the existence of national networks between adjacent management layers. Finally, monetary policy decisions seem to be linked to national representation in the core business areas of the ECB.

Figure 1. Main Refinancing Rate and Counterfactual Based on Economic Weights (%)

https://doi.org/10.5771/9783845286723

Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.
7. References


B. Multi-Level Decision-Making in the EU
I. Enlargements and Their Impact on EU Governance and Decision-Making

By Neill Nugent

The EU has been enlarging for over forty years. It has done so via a series of enlargement rounds: the first round (of 1973), the Mediterranean round (of the 1980s), the EFTA round (of 1995), and the 10 + 2 round (of 2004/07). Only the most recent accession – of Croatia in 2013 – has not clearly been part of an enlargement round, though in time it is likely to come to be seen as the trailblazer of a (very drawn-out) Balkan enlargement round.

Enlargement has thus long featured, as a highly prominent issue, on the EU agenda. This article focuses on the relationships between enlargements and the EU’s decision-making processes and capacities, particularly in respect of the making of legislation. By not only increasing the number of member states but also by increasing the diversity of member states, enlargements have inevitably posed major challenges for the EU’s legislative decision-making mechanisms. How have they adjusted and responded to these challenges, and what have been the consequences?

Many changes have, of course, been made to the EU’s institutional and decision-making arrangements over the years, but they have not all been related to enlargements. The increased policy scope of the EU has been another driving factor. So have growing concerns about the ‘democratic deficit’, which have led to the EP’s powers being progressively increased. In this article attention is restricted to changes that have, in large part at least, been a response to enlargements.

The article is structured as follows. The first section examines the ways in which the EU has prepared for and has adjusted to enlargements. The second section explains how the extent of institutional and decision-making changes has been constrained by a requirement that the EU should not be too efficient. The third section analyses the impacts of

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1 Prof. Dr. Neill Nugent is a Professor emeritus at the Manchester Metropolitan University, United Kingdom.
enlargements on EU decision-making outcomes. The article finishes with some general conclusions.

1. Preparing For and Adjusting To Enlargements

The prospect of an enlargement round has always given rise to concerns that accessions will make EU governance, and especially legislative decision-making, more difficult. Such concerns have arisen primarily from the fact that enlargements mean there is the prospect of more national needs and preferences having to be satisfied, or at least accommodated, if agreements are to be reached.

The first enlargement round, of 1973, duly made legislative decision-making more difficult. It did so because it occurred at a time when the EC was: 1) seeking to move into more contentious policy areas – notably in respect of the internal market, where much of the necessary negative integration had been achieved and there was now the challenge of focusing more on positive integration; 2) greatly hampered in its ability to take necessary decisions both by there being only very limited treaty provisions for majority voting and also by the impact of the 1966 Luxembourg Compromise – which combined to result in virtually all significant decisions needing the unanimous approval of all member states. The accessions of Denmark and the UK in particular strengthened decision-making rigidities, with both being generally opposed to policy expansion and both insisting on upholding the Luxembourg Compromise.

So, the addition of three more member states compounded existing decision-making difficulties and helped to produce the infamous years of Eurosclerosis – when decision-making in many policy areas, including the core internal market policy area, virtually ground to a halt to the background of seemingly never-ending disputes between member states over, for example, the product standards to be applied to such goods as chocolate, beer, and lawnmowers.

However, subsequent enlargement rounds have not been so damaging to the EU’s ability to make decisions. Indeed, in some respects they have improved the EU’s decision-making capacities by encouraging the member states to anticipate and react to enlargements by progressively adjusting institutional and decision-making arrangements so as to ensure that decision-making gridlock does not occur when (the ever-larger number of) member states disagree on a policy matter. As the following subsections on changes that have been made in advance of and in adjusting
to enlargements show, some of the changes that have been made are formal in nature and have been entrenched in the treaties whilst others have been informal.

2. An Increased Availability of Qualified Majority Voting

The founding treaties of the 1950s stipulated that the great majority of decisions requiring Council of Minsters approval must be taken by unanimity. Only very limited provision was made for qualified majority voting (QMV). This meant that the extent and speed of decision-making on most issues could be dictated by the most reluctant member state.

All of the major rounds of treaty reform that have been undertaken since the founding treaties – starting with the 1986 Single European Act (SEA) and continuing through the 1992 Maastricht Treaty, the 1997 Amsterdam Treaty, the 2001 Nice Treaty, and the 2007 Lisbon Treaty – have included extensions to the availability of QMV as a core component. The increasing size of the EU’s membership has been an important driving force behind these extensions, with it being recognised that more member states necessarily makes decision-making more difficult, especially when decisions can be made only by unanimity.

Such has been the extent of the extensions that have been made over the years to the treaty-based availability of QMV that it can now be used for over 90 per cent of legislation. Unanimity is required only for decisions in a few high-profile and sensitive areas – such as treaty reforms, enlargements, taxation, and foreign and external security policy.

3. An Increased Willingness to Use Qualified Majority Voting

Extending the availability of QMV would serve little purpose if there was not also a willingness to use it. Little such willingness existed for the fifteen years or so after the Luxembourg Compromise, except for a limited number of procedural matters and matters where a timetable was pressing. However, a willingness began to develop from the early 1980s – that is, after Greece became a member in 1981 and as the major phase of the Mediterranean enlargement, with the Portuguese and Spanish accessions, moved to its conclusion – and has continued to do so. The strong preference for consensual decision-making remains, but the culture of the Council has changed in such a way as to result in voting no longer being viewed as necessarily needing to be avoided.

Votes are now explicitly used in about 20 per cent of the cases where they could be, and in about another 10 per cent of cases they are
implicitly used in the sense that states that are known not to be in favour of a proposal choose not to register a dissenting vote. When there are formal votes, it is unusual for more than a couple of states to abstain or vote against.  

It might have been expected that the 2004/07 enlargement would have increased the use of voting, bringing in as it did not just many more member states but also member states that in important respects had different policy needs than the EU-15. No such increase has occurred. What has occurred, however, are two significant developments that may be said to amount to an increase in de facto voting. First, the shadow of the vote has become increasingly important, with the possibility of a vote being called resulting in member states in a non-blocking minority being more willing to negotiate the best deal they can get rather than be formally outvoted. This is especially so in Council formations that deal with a lot of specific and technical legislation and is less so in formations where legislation is not so common and where much of what there is covers politically sensitive matters.  

Second, there has been an increased practice of governments that are opposed to proposals registering their opposition not through casting dissenting votes but through issuing dissenting statements that are attached to the published minutes of Council meetings. This practice enables governments to signal their concerns to other policy actors and domestic audiences, whilst at the same time also enabling them to be seen by the governments of other member states to be abiding by the consensual culture of the Council and as being helpful in difficult circumstances.  

A willingness to use QMV has now even spread to the European Council, which was first given the power to use QMV – for the nomination of Commission Presidents-designate – by the Nice Treaty. On the first occasion QMV could have been used for this purpose, in June 2004, the European Council preferred to stay with its traditional consensual decision-making mode, even though there were two candidates who almost certainly would have received qualified majority support had a

2 There is a considerable academic literature on voting in the Council. See, for example: Golub 2012; Häge and Naurin 2013; Hosli, Mattila & Uriot 2011; Naurin and Wallace 2008; Thomson 2011.  

vote been called. However, in June 2014, when the Spitzenkandidat (top candidate) system was employed by the EP to pressure the European Council to accept its nominee, Jean-Claude Juncker, QMV was used – with the UK and Hungary voting against.4

4. An Increased Use of Restricted Access Meetings to Facilitate Decision-Making

The just-described increased availability of and willingness to use QMV in the Council and European Council is a practical reaction to the changed circumstances brought about both by enlargements and by the EU’s widening policy portfolio.

Another practical reaction has been increased decision-making activity outside of formal decision-making bodies, usually in restricted access meetings. The situation in Council meetings since the 2004/07 enlargement shows clearly why this has occurred:

- Ministerial level meetings may well have 150 or so member state and institutional representatives in the room at any one time, not counting interpreters. COREPER meetings may have 100 or so and working parties may have around 70.
- In consequence of the number attending, meetings need to be held in cavernous rooms, with microphones necessary and with there being little possibility of much meaningful eye contact between people who are not sitting near to each other.
- Speaking interventions often take the form more of the reading of pre-prepared statements than of real negotiations.
- Ministers, especially senior ministers, have become increasingly reluctant to attend, particularly when there are no key issues on an agenda, and when they do attend they often are not present for the whole meeting.

Given this nature of Council meetings, and with many more allies now being required if qualified majorities on proposals are to be found or are to be denied, much of the political activity that is necessary for decisions to be able to be made takes place on the margins of meetings and in a myriad of pre-meeting informal settings in which representatives of

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different combinations of member state governments gather on both bi-
lateral and multilateral bases. This pattern even reaches up to European
Council level, as the mushrooming in recent years of all sorts of pre-
summit meetings – many of which have been focused on the eurozone
crisis – illustrates.

Restricted access meetings can allow national representatives to ex-
change views more frankly and easily than they can when the representa-
tives of all governments are present. As such, they can facilitate deci-
sion-making, not least by enabling pre-decisions to be made, especially
when representatives of key member states are involved in the meetings.

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In the context of EMU, two particularly important, functionally spe-
cific and formal restricted access meetings have been established. One
of these is the Eurogroup of ministers, which was created in 1998 as
an unofficial gathering of Ministers of Finance from eurozone states
and which, in recognition of its increasing importance, was given legal
status by the Lisbon Treaty. The other is the Euro Summit, which
emerged out of the eurozone crisis and which was given formal status
by the 2012 Treaty on Stability, Coordination and Governance (TSCG –
the so-called Fiscal Pact Treaty, which is an extra-EU treaty). Heads of
State or Government of eurozone members may attend all Euro Sum-
mits whilst Heads of State or Government of member states that have
ratified the TSCG but which are not eurozone members may attend for
certain agenda items. As Wessels has shown, the frequency of Euro Sum-
mit meetings depends on ‘the issues at hand and on the overall political
context’. So, there were four meetings in each of 2011 and 2012, one
in 2013, and none at all in 2014. In 2015, the Greek crisis brought Euro
Summits to the very centre of the decision-making stage.

5. Institutional Changes Designed to Provide Better Leadership

The EU was long thought to suffer from something of a leadership deficit
that was damaging to decision-making efficiency and effectiveness.
There was no shortage of policy actors offering leadership in particular
contexts and at particular times – with the Commission, the Council Presi-
dency, and groups of member states (especially France and Germany)
much to the fore – but as the EU grew larger and became involved in an

ever wider range of policy activities EU political elites began to sense an increasing need for a more focused and consistent leadership that could increase the EU’s decision-making capacity.

This felt need, which was intensified from the late 1990s as the prospect of a major enlargement round including ten Central and Eastern European countries (CEECs) grew closer, formed an important part of the background to the decision – first taken at the 2000 Nice summit and then elaborated at the 2001 Laeken summit – to convene a Convention on the Future of Europe, which quickly came to be known as the Constitutional Convention. The Convention laid the bases for the inclusion in the Lisbon Treaty of two new institutional positions designed to give the EU greater leadership potential and strengthen EU decision-making capacity. One of these new positions was the post of semi-permanent and full-time European Council President. The other was the post of High Representative of the Union for Foreign Affairs and Security Policy, which was a considerably revamped and upgraded version of the post of High Representative for the Common Foreign and Security Policy which had been established by the Amsterdam Treaty.

Another, and related, recent efficiency-minded institutional change intended to improve leadership has been a reform of the Council Presidency system. The Council Presidency used to rotate between the member states on a six-month basis, but following the 2004 enlargement it was decided to arrange it in groupings of three states. This change – which grew out of a long-standing practice of preceding, current and succeeding Presidencies working closely with one another in a system known as the troika – was taken partly to assist (the now much larger number of) small member states with the heavy duties associated with the Presidency and partly to try and improve continuity and enhance consistency between Presidencies. The new system was formalised and strengthened in a Declaration annexed to the Treaty of Lisbon, which stated that the Presidency would now ‘be held by pre-established groups of three Member States for a period of 18 months’. In practice, this change is not seen by EU practitioners to have had much of an impact (interviews conducted in Brussels).

6. Increasing Numbers of Decision-Making Processes

When the EC was established in the 1950s a fairly simple and hierarchically-based decision-making system was created in the form of the
Community method. However, as Ingeborg Tömmel demonstrates in her article in this special issue, as the EC attempted to move into an increasing number of policy areas and as it also enlarged, the Community method proved to be too rigid and inflexible for types of policy development that touched on particularly sensitive issues or on matters that sharply divided the member states. Accordingly, since the late 1960s, when foreign policy began to be developed, and more particularly since the early 1990s, when pressures to expand greatly the range of the policy portfolio intensified, increasing use has been made of a variety of non-hierarchical policy approaches that employ an array of indirect steering mechanisms. The use of these approaches, which are essentially intergovernmentally-based, has resulted in a mushrooming of decision-making processes that are more flexible and less constraining than the classic Community method. Foremost amongst these newer decision-making processes are various forms of the new modes of governance (NMG), and especially the open method of coordination (OMC), which have come to be used for a wide range of social and economic policies – many of them as part of the Lisbon Strategy/Europe 2020 policy programme.  

So, an increase in the number of policy processes to accommodate differing national positions has been another way of dealing with the challenge of ensuring that the growing number of member states brought about by enlargements has not resulted in decision-making impasses. Precisely how large the number of increased policy processes has been obviously depends on the criteria that are used for counting them. A figure of well over 100 formal decision-making processes can be identified if account is taken of what may be thought of as important but not necessarily ‘first rank’ variations – with the former including, for example, whether or not the European Economic and Social Committee and the Committee of the Regions must

be consulted on a policy proposal. If attention is narrowed to first rank variations the figure naturally drops, but it remains, by comparison with decision-making processes in national political systems, still very high. An indication of this is seen in the figure given by the Constitutional Convention, which identified no fewer than 28 significantly different procedures.\(^8\)

### 7. Increasing Differentiation

A central assumption when the EC was founded was that all member states should and would fully participate in all policies. There was to be no picking and choosing of which policies to participate in and there were to be no laggards in honouring policy commitments. In short, all member states were to swim abreast in policy terms.

For the most part, this expectation and accompanying obligation continues. However, it does not do so in pristine form. This is because since the late 1970s, and more particularly since the early 1990s, there has been an increasing acceptance in EU circles that there are circumstances in which some member states will not, and sometimes even should not, be full participants in particular policies. To use the term that has come to be generally utilised for describing this phenomenon, the need for some policy differentiation has come to be accepted.\(^9\)

Differentiation is the starkest way in which the EU has responded to the situation brought about by enlargements whereby its membership has come to include states that either have no wish, or do not have the capacity, to be part of particular policy initiatives and activities. This heterogeneity of membership has resulted in the development of policy areas where one or more member states do not participate, do not fully participate, or participate in distinctive ways. It is very striking in the context of an analysis of the impact of enlargement on EU governance and decision-making that none of the founding member states has sought to

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Neill Nugent

use differentiation to opt out, even partially, of a major EU policy activity, whilst two of the three states of the first enlargement round (Denmark and the UK) have been differentiation’s most active users.

There are different types of differentiation, some of which are formal and some of which are informal.

7.1 Formal Differentiation

Formal differentiation consists of two main types: à la carte and multi-speed.

À la carte differentiation is the more important type in that it involves member states choosing not to participate in a policy or part of a policy. The European Monetary System, which was developed from the late 1970s with the UK not participating, was the first instance of such differentiation. It was followed in the mid-1980s by the Schengen System, from which the UK and Ireland opted out. À la carte differentiation was then given a considerable boost when the Maastricht Treaty gave it formal authorisation. The authorisation was very specific, taking the form of permitting the UK and Denmark not to participate in the third stage of EMU and allowing also the UK to opt out of the Social Charter. Along with the Treaty’s creation of the intergovernmental CFSP (Common Foreign and Security Policy) and JHA (Justice and Home Affairs) pillars, these opt-out provisions can be seen as laying foundations for a less rigid treaty base for policy development. As Majone has put it: It is now clear… that the differentiation or flexibility that appeared in several forms in the TEU was no momentary aberration – a sort of à la carte integration – but the clear indication of an emergent strategy for achieving progress in politically sensitive areas, even at the price of a loss of overall coherence of the system.10

The Amsterdam Treaty widened the Maastricht ‘dispensations’ by providing for ‘Provisions on Closer Cooperation’ in the Community and JHA pillars. This authorised policy development within the treaty framework but with not all member states involved, subject to a number of safeguards and conditions – including that such cooperation be open to all member states, ‘is only used as a last resort’, and ‘does not affect the “acquis communautaire”’ (TEU post-Amsterdam Treaty, Article 43).

The Amsterdam Treaty did not extend closer cooperation to the CFSP, but did allow for a different kind of flexibility within this policy area in that it allowed for member states not to apply CFSP decisions under specified circumstances. The Nice Treaty subsequently extended the remit of closer cooperation – which it renamed enhanced cooperation – to the CFSP pillar (but with military and defence matters excluded), and made it easier to operationalise by replacing the Amsterdam stipulation that a majority of member states must be involved in a closer cooperation initiative by a stipulation that only eight (increased to nine when Bulgaria and Romania joined the EU in 2007) must be so. The Lisbon Treaty largely confirmed the post-Nice position, but dropped the military and defence policy exclusion.

The perceived divisive nature of enhanced cooperation is an important reason why it was initially not used. However, it has gradually come to be seen as being more acceptable and is now occasionally being utilised, such as for the establishment of a European patent – from which Italy and Spain opted out because of objections to the limited use of languages in the operation of the scheme. It may in time prove to be very significant for the use of enhanced cooperation that at the time of writing several member state governments are supporting its use in one of the most sensitive policy areas of all: taxation. More particularly, some governments (the exact number keeps varying, but hovers around 11) are seeking to use enhanced cooperation for the creation of an EU financial transactions tax.

The other main type of formal differentiation is multi-speed differentiation, which occurs when a member state or states wish to participate in a policy but judge themselves, or are judged by others in authority, to be not yet sufficiently prepared or able to do so. The first clear example of multi-speed differentiation occurred with the launch of the single currency phase of EMU in 1999, when Greece was excluded (although only until 2001 as it turned out) because the Commission, supported by the Council of Ministers, decided that it did not meet the qualifying convergence criteria. The 2004-07 enlargements then saw multi-speed differentiation on a mass scale, with the new member states all initially being prevented by their terms of accession from becoming EMU or Schengen members until they had established their credentials for membership. (Seven of the ten 2004 acceding states have since become eurozone members – the Czech Republic, Hungary and Poland are the exceptions – whilst nine of them have been admitted into the Schengen Area – with Cyprus being the exception.)
7.2 Informal Differentiation

The word ‘differentiation’ is usually applied only to the formal à la carte and multi-speed processes of the kind that have just been described. However, as Andersen and Sitter have argued, there is a strong case for applying it more widely because opting out or exclusion from a policy area are not the only ways in which there is variation between member states in their policy engagement.\textsuperscript{11} There are other ways, of which an especially important one is when what Andersen and Sitter call ‘autonomous integration’ exists. This occurs when weak demands for single organisational and behavioural patterns at EU level combine with strong national level pressures for the maintenance of established national practices. Situations of this sort are particularly common in some of the more sensitive economic and social policy spheres, including those covering industry, employment, and social welfare. In such circumstances, one of two types of policy instrument is commonly used. The first type involves EU laws, usually in the form of directives, which allow considerable flexibility in national transposition and application. A particularly graphic example of such a law is a directive that was agreed in March 2015 – after years of highly-charged political conflict – on the use of genetically-modified crops (GMOs) in the EU.\textsuperscript{12} Under the directive, EU member states are, subject to some restrictions, able to restrict or ban the cultivation of GMOs in their territory, but are not able to block the authorisation process at EU level. The second type of policy instrument involves non-legal mechanisms such as communications, recommendations, and resolutions. Member states may be strongly pressured to abide by the requirements of the contents of such policy instruments, but the instruments themselves have no binding force behind them. This is one of the main criticisms of the OMC, which relies heavily on soft law instruments.

But whether or not legal instruments are used, autonomous integration involves member states being accorded considerable flexibility in the ways in which they apply decisions. Naturally, where this flexibility


exists, the need for member states to oppose the taking of the relevant authorising decisions is weakened: which is precisely why the above-mentioned GMO directive was able to be (eventually) passed.

8. Constraints on Being Too Efficient

The EU has thus adjusted itself in many ways so as to ensure that enlargements have not resulted in its decision-making capacities grinding to a halt. But, it has always been restricted in how far it has been able to go in making such adjustments. Two, in practice overlapping, constraints have existed, both of which are found – to differing degrees and in varying forms – in all federal and quasi-federal systems.

8.1 A Reluctance and Unwillingness to Maximise the Efficiency of EU Decision-Making Processes

There has been a reluctance of some member states and an unwillingness of others to go as far in pursuing decision-making efficiency as ‘advanced integrationists’ have wished. (In democratic systems, efficient decision-making may be said to consist of decisions being able to be made relatively quickly by a restricted number of policy actors operating on largely majoritarian bases.) States that are not in the ‘integration fast stream’, and especially states where eurosceptic tendencies are pronounced, are not naturally predisposed to support more ‘efficient’ EU decision-making processes and the loss of national control that is entailed unless clear national benefits will result.

The UK, with its concerns about the preservation of national sovereignty, has long been the most ‘problematic’ state in this regard (though, in a notable exception to the customary UK position, Mrs Thatcher actively supported the use of QMV for the passage of legislative measures to give effect to the Commission’s programme of ‘completing’ the internal market by 1992). But, the UK has not been alone in wanting a slower integrationist pace than ‘fast integration’ states such as Belgium, Italy and Luxembourg normally have preferred. Denmark, Sweden and more recently the Czech Republic, Hungary and Poland have, for example, also been in the ‘slow integration stream’ on particular issues. Sometimes, even states normally associated with strong integrationist positions have adopted cautious stances towards ‘efficiency reforms’. Such was the
case, for example, with Germany in the Intergovernmental Conference (IGC) that produced the Amsterdam Treaty, when domestic political difficulties resulted in Chancellor Kohl being unwilling to agree to all of the extensions to QMV most other states either wanted or were prepared to accept.

A point meriting note here is that prior to the 2004/07 enlargements it was widely assumed, especially by those in the ‘intergovernmental school’ of EU Studies, that the new Central and Eastern member states would be particularly sensitive to sovereignty-related issues and hence would be less-integrated minded than most existing member states. In practice, as a group they have not proved to be so.

8.2 The Need to Retain the Confidence of All Member States in Decision-Making Processes

Like all federal and federal-like systems, the EU must retain the confidence of its constituent units (the member states). It cannot be too majoritarian in its governance arrangements. It is a voluntary organisation, so retaining the confidence of members is vital. If member states were to feel their needs and preferences were not being reasonably accommodated within decision-making settings they could become highly disruptive members (as the UK has been at various times) and could even come to question the value of membership.

The EU, therefore, has always had to balance the need for decision-making efficiency with the potentially conflicting need of ensuring that all member states feel they have a fair involvement in decision-making processes. Accordingly, several ‘inefficient’ features of decision-making processes are deliberately ‘built in’ to reassure member states – especially eurosceptic-leaning and smaller member states – that their policy needs and preferences will be both heard and will not be, and indeed cannot be, easily ignored or by-passed. The most notable of these ‘inefficient’ features include the (over) large sizes of the College of Commissioners and the EP, and the continued use of decision-making by unanimity in the European Council for virtually all decisions and in the Council for some important decisions.
9. The Impact of Enlargements on Decision-Making Outcomes

So, over the years the EU has made various changes and adjustments to its decision-making structures and processes that, in large part, have been designed to enable it to adapt to enlargements. But it has also retained features of its original structures and processes – such as one Commissioner for each member state and the unanimity requirement in the Council for a few highly sensitive policy areas – that may be viewed as making for decision-making inefficiencies. What does the evidence indicate with regard to where, in practice, the balance lies between decision-making efficiency and inefficiency?

9.1 The Volume of Decisional Outputs

It is easy to make a case that notwithstanding the ‘improvements’ that have been made to EU decision-making processes, EU decisional outputs are less than satisfactory. Too many policy areas can be portrayed as being not sufficiently developed, whilst too many of those that are developed can be presented as being based not on clear and strong policy decisions but rather on decisions that are rooted in compromises in which there is something for everyone.

However, the critique should not be overdone, for there clearly have been very considerable EU-level policy and legislative achievements over the years. To cite just a few of the EU’s most important policy advances since the 1995 enlargement: EMU and the single currency have been established and operated; the internal market has continued to deepen on many fronts, with significant legislation having been passed in such key areas as the liberalisation of network industries, the opening-up of services, and protections for consumers; justice and home affairs policy has mushroomed, with many measures adopted – on matters including visas, management of external borders, and police and judicial cooperation – in pursuit of the goal of creating an ‘area of freedom, security and justice’; and the foreign and external security policies have both greatly advanced, to the point that the EU now has launched over 30 civilian/police/military operations – something that was almost unimaginable until relatively recently.

This success of EU policy and legislative processes since the 1995 enlargement can be judged not only in qualitative terms but also in quantitative terms, with the EU having continued to produce a very
considerable volume and a wide range of policy and legislative outputs each year. Focusing here just on legislative outputs, Hix, König, Luertgert & Dannwolf and others have indicated that the volume of legislation in the early 2000s was lower than it was in the first half of the 1990s. But, this depends on what is counted, for the total number of ‘basic’ legislative acts (that is, excluding ‘amending’ acts) actually rose: from a total of 1500-2000 per year in the first half of the 1990s to 2500-3000 in the first half of the 2000s. If directives, which are usually the most important legislative acts, only are counted, there is indeed a decline, but it is only slight – from 40-60 in the first half of the 1990s to 35-45 in the first half of the 2000s. So, the figures show no sign of the 1995 EFTA enlargement having greatly diminished the EU’s decision-making capacity.

The EUR-Lex figures for the years immediately after the 2004 enlargement show the total number of basic acts per year falling back to between 1500-2200, but the number of directives held steady – albeit within a wider band of between 16 (2007) to 76 (2009). A number of academic studies – usually using narrower tabulation criteria than EUR-Lex and employing variable measuring techniques – have also shown no significant reduction in the total number of acts being adopted in the early years following the 2004 enlargement. Taking figures compiled by Best and Settembri, comparing two twelve month periods before and after the 2004 enlargement, a total of 479 acts were adopted under the Greek and Italian Presidencies in 2003 whilst 455 were adopted under the British and Austrian presidencies in the second half of 2005 and the first half of 2006. However, whilst Best and Settembri’s figures indicate no

significant decline in the total volume of EU acts, they do show a decline in the proportion that are legislative acts: from 56 per cent to 49 per cent, thus confirming the more widely-observed feature of EU policy and decision-making processes of a decline in the use of the Community method to make legislation and an increase in the use of other methods to produce non-legislative outputs.

So, the last two enlargement rounds have not resulted in a significant overall decline in the volume of EU legislative activity. Moreover, in so far as there has been a marginal decline in legislative outputs since the early 1990s, it is not accounted for by enlargements. Focusing on directives, a number of – in practice overlapping – reasons can be identified for the decline. One is that the particular circumstances of the late 1980s and early 1990s, when the EU was very much in policy expansionist mode and required a very high volume of legislation – not least in regard to ‘completing the internal market’ – no longer apply. A second reason is that, as Hix (2008) has emphasised, the nature of the policy agenda has shifted in the direction of more contested and divisive issues. There used to be a broad consensus amongst policy actors about the principle of creating the internal market, but once the essential foundations of the market were largely in place and the political debate moved onto the extent to which and the ways in which the market should be social or economically liberal in character, consensus became less easy to find and decisions became harder to make. A third reason is that since the early 1990s it has become logistically more difficult for the Commission to bring forward legislative proposals. It must, for example, now produce impact assessments for any new legislation of significance and it must be able to justify new legislative proposals in terms of the principles of subsidiarity (EU actions must be more likely to advance policy goals than national actions) and proportionality (EU actions must not exceed what is necessary to achieve the objectives of the treaties). The working assumption has thus become that new EU-level legislative activity must be seen to be ‘fully justified’ – which, inevitably, has made the Commission more cautious about bringing forward legislative proposals. A fourth reason is that as the EU has moved into more difficult and sensitive policy areas – of both a socio-economic nature, such as Lisbon Strategy/Europe 2020-related policies, and of a non-economic nature, such as security-related policies – then so has much of its policy-making activity become focused on using non-legislative policy instruments. In such policy areas the member states often accept that there is a need for EU policy activity
but are not necessarily persuaded that this need always take the form of enacting binding legislation.

A fifth reason, which had been ‘lurking’ for some time but that has been greatly boosted by the rising tide of euroscepticism that has accompanied the post 2008-economic and eurozone crises, is widely-felt concerns that the EU has not sufficiently prioritised the core policy challenges facing the Union. Such concerns have led to various initiatives over the years – initially under the general heading *Better Lawmaking* and more recently *Better Regulation* – which have included drives for more focused and more effective legislation, and also only for legislation that is absolutely necessary. This latter drive ‘took off’ in 2012 and has continued to date: only 11 new directives were passed in 2012 and only 14 in 2013.\(^{17}\) The figure of 53 directives in 2014 might at first sight appear to indicate that the drive came to a halt, but 2014 was untypical as it included the last few months of the 2009-14 Parliament, which like previous outgoing Parliaments used its dying days to push through unfinished business. The drive was returned to after the 2014 EP elections, with the incoming Juncker Commission proposing in its 2015 Work Programme only 23 ‘new initiatives’, of which just fourteen were anticipated as being at least partly legislative in character.\(^{18}\)

9.2 The Speed of Decisional Outputs

EU policy processes are subject to great variations in terms of how quickly they proceed. Whereas at the national level a government with a working majority in the legislature can normally be confident of making reasonably rapid progress with a policy initiative, at the EU level no such assumption can be made – especially if the policy issue in question is controversial and/or is strongly contested.

Examples of very slow, and in some cases no, decision-making in seemingly important policy areas are not difficult to find. Corporate taxation policy is an example of the latter, with the Commission having first made the case for some harmonisation of corporate tax rates and

\(^{17}\) EUR-Lex 2012 and 2013.

shifting responsibility for corporate taxes from the national to the European level as long ago as the early 1960s – a decade before the first enlargement. But, nothing much beyond the loose 1997 voluntary Tax Code and legislative instruments to deal with specific tax problems, such as double taxation, have been achieved. In consequence, the Commission’s attention has increasingly turned more to the need for a common corporate tax base, but this idea has also met with stiff resistance from some member states.

An example of very slow decision-making is provided by the EP and Council regulation on The Registration, Evaluation, Authorisation and Restrictions of Chemicals (REACH). Proposed by the Commission in October 2003 – for the purpose of reducing health risks and protecting the environment through the required registration and authorisation over an eleven-year period of some 30,000 substances – the Regulation was not passed until December 2006, by which time its contents had been much diluted. The protraction of the policy process was occasioned by the complexity of the legislation (it was some 1,000 pages in length!) and by fierce disagreements in and between the Council and EP – that were partly fuelled by intense lobbying from environmental and business interests – about where the balance should lie between environmental protection on the one hand and competitiveness on the other.

However, slow though EU policy processes can be, they are not necessarily so. Several factors can make for a relatively speedy legislative process. The extent to which a proposal is or is not controversial is, of course, one factor. Another is the availability of QMV in the Council. And a third factor is the applicable legislative process, with measures that are subject to the one-stage consultation procedure naturally tending to proceed more quickly than those that are subject to the potentially three-stage ordinary procedure.

It was noted above that the 2004-07 enlargement has not in itself reduced the volume of policy outputs. The evidence in regards to whether it has reduced decision-making speeds is not wholly consistent. Two major research studies of the early post-enlargement years showed that decision-making speeds did slow, albeit only relatively marginally, as a
result of the enlargement, but two other studies detected no such decreases. The explanation for the contrasting findings of the studies lies in a mixture of differences in the methodology used and differences also in the decisions being studied.

Yet, however one evaluates the empirical evidence, it is clear that, notwithstanding the increased transaction costs involved, the 2004-07 enlargement round has not significantly slowed the speed of EU decision-making. There appear to be three main reasons for this. The first reason is that policy actors from the 2004-07 member states rapidly adapted to the EU’s prevailing decision-making norms and mores, and particularly to coalition dynamics. So, representatives from the new member states quickly came to recognise, as much as representatives from EU-15 states have long done, the importance of coalition formation and of not being isolated in the Council. The second reason is that the pre-2004 trends of increasingly using explicit and implicit QMV and settling matters as early as possible (notably by reaching agreements at first reading under the ordinary legislative procedure), both of which quicken decision-making, have continued. The third reason is that the enlargement round further stimulated the already developing movement away from the use of tight legislation towards the use of policy instruments that give more room for adjustments to suit local circumstances. This is most obviously the case with the increasing use of non-legislative instruments, but even where legislative instruments are used they are often now looser and more flexible in form than they formerly were. As such, they are more likely to be politically acceptable.

What then are decision-making speeds? Taking legislative proposals that are subject to the ordinary procedure, during the 2009-14 Parliament the average period from the Commission issuing a proposal to it being finally adopted was 19 months. Since the 19 months is an average, much legislation naturally passes at a faster speed. So, legislation that is

agreed at first reading – which now constitutes over 85 per cent of concluded ordinary procedures – averages 17 months.\textsuperscript{22} Best and Settembri calculate that what they categorise as ‘major’ legislative acts take, on average, almost 900 days from the initial reference from the Commission to the Council and EP to adoption, while ‘ordinary’ acts take almost 400 days and ‘minor’ acts take just over 200 days.\textsuperscript{23} These timescales are longer than is common in national legislatures, but given the enormous diversity of interests and the large number of actors that are involved in EU decision-making processes they are not as protracted as perhaps might be anticipated. That said, the figures just given do not, of course, allow for acts that the Commission would like to have proposed but did not do so because it knew that they had no chance of attracting the required support.

10. Conclusions

The EU has adjusted its decision-making arrangements over the years so as to ensure that as the number of member states has increased so has the sometimes predicted decision-making paralysis been avoided. In addition to formal changes that have been made to decision-making processes, attitudinal changes amongst decision-makers have also been important, with it having become increasingly recognised and accepted that – in an EU with now so many member states and so many areas of policy involvement – decision-making flexibility is vital if the EU is to be able to function in a reasonably efficient manner.

The combined effect of the changes has been to ensure that legislative processes have continued to be reasonably efficient, both in terms of the volume and speeds of outputs. Where the changes have impacted most has been on the organisational nature of the EU itself. This is most obviously seen with differentiation, which is both making the EU a more internally varied organisation and is altering what it means to be an EU member state. The increasing use of differentiation is usually presented by supporters of the European integration process as being regrettable because it loosens the nature of the EU, but it is also highly functional in that it enables integration to proceed.

\textsuperscript{22} ibid.
\textsuperscript{23} Best and Settembri (2008b).
Like most of the other changes to decision-making processes that have been noted in this article, differentiation has been introduced and developed in a pragmatic and adaptive way rather than being laid down at a distinct moment as part of an intended transformation of the EU system. But, the shifts in the nature of governance that the changes have brought about may certainly be thought of as amounting to a de facto transformation.

II. European Hesitation: Turkish Nationalism on the Rise?

*By Dirk Rochtus*

The question whether or not Turkey can or should be allowed to accede to the EU has already stirred up a lot of discussion. The advantage of Turkey’s application for EU membership is that ordinary citizens in Europe have also started to think about the further enlargement of the EU. The accession of the Central European and the Baltic States on May first 2004 passed off almost unnoticed. The Turkey issue on the other hand roused the emotions, especially as the country differs so much from the new EU member states or in other words because it is experienced as “less European”. Old issues crop up again even more intensely. The debate on Turkey is not simple and cannot be held in black-and-white. The pros and cons perfectly balance one another. Each argument that is put forward supporting Turkey can immediately be refuted and conversely.

The debate about Turkey’s possible accession to the EU is about two big issues that have to do with culture and identity, on the one hand, and costs and benefits of an economic, political and geostrategic nature on the other. As by early October 2004, the time when the European Commission was about to present its report on Turkey, it became clearer that Turkey would fulfil the Copenhagen criteria (“sufficiently” as the Commission would write in the end) and it became increasingly difficult to slam the door in Turkey’s face. No doubt Turkey has carried through impressive reforms in the past years, which could be denoted as “Turkestroika”.

Finally on October third 2005 the EU decided to open the negotiations with Turkey.

Although the economic situation continues to take much thought, it is an issue that can still be arranged and does not only concern the Turkish application for EU membership. The focus of this contribution will be on the role

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of culture, identity and the Kemalist nature of the Turkish state. The statement by Giscard d'Estaing that Turkey does not belong in a Europe which is characterised by Christianity, is notorious. This statement in its turn reinforced the prejudice of Turkish commentators that the EU is a “Christian club”. Especially in Germany where the Christian Democratic Party is still a real people’s party, the Turkish EU ambitions faced fierce opposition. The Christian Democrats even came up with an alternative: privileged partnership.

Is Turkey's size the actual problem (in terms of population, it has as many inhabitants as the ten new EU Member States together)? If Turkey would be a country with a small Muslim population, would it have been integrated into the EU much sooner? Would this also be the case if it were a country with a large, non-Islamic population? The problem thus seems to lie in the combination Islam and demography (the large number of inhabitants). The underlying fear is that a country with such a large Muslim population would contribute to the reinforcement of Islam in Europe because of its weight within the EU institutions. The element that most explains why opponents consider Turkey “different”, is religion. Still, how can this “being different” be defined by religion these days?

That leaves the question of whether having the Turkish identity implies being Turk as well as being Muslim. There are indeed also Jews, Armenians, Christian Assyrians who are Turkish nationals, but can a Turk who does not belong to one of these minorities also choose to become a Christian? Does the fact that 99% of the Turkish population is born into the Islamic culture, not mean that being Turk is the same as being a Muslim, to any extent? Although, historically speaking, the EU originates from a Christian source of inspiration, it does not present itself as a "Christian club". This is demonstrated by the debate on allowing not just Turkey but in the future also Bosnia-Herzegovina to accede. Besides, Christianity is not the dominating or exclusive philosophy in all EU states. Belgium, for instance, is built on the balance between Catholicism on the one hand and freethinkers on the other. Anyway, people in Europe fear that because of Turkish EU-accession the identity of Europe or of the European Union, would gradually fade.

The question is: What does identity mean? And when is it being threatened? Identity concerns characteristics that give people an individuality that makes them different or separates them from other people. The most visible and decisive ones are language and religion, if we are talking about population groups rather than about individuals. In the EU the coexistence of different languages still puts up barriers. Still, this does not need to be an
impediment in creating a European identity, especially if the speakers of these different languages, who consider themselves part of different nations, are familiar with one another through their historic and geographical backgrounds.

With Turkey, the issue is more complicated. At first sight, the people in Western Europe seem to have little in common with Turkey throughout history. Moreover, Anatolia’s peripheral location causes Europeans and Turks to hardly have any personal contacts with one another. Among Europeans, the historical sense of alienation and geographical distance is even enhanced by a religious factor, namely the fact that 99% of the Turks adhere to the Islam. They hardly know anything about Islam and this inadequate knowledge feeds prejudices that are even enhanced by terrorists committing acts and crimes in the name of Islam. September 11 has made Samuel Huntington’s article on the "Clash of Civilizations" topical again. Religion is starting to play a role again in one's own identity building process and even becomes a weapon to fight the powers that attack the personal identity. The statement of the German bishop Algermissen fits in with this framework: "Unsere Schwäche macht den Islam stark". The Islam he is talking about has a threatening, expansive and aggressive aspect to it. He is not directly referring to Turkey, but the idea that a state with a Muslim population is knocking on the door of the EU (or stands at the gates of Vienna to use a metaphor), the idea that such a state could pose a threat, is not far-off.

Since 1839 (with the proclamation of the Tanzimat reforms by the Sultan), Turkey has been going through a modernisation process. This can of course not be compared to the Enlightenment, but here too – just like in the West - "enlightened despots" (sultans) and intellectuals (Young Turks) tried to reform the structures and way of thinking. During a disputation with the German historian Wehler, the Turkish political scientist Hasan Ünal, who is opposed to Turkey’s application for EU membership, pointed out the exemplary role of the Enlightenment and the ideals of the French Revolution for Turkey: "Im späten Osmanischen Reich wurde das Rechtssystem von europäischen Ländern übernommen und an den Islam angepasst" (In the Late Ottoman Empire, the legal system of European countries was adopted and adapted to Islam). The Kemalists continued this work using a Western instrument, the nation state. The difference with the West is that Turkey is still stuck in that phase. Whereas European nations mentally distanced themselves from nationalism after the Second World War, Turkey has not

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3 Die Welt, 3 August 2003.
4 Süddeutsche Zeitung, 3 November 2002.
yet taken any steps towards the concept of the post-modern state, which is
described by Robert Cooper as a system which “(...) does not rely on bal-
ance; nor does it emphasise sovereignty or the separation of domestic and
foreign affairs. The European Union has become a highly developed system
for mutual interference in each other's domestic affairs (...).”

So nationalism is another argument that would distinguish the EU from
Turkey. The European Community provided an answer to the state nation-
alism which had immersed Europe in two World Wars. National egoisms
should be overcome. The EC/EU has succeeded in bringing old enemies
together and in reconciling them, but national identities continued to exist.
Therefore mechanisms were looked for to reconcile the national identities
with the EU being an effectively organized whole.

The Kemalist state is characterised by a Jacobin strive to have the nation
and state coincide with each other. Whereas the Turkish ethnic majority is
the core, non-Turkish population groups are expected to assimilate. To push
this assimilation through, the Turkish state sometimes used less democratic
means throughout history. This attitude can be traced back to the Sèvres
Trauma which still haunts the Turks. It was against the partitions plans
drawn up at the French town of Sèvres (1920) after World War I that Mus-
tafa Kemal took up arms as the leader of the National Liberation Movement.
This would lead to the foundation of the “one and indivisible” Republic of
Turkey in 1923. It is against every real or pretended threat of the integrity
of the republic that those politicians and generals that see themselves as
heirs to Atatürk’s ideas or ‘Kemalism’ are opposed. Internal dangers like
Kurdish nationalism or Islamist fundamentalism are seen in the light of at-
tempts to destroy the pillars of the Kemalist system, namely republicanism
and secularism. It is significant to see how much the governing AKP is try-
ing to enfeeble the suspicions as if it were led by fundamentalist ideas.

The resurgence in the eighties of the ideas of namely Kurdish nationalism
and political Islam, which already threatened the young republic, proves
that not much has changed since the days of Atatürk. The problems re-
mained the same for Turkey, and the way in which they were dealt with,
does not differ much from the beginning period. This is because as state
document Kemalism is still dominating the minds of the leading groups in
the Turkish society. The struggle that the Kemalist establishment was and
still is conducting against Kurdish nationalism and political Islam, was a
struggle with arms or with political and jurisdictional means against the
forms in which they appeared, against DEHAP, PKK or KADEK, or against

124
Islamist parties under whatever name the latter participated to elections. Even when at the present day a so-called moderate Islamist party, the AKP with Prime Minister Tayyip Erdoğan and foreign minister Abdullah Gül, has come to power, Kemalists remain suspicious, fearing that the party might have a “hidden agenda”. Although the armed arm of Kurdish nationalism has been shattered since the capture of their leader Öcalan in February 1999, the Kemalist state still worries about the impact that some form of Kurdish autonomy in Northern Iraq could have on the Kurdish population in South East Anatolia.

Being anxious about the security and the integrity of the Turkish territory, the Kemalist establishment never has had any empathy for the internal reasons which lie at the base of the challenges that both Kurdish nationalism and political Islam pose to the Kemalist state. Both phenomena might have counted on sympathy or even support from abroad, even from external enemies of Turkey, this however does not alter the fact that they are a reaction to Kemalism itself, i.e. they first originate from inside.

In Kemalist circles a certain uneasiness prevails with regard to the effects of an eventual membership of Turkey to the EU. The question whether the national integrity is guaranteed, gives birth to most concerns. Kurdish nationalists however and the so-called “fundamentalists” – some call them “Light Muslims”\(^6\) – are much in favour of the accession of Turkey to the EU. Whether this stems from a deep conviction or from a belief in the values that the EU postulates still has to be proved. An EU-membership of Turkey offers protection to both movements and their leaders. Erbakan knocked at the door of the European Court of Justice and Öcalan set his hopes on the European Court of Human Rights in Strasbourg in order to shun the execution of the death penalty. Tayyip Erdoğan and his AKP-government expect more religious freedoms to come with the EU-membership. The Turkish citizens of Kurdish origin can only benefit from the perspective of Turkey becoming a EU-member state. The EU compels the political class to carry through reforms of which all Turkish citizens, whatever their religious or ethnic background may be, would reap the fruits. But the question remains whether the EU-led changes in the legal framework are sufficient to liberalize Turkish society and politics. Demet Yalcin Mousseau, who is Jean Monet Assistant Professor of International Relations at Koç University, Istanbul, states that “Turkish citizens must develop a desire for the rule of law to protect individual rights”, but “if Turkish accession to the EU does not

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6 Sean Michael Cox, “Turkey’s “Light Muslim’s” and the West”, in: *Turkish Policy Quarterly*, spring 2003, pp. 47-56.
result in increased employment opportunities in the market, substantial numbers of voters will continue to support parties that make nationalist, religious, or other collective appeals\textsuperscript{7} (such as for instance the Nationalist Action Party, the MHP).

We notice in Turkey in the last months a “growing nationalist frustration with the United States and Europe”, as Philip Gordon and Omer Taspinar call it\textsuperscript{8}. Turks feel uneasy about the enduring isolation of the Turkish Republic of Northern Cyprus, the revival of Kurdish nationalism (with its violent attacks on civil targets in Turkey) and Western pressure for the recognition of the Armenian genocide (or the so-called “tragedy” as the Turks use to say). Nationalist feelings are growing in Turkey, whereas at the same time the support for EU-membership is in decline (support has fallen in the past two years from 85 per cent to 54 per cent\textsuperscript{9}). The Turks are starting to suspect the EU and Western countries of wanting to “disintegrate Turkey like they disintegrated the Ottoman Empire in the past”, and according to the same opinion poll by a Turkish NGO in July 2005, 51 per cent of Turks believe that the “reforms required by the EU are similar to those required by the Treaty of Sèvres which dismembered the Ottoman Empire in 1919.”

Turkey stands under a double pressure: from inside, political Islam is striving for more religious freedom, that is to say more freedom for Islam within state and society, from outside, the European Union wants Turkey to comply with Western standards of democracy which would bring the Kemalist concept of the state to an end. The generals stick to Atatürk’s view of the West, which is however the West of yesterday. The EU-accession would lead to the loss of power of the military, whereas the generals see the military as the only bulwark against “Islamic fundamentalism”. The tensions with the Kurdish nationalists in 2006 force Prime Minister Erdoğan to take a more (Turkish) nationalistic stance. This in turn would probably alienate many Kurdish voters from Erdoğan’s Islamic party AKP in the parliamentary elections in 2007.

Also the tensions between secularism and political Islam in Turkey are growing as recent events demonstrated. On May 17 2006 a gunman killed a judge and wounded his colleagues of the Constitutional Court in Ankara. The alleged fundamentalist acted out of rage because the judges had decided

that a schoolteacher could not become director of the school because she is wearing the headscarf. Violence is returning to the political scene. Will ideological battles not only be fought by words any longer, but also by bullets? Indignation brought ten thousands secularist people on the street to demonstrate against the sneaking islamisation of the Turkish society.

The situation in Turkey is worrying, for the Turks as well as for the citizens of the European Union. Where is Turkey heading? Philip Gordon and Omer Taspinar advise policymakers in the West not to take Turkey’s pro-Western orientation for granted: “(...) Turkey now has a Eurasian strategic alternative that looks increasingly appealing to growing numbers of frustrated nationalists within the country.” So could Turkey be regarded as another kind of Russia, which doubts whether it belongs to Europe or to Asia? In March 2002 the then secretary general of the National Security Council, general Tuncer Kilinc, had expressed his view that Turkey should abandon its efforts to become a member of the European Union and turn towards its regional neighbours Iran and Russia. No one took him seriously at that time, but the ‘Transatlantic Trends Survey’ of the German Marshall Fund in the summer of 2006 showed that most Turks feel sympathy for Iran, and even Russia and China, whereas America has lost a lot of sympathy. As the survey states: “Turkish feelings toward the United States and Europe have cooled since 2004, with a warmth reading toward the United States declining from 28 degrees in 2004 to 20 in 2006 on a 100-point thermometer scale, and from 52 degrees to 45 toward the European Union.”

A Turkish nationalism that is critical towards the West is on the rise. As the much (muck?) movie “Kurtlar Vardisi”, enthusiastically applauded in Turkey, demonstrates. Suat Kiniklioglu, the director of the Ankara Office of the German Marshall Fund, believes that “the primary reason behind the sea-change is the post-9/11, ‘with-us-or-against-us’ environment and the trauma inflicted on Turkey by the war in Iraq. In addition, the global rise of identity politics most aptly signified by the Danish cartoon crisis, and the increasing instability around Turkey’s borders, have shaken traditionally secular Turks.”

10 Cited: Gordon and Taspinar, p. 69.
What angers the Turks, is the ambivalent policy of the European Union. Israel is allowed to attack Hezbollah in Lebanon (in July 2006), but Turkey is advised not to act against the PKK hiding in Northern Iraq. German Chancellor Angela Merkel, when visiting Ankara in October 2006, pleads for negotiations, but not for accession. Matthias Kamann asks himself what the EU really wants: “When the EU takes in Turkey, it becomes a ‘Reich’ without homogeneity. If it makes Ankara a ‘privileged partner’, it becomes an Empire with satellites struck by crises. If it leaves Ankara outside, it gives up its civilisatory mission.”


14 Die Welt, 7 October 2006.
III. Limits of Cultural Engineering: Actors and Narratives in the European Parliament’s House of European History Project*

By Wolfram Kaiser

1. Introduction

‘A single museum to include and represent European civilization … would need to be shaped by genius, not by a committee’ – this is how Kenneth Hudson, a British curator and museum entrepreneur, conceived of a museum of European history back in 1997 (cited in Vovk van Gaal and Itzel 2012, 77). Museum by committee it shall be, nevertheless concluded Hans-Gert Pöttering, then President of the European Parliament (EP), when he first proposed the creation of such a museum in 2007 and charged a Committee of Experts with drafting a plan for a structure and narrative for it. This House of European History (HEH), as it has become known, is currently scheduled to open in Brussels in the Spring of 2017.

The HEH as a major cultural institution to be housed in the Eastman Building close to the EP is a key project for attempts by EU institutions since the 1980s to strengthen the cultural basis for integration, enhance European identity and foster the legitimacy of the EU. The transformation from a permissive consensus, which characterized the first 25 years of ‘core Europe’ integration, to what has recently been coined ‘constraining dissensus’ (Hooghe and Marks, 2009), and the rise of euroscepticism appear to require such EU activism to shape a collective identity among citizens to protect the EU. Whereas the EU’s activism initially focussed on strengthening the organisation’s symbolic properties (Manners, 2011), the Commission and the EP have increasingly concentrated on co-shaping the transnational politics of history – initiatives geared towards fostering the formation

* The author would like to thank the Research College ‘The Transformative Power of Europe’ at Free University Berlin for co-funding research for this article, and Professors Tanja Börzel and Thomas Risse for their support, intellectual contribution and friendship over the years.
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and dissemination of more aligned and consensual narratives. The focus here is particularly on the highly divisive 20th-century European history – particularly following the 2004 Eastern enlargement, when memory entrepreneurs – actors who actively seek to shape remembrance policies and collective memory – from Eastern Europe began to challenge the emerging Western European elite consensus around notions of the singularity of the Holocaust and post-war ‘core Europe’ integration as a peace project (Mälksoo, 2009).

The European Commission has run, among other initiatives, the ‘Active European Remembrance’ programme (Littoz-Monnet, 2012). It has also managed the project ‘New Narrative for Europe’ initiated by the EP and geared towards developing a new storyline to legitimize European integration and the EU (Kaiser, 2015). The EP has increasingly become involved in history politics as an institutional memory entrepreneur (Kaiser, 2012; Neumayer, 2015). It has passed several resolutions on European history, especially on the Hitler-Stalin Pact and the start of the Second World War in 1939 (European Parliament, 2009), which introduced 23 August as a Europe-wide so-called Remembrance Day ‘for victims of all totalitarian and authoritarian regimes’. The HEH now marks a high point of the EP’s activism. It seems that the process of Europeanisation was ‘looking for a museal form’, as Claus Leggewie observed when Pöttering made his proposal (cited in Assmann et al., 2008, p. 78). The EP President was in any case keen to give it that particular form.

Using process tracing (see, for example, Vennesson and Wiesner, 2014) this article examines the development of the HEH project from its origins in 2007 through to the present-day. It is based on the analysis of documents and interviews with Members of the European Parliament (MEPs), members of the Academic Committee and the team of curators who have been preparing the first permanent exhibition since 2011. The article compares the two phases in the project’s development sequentially: the first phase from 2007 through to the submission of the Committee of Experts’ report, ‘Conceptual Basis for a House of European History’ published at the end of 2008 (Committee of Experts, 2008); and the implementation phase from 2010 onwards. This phase saw the nomination of an Academic Committee with a changed composition, and the recruitment and work of the team of curators to realize the actual permanent exhibition for the HEH’s opening.

From the first to the second phase the project has undergone substantial changes in regard to the dominant actors, the preferred process of deliberation about the contents and the resulting narrative. The project’s origins
were dominated by a micro-network of Catholic German Christian Democrats. During the second phase, however, the EP gave the team of curators and the Academic Committee a lot of leeway to change the original plans for the museum. At no point did the EP seek to exert direct influence over the museum’s content and narrative. The plan’s initiators and the EP Bureau measured the project’s ‘success’ purely in terms of securing strong EP majority support for it, its actual implementation and the opening of the museum.

Moreover, during the first phase the Committee of Experts advocated instigating a broad political and public debate about the museum, its content and narrative. In contrast, Pöttering and his successors colluded with the team of curators and the Academic Committee in the second phase to prevent any public debate about the museum at all to avoid political controversies and secure funding for the HEH in the EP.

The Committee of Experts, finally, advocated a *longue durée* representation of the history of Europe since Antiquity, which would still have centred on post-war European integration. In contrast, the permanent exhibition has shifted the focus to the short-term perspective on Europe since the 19th century. However, (Western) European integration proper has become marginalized.

The activism of EU institutions in the cultural field has been analyzed as attempts at top-down cultural engineering (Shore, 2000) comparable to 19th-century national integration and nation-state formation. Analyzing the HEH experience, however, this article argues that EU institutions are severely constrained in their history politics by the growing political dissensus and the associated need to accommodate the cultural milieu and the preferences and practices of curators and historians. The HEH outcome in other words reflects the limited power of EU institutions to develop and disseminate cohesive narratives of the history of Europe and European integration, which could potentially contribute to the transnational convergence of European remembrance strategies and collective memory and the strengthening of European political identity. In fact, the EP has been so sensitive to the possible accusation of wasting taxpayers’ money on a prestige propaganda project to tell a teleological story about European integration that it relied entirely on the curators and professional historians (Vovk van Gaal and Dupont, 2012, p. 47) to legitimize its museum as one that conforms to prevailing curatorial and historical standards.
2. Catholic Micro-network for a European Integration Museum

Putting ‘Europe’ in a history museum is not an innocent practice. The museum as a medium for forming and disseminating narratives about individual and collective experience constitutes an ‘identity factory’ (Korff and Roth, 1990). Increasingly, museums see their role as mediators in societal and political debates. It sometimes even appears that museums are given ‘a responsibility to fix the situation’ (Conn, 2010, p. 9). Historically, they were created to invent, strengthen and celebrate national master-narratives (Anderson, 1983). Many museums have critically re-evaluated the underlying nationalist projects and are continuing to do so (Porciani, 2012). They seek to transnationalize their narratives in the light of the growing ethnic and cultural diversity of societies, ongoing processes of Europeanisation and globalisation, and the growth of city tourism with the resulting increase in foreign visitors.

However, history museums do not incorporate organized forms of ‘Europe’, and of European integration in the present-day EU, in a meaningful way as part of the transnational revision of their narratives (Kaiser et al., 2014). The European Commission noticed this absence of ‘Europe’ and European integration from national museums as early as 1977. At that time, the Commission started to advocate a stronger role of the European Communities in preserving and propagating European cultural heritage (Calligaro, 2013, pp. 79–116; Littoz-Monnet, 2007). It recommended, among other measures, that national museums should dedicate one room to ‘Europe’, but nothing came of it. Then, in the 1990s, several bottom-up societal initiatives advocated the creation of a museum specifically dedicated to the history of Europe and European integration. However, the EP eventually informed the Musée de l’Europe, a Belgian project propagated by the exhibition company Tempora, that it would use the premises provisionally foreseen for this museum for its new Visitor Centre.

The following origins of the HEH provide an excellent example of how an effective micro-network can link politics, academia and culture to initiate a major European cultural project. The Musée de l’Europe project had provided a stimulus for the idea for such a museum. Its temporary exhibition ‘C’est notre histoire!’ shown in Brussels in 2007–2008 presented a strongly affirmative and teleological narrative of Western European integration after 1945 (Mazé, 2009). But the Belgian project lacked institutional support (Mazé, 2014). Eventually, Pöttering took up the suggestion by Ludger Kühnhardt, one of three directors of the Center for European Integration Studies at the University of Bonn, that the EP should take over and create
such a museum. They worked closely with Hans Walter Hütter, director of the House of History of the Federal Republic of Germany, also in Bonn, who became the chairman of the HEH’s Committee of Experts and continued as an ordinary member of the Academic Committee.

Pöttering, a Catholic member of the Christian Democratic Union (CDU) from the Emsland region was first elected to the EP in 1979. From 1999 to 2007 he chaired the parliamentary party of the European People’s Party (EPP) before becoming EP president in 2007. Pöttering had known Kühnhardt, who is also a Catholic CDU member, since 1983, co-authoring several books with him. In some of his own publications Kühnhardt advocated the creation of a European history museum in Brussels (see Kühnhardt, 2005, p. 137). It was only Pöttering’s election to the EP presidency, however, which allowed both men to launch the proposal in a suitable institutional framework. In March and September 2007 Kühnhardt drafted two papers on the topic for use by Pöttering (Interview Kühnhardt; Kühnhardt, 2007). He did not become a member of the Committee of Experts, but arranged a visit to the House of History in Bonn for members of the EP Bureau. The Bonn museum director Hütter used this opportunity to argue for his museum, and its combination of a chronological and thematic narrative, as a model for the future museum focused on the history of Europe and European integration. Hütter, who is also a Catholic CDU member, had been active in local party politics in Mönchengladbach until he was appointed director of the Bonn museum.

The core of the micro-network behind the HEH project therefore consisted of only three individuals – all of them Catholic members of the CDU from the western borderlands of Germany. Their preferences for European integration were largely shaped by the Christian democratic federalist tradition and the policy of Western integration pursued by the Catholic German chancellors Adenauer and Kohl (Kaiser, 2007). As a consequence they were keen to use the future museum for strengthening the EU’s cultural integration and political legitimacy. Pöttering was quite explicit about this overriding objective. At the inaugural meeting of the Committee of Experts on 3 March 2008 he stated that the ‘political discourse of the day [lacks] an historical view, which might help to foster such a sense [of identity]’. His hope was that the HEH could ‘give a fresh boost to a spiritual dimension for the EU, focusing heavily on the European integration process’. He added that the HEH should place particular emphasis ‘on the values underpinning
According to Kühnhardt (Interview) this particular focus on values reflected a strategic choice to generate broad EP support for the project. Highly experienced in the institutional politics of the EP, Pöttering quickly established two crucial trajectories for securing political support for his proposal. One concerned the management of the EP’s internal processes. Pöttering liaized closely with the Dane Harald Rømer, Secretary General of the EP from 2007 to 2009. When he retired from the EP in 2009, Rømer became co-ordinator of the internal EP working group on the HEH project. He co-operated closely with Klaus Welle, his successor as EP Secretary General, who had previously been Secretary General of the EPP and its parliamentary party before acting as Head of Pöttering’s cabinet during his EP presidency. Welle was ideally placed to ‘keep the ball low’ (Interview Kühnhardt) and the project as much as possible out of partisan conflict in the EP.

The second trajectory concerned the need to secure support from the socialists following the EP’s dominant pattern of informal grand coalition politics (Hix et al., 2003), which have been reinforced recently by the rise of eurosceptic parties. Here, Pöttering drew on his close contacts with EP Vice-President Miguel Angel Martínez. The Spanish socialist became the EP’s special mediator for the co-ordination of the HEH project and regularly attended meetings of the Committee of Experts and the later Academic Committee and Board of Trustees. Martínez had been President of the Parliamentary Assembly of the Council of Europe from 1992 to 1996. In this capacity he had participated in the award of its annual Museum Prize to the House of History in Bonn in 1995. Together Pöttering and Martínez generated support for the HEH project and recruited, among others, the former Belgian Commissioner Etienne Davignon and the former Irish Commissioner and World Trade Organisation director Peter Sutherland for the Board of Trustees. To secure the broadest possible cross-party support and appease Eastern European critics they even included the Polish MEP Wojciech Roszkowski, a member of the nationalist Party of Law and Justice, which is allied to eurosceptic parties in the EP and in power in Poland.

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3 E-mail from Alfonso Guerra Reina, [office of Miguel Angel Martínez] to author, 9 December 2010.
since 2015. Roszkowski ‘luckily lacked interest and engagement’ however,\(^4\) and did not try to disrupt the project in the EP.

Pöttering was keen to use the concept paper to be prepared by the Committee of Experts for shoring up support for his project in the EP. He focused his attention entirely on managing the EP process. In contrast, the Committee of Experts discussed in depth the desirable process for setting up the museum and developing the permanent exhibition. Against the background of their own controversial discussions about appropriate narratives of the history of Europe and European integration, the committee members stated clearly that their report should form ‘the starting point, and not the conclusion, of a comprehensive public debate, and that this should take place not only in the parliamentary bodies, with MEPs and in administrative circles, but should also involve academics and museum specialists and the general public.’\(^5\) Their plea for such a public debate was strongly informed by the German experience of the House of History in Bonn. When Chancellor Kohl first proposed the idea upon taking power in 1982, it was sharply criticized as a propaganda tool for the ‘spiritual and moral renewal’ that he proclaimed. Subsequently, however, Heiner Geißler, the more centrist and intellectual CDU Secretary General succeeded in removing the project from partisan conflict by facilitating a broad cross-party and public debate about its objectives and appropriate narrative.

3. Longue Durée Narrative with a Focus on Post-war European Integration

When they started work, the Committee of Experts had a natural reference point for their proposal for the future museum’s narrative in ‘C’est notre histoire!’ (Tempora, 2007). Tempora staged this exhibition to propagate their museum project and showcase how its section on post-war European integration might look. As a result of this focus on the time after 1945, this temporary exhibition lacked the long-term perspective since the high middle ages which characterized the larger project for a Musée de l’Europe. Moreover, the exhibition largely failed to contextualize post-war ‘core Europe’ integration in the present-day EU within the Cold War and decoloni-

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4 E-mail from Tobias Winkler [office of Hans-Gert Pöttering] to author, 15 November 2010.
5 Committee of Experts, House of European History, Minutes of the meeting on 16 July 2008, PV/736156EN.doc.
Its narrative method drew on the combined strategies of personalisation and personification (Kaiser, 2011). The first room sought to personalize the origins of ‘core Europe’. It told the story of eight so-called founding fathers of European integration. Throughout the rest of the exhibition, however, the organizers complemented this form of personalisation with the personification of European integration reflecting a broader shift in history museums towards telling stories of acting or suffering, but of unknown individuals (Thiemeyer, 2010, p. 146). Here, the exhibition told stories about 27 individual citizens, one from each EU Member State at the time – stories that were all related in one way or another to these individuals’ own experience of, or contribution to, integration in a larger societal as well as political sense. Such personification can introduce an emotional touch into the museum, which has the potential to attract visitors who can identify with these ordinary citizens.

The members of the HEH Committee of Experts visited ‘C’est notre histoire!’ and discussed its merits at their meeting on 15 April 2008. They commended some of the strategies and modes of representation. They also criticized what they saw as the teleological character of interpreting post-war European integration in ‘crude black-and-white terms’. In particular, the committee members highlighted that the exhibition was characterized by an ‘excessive concentration on revolutionary aspects’ of post-war ‘core Europe’ integration at the expense of longer-term continuities in fields like culture and social life. Visitors got the impression that ‘Europe had simply emerged quite spontaneously, preceded by nothing’. Moreover, the exhibition focused above all on what might appear with hindsight as the ‘victors of history’, namely those who supported ‘core Europe’ integration from the start. The highly contested nature of European integration, euroscepticism and countries like Sweden, Finland and Austria, which did not join the EU until 1995, did not feature at all.6

The committee members agreed on a number of key points of the museum’s future narrative which they summarized in their final report (Committee of Experts, 2008; Mazé, 2009; Settele, 2015; Siepmann, 2012). First of all, they rejected the idea reiterated in a letter to Hütter by committee member Giorgio Cracco, Professor of Ecclesiastical History at the University of Turin, to include one room per EU Member State to present its national history. All other committee members believed instead that the HEH

6 Committee of Experts, House of European History, Minutes of the meeting of 15 April 2008, PV/720153EN.doc.
'cannot be a summation of regional and national histories, but must draw attention to the main points and themes of European history'.

Secondly, unlike the Musée de l’Europe project, which proposed to start its narrative in the high middle ages, the committee agreed on a longer-term perspective on European history beginning with Greek and Roman history, not the origins or spread of Christianity. Thus, Matti Klinge, Professor Emeritus of Nordic History at the University of Helsinki, suggested starting ‘with Homer and Greek tradition, 2,500 years’. Similarly, António Reis, Professor of History at the New University of Lisbon, insisted that it was necessary to explain the long history of European values by reaching back to Greek philosophy and Roman law. Mária Schmidt, director of the House of Terror museum in Budapest, added from a more practical curatorial perspective that without such contextualisation, ‘young people could not be taught anything about historical events’. Compared to the Christian-Catholic perspective of the Musée de l’Europe, therefore, the Committee of Experts advocated a secular narrative of European values (Huiistra et al., 2014, p. 132) – something in line with the more left-liberal and Republican notion of ‘constitutional patriotism’ (Stemberger, 1990) borrowed from the discourse about the (West) German political system and identity since the 1960s.

The Musée de l’Europe, thirdly, had a clear notion of historical evolution. According to its narrative plan (Tempora, 2003), Europe has alternated between phases of unity and of conflict during the last 1,000 years. Instead, the Committee of Experts in the end advocated devoting 60 to 70 per cent of the permanent exhibition to the section entitled ‘Europe in the Twentieth Century’, which would start with the end of World War I. The two sections on Europe’s origins or heritage and ‘Europe in Turmoil’ would each occupy 15 per cent of the available floor space. These sections would treat themes to prepare the visitor for the experience of the 20th century. The committee simply collected ideas for themes such as ‘prosperity’, ‘reason’ and so on, which ran to 28 points at the end of the committee meeting on 15 April 2008.

The Committee of Experts, fourthly, shifted the focus somewhat away from European history after 1945 to strengthen long-term perspectives on European history and values. Their initial idea was to devote 30 per cent of

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7 Committee of Experts, House of European History, Minutes of the meeting on 16 July 2008, PV/736156EN.doc.
8 Committee of Experts, House of European History, Minutes of the constituent meeting of 3 March 2008, PV/714473EN.doc.
the floor space to Europe up to 1945, and 70 per cent to post-World War II Europe. During the course of its deliberations, the committee changed this to 30–40 per cent and 60–70 per cent. Moreover, it redefined the main section as covering the entire period since the end of World War I, not World War II, which in turn necessitated its renaming from the original title ‘Building Europe’.

Despite the reduced space for Europe since 1945, in the end this section retained a strong focus on the history of European integration as originally proposed by Pöttering and his micro-network. The history of European integration ‘could be related at several levels’, Włodzimierz Borodziej, Professor of Modern History at the University of Warsaw suggested, but it was primarily ‘a history of events’. Michel Dumoulin, Professor of Modern History at the Catholic University of Louvain-la-Neuve, insisted on making a distinction between a ‘dreamed-of Europe’, predating the start of an institutionalized process, and a ‘Europe in action’ after 1945. Still, even Dumoulin, an expert in European integration history, did not advance a clearer notion of European integration and how to represent it in a museum – a lack of clarity about its nature and innovative forms of narrating its history beyond negotiations and treaties by men in grey suits which had repercussions for the theme’s subsequent relative neglect by the team of curators appointed during 2010–11.

4. Curators and Historians Cooperating on a European History Museum

As it turned out, the work of the Committee of Experts did not create significant path-dependencies for the planning of the museum’s actual permanent exhibition to be housed in the Eastman Building in Brussels. The final version of the report (Committee of Experts, 2008) played down key decisions such as the structuring into three sections. Instead the report read more like a chronological enumeration of themes from the history of Europe which deserve to be treated in the future museum. Conscious as museum director of the practical implications and limitations of creating a permanent exhibition, Hütter did not want to constrain the future team of curators too much. Subsequently, however, three main factors changed the final narrative outcome in a major way compared to Pöttering’s proposal and the Committee of Experts’ preferences. First, the politicians and key administrative staff focused entirely on securing EP support for the project, not the permanent exhibition’s changing concept and content. Second, the aggregate preferences of the newly appointed team of curators diverged substantially from
the original proposal for a museum of European and European integration history. Finally, the newly constituted Academic Committee with its different composition compared to the earlier Expert Committee, colluded with leading staff in the team of curators in strongly downplaying the role of (Western) European integration in the permanent exhibition.

At the political level, Pöttering, who remained MEP until 2014, sought to ensure a smooth transition to his successor as EP president, the Pole Jerzy Buzek, also from the EPP. More importantly, together with Martínez he maintained grand coalition support for his project when the German social democrat Martin Schulz became EP president in 2012. At a meeting with the team of curators in December 2012, Schulz assured them of his backing on condition that they eschew a Christian democratic-dominated teleological ‘core Europe’ narrative in favour of a scientifically sound broader approach to contextualising European integration, which they preferred anyhow. Discussions in the parliamentary parties and EP committees showed much broader support for the project extending beyond the EPP and the socialists. Despite some criticism in the Greens–European Free Alliance parliamentary party targeted at the project’s EPP origins and cost, for example, the group’s co-leader Daniel Cohn-Bendit spoke strongly in favour of a ‘museal space’ for ‘European memory cultures’ (Interview Trüpel). Ultimately, sharp political criticism of the HEH largely remained limited to MEPs from the Polish Party of Law and Justice and the eurosceptic UK Independence Party in Britain, where the Committee of Experts’ report had already been received with disdain by eurosceptic newspapers (Daily Mail, 2011).

Moreover, the politicians and key administrators did not want to be seen as interfering with the professional competence and judgements of the newly appointed team of curators. They were keen to minimize any potential criticism of the possibly partisan or federalist character of the museum’s narrative. To facilitate co-operation between the team of curators and the EP administration, Constanze Itzel became a team member. With a doctorate in art history and curatorial experience, Itzel was ideally placed to mediate between the academic and museum milieu and the political and administrative milieu.

At the end of 2010, the EP appointed Taja Vovk van Gaal as leader of the team of curators. Three motives influenced her appointment. Vovk van Gaal had been director of the Ljubljana City Museum for many years, which she modernized in line with Western museum standards. Moreover, she appeared professionally reliable due to her Western European work experi-
ence at the European Cultural Foundation in Amsterdam. Finally, the decision to appoint her at least in part stemmed from the underrepresentation of Eastern European perspectives on the Committee of Experts and the criticism from Polish commentators in particular of its report’s allegedly heavily Western European bias (Sauerland, 2008; Trüpel, 2009, p. 187). More generally, MEPs from the new Eastern European EU Member States had actively lobbied for many years as part of the broader ‘fight over European remembrance’ (Leggewie, 2011) for changing the EP’s own remembrance culture. They were keen to include the experience of Stalinism on a par with National Socialism as two totalitarian systems and sides of the same coin, and to insert Eastern European suffering under Stalinism and communism more effectively into pan-European discourses (Neumayer, 2015; Troebst, 2013) – demands that Vovk van Gaal supported and which effectively downgraded the prevalent German and Western European discourse about the singularity of the Shoah.

In contrast, Vovk van Gaal had practically no knowledge of, or interest in the experience of Western European integration after 1945, which was after all supposed to be the museum’s core focus. When she presented her initial ideas to the team of curators she heavily emphasized the Stalinist experience in Eastern Europe and the everyday lives of Europeans (Interview Itzel). Her primary interest in the history of everyday life as connecting Eastern and Western Europe to some extent was shared by Elke Pluymen, a museologist from The Hague, with whom Vovk van Gaal worked closely in the beginning. Moreover, Andrea Mork, who joined the team from the House of History in Bonn and as Concept Manager became responsible for the exhibition’s overall integration, was a specialist of Nazi Germany and inter-war Europe. She, too, had limited knowledge of, or interest in European integration. In fact, when she moved to Brussels the House of History in Bonn was undergoing the first major revision of its permanent exhibition which resulted in the removal of its section on the Treaties of Rome and the downgrading of European integration in favour of the inclusion of the East German experience during the Cold War. Two team members were appointed to lead on the history of European integration, however. They were Etienne Deschamps and Martí Grau I Segú, who had worked in the EP as parliamentary assistant before briefly becoming an alternate socialist MEP during 2008–09. Deschamps was the only member of the larger team of curators with more in-depth knowledge of the history of European integration and academic debates about it.

The shift towards strengthening Eastern European perspectives was reciprocated in the newly appointed Academic Committee. Coinciding with
Buzek’s EP presidency, Borodziej, who is close to Buzek’s centrist Citizens Platform and the EPP, assumed its presidency, with Hütter becoming an ordinary member. With his strong connections to German academic institutions and historians, for which he has recently been attacked in the intra-Polish fight over historical memory, Borodziej seemed a safe pair of hands. At the same time, his appointment strengthened Eastern European perspectives on post-war history, as did the co-optation of two other individuals on the Academic Committee: Norman Davies, a British historian of Poland, and Oliver Rathkolb from the University of Vienna.

At the same time, Dumoulin as the only expert of European integration history on the Committee of Experts no longer contributed to the academic advisory work. He believed that the process was not academically sound enough and could potentially lead to a teleological narrative (Interview Dumoulin). Moreover, Isabelle Benoit, who had masterminded the temporary exhibition ‘C’est notre histoire!’ was invited, but withdrew from the Academic Committee after a few months in October 2009 in the vain hope that this would allow the exhibition company Tempora to play a role in implementing the HEH plan. As a result of these changes the Academic Committee did not have a single member with specialist academic expertise in what was originally intended to be the museum’s main focus. Its composition had been entirely determined by issues of regional and grand coalition balance. To give but one example, the appointment of the social democrat Austrian historian Rathkolb as a counterweight to the nationalist conservative Hungarian Schmidt followed informal advice given to Pöttering by the former Austrian Vice-Chancellor Erhard Busek from the EPP-allied Austrian People’s Party.

As it turned out, the newly appointed team of curators and the Academic Committee had different preferences for the process of devising the permanent exhibition from those of the Committee of Experts and their plea for an open and transparent public debate. The eurosceptic political and media reaction to the Committee of Experts’ report in 2008 only served to reinforce their attitude. Pöttering (Interview) deliberately limited publicity to avoid controversy and safeguard the EP’s internal decision-making process. The information about the project that Pöttering disseminated at a press conference in January 2012 was minimal. As if historicism and positivism had never been challenged, he claimed that the HEH would give an ‘objective portrayal of history’ (Sels, 2012). At one point in 2012, the team of

9 E-mail from Isabelle Benoit to author, 17 December 2009.
10 Private communication Erhard Busek to author.
curators and the EP administration discussed the option of a larger public symposium to discuss the preliminary plan for the permanent exhibition to seek more external input. However, EP Secretary-General Welle shelved the idea in September 2012. The EP president’s cabinet, the Board of Trustees, and the Academic Committee all agreed to avoid such publicity and ‘let the team work quietly’ (Interview Rathkolb). Vovk van Gaal occasionally spoke about the HEH in more academic settings and otherwise controlled the team’s external contacts tightly for a long time. In short, the EP and the team of curators were largely successful at keeping the HEH under the radar of the European media and eurosceptic political groups.

5. European Integration Lost in Narrative Translation

The changing actor constellation and the deliberate strategy to avoid a broader public debate about the museum during the second phase strongly impacted on the permanent exhibition’s planned narrative. This narrative focuses on the 20th century and only covers the 19th century as explanatory context. Thus it largely lacks the consistent longue durée perspective advocated by the Committee of Experts. Compared to the 2008 report the HEH strengthens Eastern European perspectives considerably. It also prioritizes the history of Europe since 1945. However, it treats European integration largely as a history of major events such as treaty negotiations and EU enlargements. Integration history thus provides the chronological scaffolding of the rest of the permanent exhibition that zooms in on themes as diverse as the Cold War and women’s emancipation. When co-operation in the team of curators became protracted due to their conflicting views and they ran out of time, Vovk van Gaal and Mork allocated thematic and spatial responsibilities to individual curators to accelerate planning. Their procedural decision however accentuated the ghettoization of the history of European integration, which is not integrated organically with other sections to illustrate its wider political, economic and social impact.

To some extent the HEH’s permanent exhibition has been shaped by the choice of the Eastman Building and its renovation. Its seven levels have invited a chronological spatial division as recommended by the Academic Committee, from (after two entrance levels) levels 2 to 6, the top floor atrium, where the exhibition ends with a section entitled ‘Looking Ahead’

11 Academic Committee, Summary, Draft, Meeting of 12 October 2011, PE479.740/BUR/GT.
(European Parliament, 2014). While such a division could invite a teleological narrative about Europe’s upwards evolution through different stages, as in the Musée de l’Europe’s idea of phases of unity and conflict, the HEH uses level 2 for a basic introduction to some themes of European history and the structure of the exhibition, before proceeding on level 3 to discuss Europe’s history from the 19th century to 1945. Level 4 is devoted to Europe until 1973 and level 5 to Europe’s development since then.

Starting the chronological narrative with the 19th century on level 3 reflects the influence of more left-wing historiographical paradigms and curatorial perspectives about the great importance of industrialization, urbanization, and colonial expansion for understanding increased class conflict and extreme nationalism as key factors contributing to the rise of dictatorial regimes and the self-destruction of Europe in two World Wars. Hence, when meeting the team of curators in December 2012, the German social democrat EP President Schulz complimented them on having the British historians ‘Judt and Hobshawm on their mind’ in their conceptualization of European history. While the permanent exhibition introduces themes such as the Reformation and the Enlightenment on level 2, it does not make the European experience until the French Revolution and industrialization central to the narrative. Themes such as the legacy of Greek philosophy, Christian ‘unity’ in Medieval Europe or the Reformation would be central to a variety of more culturalist, and potentially essentialist, narratives of European history. Hence, by de-emphasizing cultural and religious aspects, the HEH refrains from engaging in a potentially highly divisive discussion of what might have made Europe specific or even, in more normative terms, special. Thus, the HEH narrative is broadly aligned with secular and ethnically and culturally inclusive contemporary preferences for constitutional patriotism.

The HEH has also strengthened Eastern European perspectives on European history. Vovk van Gaal’s original preference for almost writing Western European integration out of the museum narrative provoked heated discussions in the team of curators and proved politically unacceptable to the EP. Her plea and that of others on her team and the Academic Committee and more generally in Eastern Europe (Mälksoo, 2014), for discussing Stalinism and the fate of Europeans behind the ‘Iron Curtain’ on a par with National Socialism and the Western European experience is largely reflected in the HEH narrative, however. The permanent exhibition systematically compares the Nazi and Stalinist regimes on level 4, which responds to a key demand in Eastern European history politics and conforms to the EP’s more recent remembrance practice. It also treats the Holocaust far less...
prominently than might have been expected in a more traditional Western European setting. Thus, the Academic Committee recommended at an early stage in its deliberations that an ‘exhibition with the Shoah and the World Wars at its centre’ was ‘not being made for the future’. They also opposed the idea of a separate room or space devoted specifically to the annihilation of European Jews. Instead, the HEH weaves the Holocaust experience into the three sections about the Nazi regime, World War II, and how it has been remembered.

In the end, however, the HEH narrative represents a compromise, just as recent EP resolutions on European history have sought to amalgamate Western and Eastern European experiences and preferences. Crucially, it does not cross two red lines of dominant Western European historiography and memory discourses, which – in the perspective of Mária Schmidt – marked the ‘framework of censorship’ in the Academic Committee (Interview Schmidt). While adopting the totalitarianism paradigm for the ‘highly sensitive’ comparison of two political systems, the exhibition highlights that the Nazi and Stalinist regimes were nevertheless ‘not equal’ and ‘very different in their ideological roots and goals’. Moreover, the exhibition points out that ‘the industrialized genocide on European Jews organized by the Nazis with bureaucratic precision was without precedence in world history’. It thus defends the idea of its singularity (Littoz-Monnet, 2013), although it does so only in terms of the mass murder’s industrial organization.

The HEH, finally, tells the story of European integration in ‘15 milestones from the Congress of Europe [in 1948] to the discussion about a constitution since 2000’, as a ‘story of ambitions and setbacks’ (Interview Grau I Segú). It has adopted an ‘atomic model’ for its approach. The milestones are arranged at the heart of levels 3 and 4, around the central staircase, surrounded by thematic sections. The seven ‘milestones’ on level 3 focus on themes such as the formation of the ECSC and the Treaties of Rome that created the European Economic Community, for example. This level also has a gallery with the ‘founding fathers’ as ‘visionary statesmen’. However, ‘far from promoting a personality cult, this gallery should give an insight

12 Academic Committee, Summary, Draft, Meeting of 12 October 2011, PE479/740/BUR/GT.
13 Andrea Mork, Presentation Academic Committee, 28 January 2014.
14 Andrea Mork, Presentation Academic Committee, 28 January 2014.
15 Andrea Mork, Presentation Academic Committee, 28 January 2014.
into the lives and political thinking of men who built the foundation of the integration process’. The curators assured the Academic Committee that the HEH would present these ‘founding fathers’ in an ‘unheroic manner’.16

The permanent exhibition therefore retains a focus on European integration. Ironically, however, the theme features far less prominently in the EP-organized HEH than in the Musée de l’Europe plan or, for that matter, in the Committee of Expert’s 2008 report. It draws on personalization to some extent, but eschews the representational strategy of personification that played a central role in the temporary exhibition ‘C’est notre histoire!’ Moreover, the theme was clearly delimitated in the team of curators’ organization and working patterns so that it has not become mainstreamed into the representation of the history of Europe since 1945. Its relative marginality can be explained by a combination of three factors: the lack of knowledge of European integration and the more recent historiography on the part of the vast majority of curators and the Academic Committee, which has no historian with relevant specialist expertise on it; the push by some curators and the Academic Committee for the greater prominence of Eastern European perspectives, which are naturally absent from the Western European integration narrative until the end of the Cold War (Interview Schmidt); and finally, the strong belief among many curators and members of the Academic Committee (e.g. Interview Rathkolb) that the history of European integration as (apparently only) one of treaties and negotiations is boring and cannot be told for visitors in an animated and engaging manner to guarantee the HEH’s popularity with visitors.

6. Conclusion

This article has traced the process of the HEH’s formation as a major cultural initiative and project from its origins through to the finalization of its permanent exhibition in advance of its projected opening in the Spring of 2017. It has analyzed the changing constellation of actors and networks who have sought to influence this process, and their preferred narratives of the history of Europe and European integration.

Since Pöttering’s original proposal, the EP has managed the project according to its own institutional logic. Pöttering himself successfully embedded his idea in the EP’s broader grand coalition politics. Placing the project

16 Presentation on European Integration and Founding Fathers, Academic Committee, 28 January 2014.
planning in the hands of DG Communication indicated moreover that Pöttering, Rømer and Welle primarily saw the HEH as a means of disseminating information to EU citizens and offering them added value on their trips to EU institutions in Brussels, not as a particularly innovative cultural project. They had no strong interest in the museum’s actual content and narrative, only in its institutional success and actual opening. Hence, sporadic attempts to mobilize Rømer to make the EU more central to the museum and its narrative failed.

The nomination of the Academic Committee and the team of curators followed the prevalent EU logic of regional and political proportionality, irrespective of the prospective members’ historiographical or curatorial preferences. Responding to the political noise created by MEPs and other individuals and organized groups from new Eastern European Member States, the positions of chairman of the Academic Committee and of leader of the team of curators were filled with a Polish professor and a Slovene curator. In terms of their research focus and preferences for the museum, even Academic Committee members like the British Norman Davies and the Austrian Oliver Rathkolb supported the East Europeanization of the narrative proposed in the Committee of Experts’ 2008 report. The Academic Committee was also balanced in terms of its members’ affiliation with socialist or centre-right EPP parties. Strikingly, as a result of this recruitment process, the team of curators had only one member with deeper knowledge of European integration and its associated historiography, and the Academic Committee none. Instead, several of its members were positively hostile to narrating the experience of European integration in any detail in the HEH, and absolutely averse to its personalization as a representational strategy.

Thus, the EP’s own institutional logic (alongside curatorial and design motives) quite fundamentally transformed the HEH’s narrative focus. The HEH eschews a long-term cultural historical perspective on the present-day Europe and the EU as propagated by the Musée de l’Europe. Instead, it essentially locates the origins of Europe’s 20th century experience in the 19th century. Moreover, it advances the East Europeanization of the EP’s history politics and preferred historical narrative up to a point without however crossing two red lines of prevalent Western European historiography and memory discourse: the difference between the Nazi and Stalinist political ideologies and the singularity of the Holocaust, at least in terms of its industrial organization and scale of the mass murder. Finally, the HEH fails to put European integration at the centre of its narrative. It avoids a teleological narrative of progress through ‘ever closer union’, something that
will strengthen its legitimacy among professional curators and historians. Paradoxically, as a result these groups may be more satisfied with the outcome than those like Pöttering who originally proposed the project. At the same time, the need to say something about European integration within a very limited space nevertheless has led to an antiquated focus on negotiations and treaties as ‘milestones’ combined with a mild form of personalization with the ‘founding fathers’ storyline. As a result, the HEH largely fails to show the impact of the present-day EU, let alone other forms of transnational voluntary and international organization, on the political, economic and social development of Europe and on the everyday lives of European citizens.

This narrative outcome is a compromise after long negotiations among a variety of actors. It does not constitute a new EU-centred consensus on European memory. It is remarkable, however, how much advocates of a greater presence of Eastern European memory cultures succeeded in hijacking these negotiations and focusing them on narrowing down the gap between prevalent Western and Eastern European memory cultures – this at the expense of other forms of spatial fragmentation such as between the experiences of Northern European democratic welfare states and Southern European dictatorships and economic backwardness; or more generally, between the ‘core’ and various peripheries in Europe and the EU. Thus, the experience of the HEH raises the larger question, which is beyond the scope of this article, to what extent the history politics and remembrance policies of EU institutions more generally have become East Europeanized. Clearly, ‘core Europe’ states and networks still dominate much of the politics and policy-making in the EU even after its several enlargements. It may well be, however, that their governments and elites see cultural policy and history politics as a weak field of little material significance – and in this sense as a suitable playground for Eastern European history politics activism that could help deflect criticism on the EU’s periphery of its prevailing informal power relations.

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C. Governance of external relations
I. Mapping out a Euro-Mediterranean Strategy

By Stephen C. Calleya

In the world of 7 billion people the emergence of more turbulent times in international relations has unleashed numerous forces that are undermining the very foundations of the sovereign state system. The incredible level of inequality between different peoples around the world and the increase in hate crimes against different religions and cultures is manifesting itself in ways that are often proving very difficult to manage within countries and at a regional level.

The process of rapid change in domestic and international relations continues at an amazing pace impacting on the fabric of our political, economic and social landscape. Since the end of the Cold War in general but especially since the Arab upheavals of 2011 major questions are being asked in Europe and the Arab world about which direction the world is moving in and whether this is the path to a future of more stability and prosperity or uncertainty and austerity.

In light of the more turbulent and transitional times across the southern shores of the Mediterranean is it possible to shift EU external policy making in such a manner that a re-set in Euro-Mediterranean relations takes place towards a more cooperative regional framework where all security challenges are addressed in a more coherent manner? Given the fragmented nature of contemporary inter-Mediterranean relations and the serious risk of EU integration faltering further after the Brexit vote it is in everyone’s strategic interest to map out a Euro-Mediterranean strategy that connects more effectively with the unstable reality currently manifesting itself. Failure to adopt such a strategic agenda will only further erode the relevance gap that should exist between the people and their respective governments across the region.

Against this very fluid context Malta will be assuming the EU Presidency in 2017. It has already been announced that Malta’s EU Presidency will focus on three main themes: migration, maritime affairs in terms of transport and tourism and relations between the EU and its neighbours in

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1 Prof. Dr. Stephen C. Calleya is the Director of the Mediterranean Academy of Diplomatic Studies (MEDAC), University of Malta.
the Mediterranean. During the EU Presidency Malta together with other countries will be expected to put forward proposals to take stock of the situation in each of these areas and formulate a way forward to address the challenges in each of these very important strategic sectors.

A review of contemporary trends indicates that what we require is more of a focus on solidarity and not just security. The numerous challenges we are facing dictate that a clear message be communicated that emphasises the message that we either all swim together or else sink together. In order to carry this out it will be important to clearly stipulate that all of us in the European Union and beyond share a common future and it will be essential that a counter narrative to the divisive policies that some are putting forward is introduced and implemented.

Given the indivisibility of security in Europe and the Mediterranean, the EU must continue to adopt a more proactive stance when it comes to influencing and managing the international relations of the Mediterranean area if it wants to successfully project stability in the area.

The challenge the EU is facing is to demonstrate that it can be a source that exports stability rather than imports instability. In recent years it seems that the latter is happening more often than not and this is already having tremendous consequences for all of us.

The very fluid nature of international relations during the first two decades of the new millennium has resulted in an ever-changing global security landscape. Perceptual changes taking place in the Euro-Mediterranean security environment demand a strategic re-think when it comes to addressing and managing more effectively sources of instability. The continuous emergence of different sources of insecurity demands a more flexible modality of security management as states in the international system seek to limit the ramifications from the dominant insecurity landscape we find ourselves in.

The very fluid and dynamic contemporary post-Cold War era demands that the concept of security be constantly under review. In post-Cold War international relations there has been a gradual shift away from traditional security concerns that focus exclusively on military threats to so-called soft security risks and threats. This category of security challenges includes terrorism, organized crime, drug trafficking, illegal migration, and climate change.

The United States' Global War on Terror (GWOT) that dominated the strategic landscape for a decade after the 9/11 terror attacks in New York and Washington D.C. unleashed military offences in Iraq and Afghanistan that reinforced the traditional military dimension to security challenges, and
provided a boost to a more innovative approach that focuses on intelligence gathering, sharing and monitoring on a global basis. The United States’ withdrawal from Iraq and Afghanistan has resulted in the emergence of a security vacuum that has been taken over by numerous militant forces including ISIS.

In 2003 the EU adopted its own Security Strategy that set out to delineate the new security environment, the EU’s strategic objectives and policy implications. The following areas were identified as the main bones of contention: terrorism, proliferation of weapons of mass destruction, an escalation of regional conflicts both globally and in the proximity of the EU, an increase of failed states, and organized crime that includes cross border trafficking in drugs, illegal migration, and weapons.2

In an effort to address more effectively the long list of security challenges the European Union launched its Global Strategy for the EU Foreign and Security Policy entitled ‘Shared Vision, Common Action: A Stronger Europe’, in June 2016. The EU clearly refers to the EU supporting cooperative regional orders globally including in the Mediterranean.3 In the section entitled ‘A Peaceful and Prosperous Mediterranean, Middle East and Africa’, the EU stipulates that it will intensify its support for and cooperation with regional and sub-regional organisations and other functional cooperative formats in the region. This policy objective is to be achieved by mobilising bilateral and multilateral initiatives and partnering with civil societies in the region.4

The EU identifies five lines of action: first, in the Maghreb and the Middle East, the EU will support functional multilateral cooperation. This will include working through the Union for the Mediterranean to strengthen border security, human trafficking, counter-terrorism, non-proliferation, water and food security, energy and climate, infrastructure and disaster management.

The EU also commits itself to continuing to dedicate its diplomatic resources to fostering dialogue in regional conflicts in Syria and Libya and to continuing to support the Quartet in the Palestinian-Israeli conflict.

Second, the EU will strive to deepen sectoral cooperation with Turkey. This includes seeking to pursue the accession process by anchoring Turkish

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4 ibid., p.34
democracy to the EU membership criteria including normalisation of relations with Cyprus. After the Turkish military coup attempt of July 2016 it remains to be seen how successful the EU will be in balancing its strategic perspective with realities unfolding in Turkey.

Third, the EU will continue to seek engagement with the Gulf States, including the Gulf Cooperation Council, (GCC). An effort will also take place to build on the Iran nuclear deal and its implementation.

Fourth, growing transnational interaction between North and sub-Saharan Africa, as well as between the Horn of Africa and the Middle East, the EU will support cooperation across these sub-regions. This ‘neighbours of neighbours’ approach will include triangular relationships between the Red Sea area and Europe and the Horn Africa and the Gulf to address common security challenges and economic opportunities. More specifically the EU also commits to focusing on cross-border dynamics in North and West Africa, the Sahel and Lake Chad regions through closer links with the African Union, the Economic Community of western African States (ECOWAS) and the G5 Sahel.5

Fifth, the EU also stipulates that it will dedicate more of its resources towards African peace and development by working more closely with the African Union, ECOWAS and the East African Community among others. A key objective will be to generate economic growth and create jobs and to implement a sustainable development agenda that focuses on issues pertaining to migration, health, education, energy and climate, and science and technology.6

The 2016 EU Global Strategy recognises that the Mediterranean is already a geo-strategic area where numerous sources of insecurity threaten to escalate and put regional and international stability at risk. It also admits that regional dynamics that need to be urgently addressed include the collapse of failed states, the increase of terrorist activities, the Israeli-Palestinian conflict, the proliferation of all types of weapons, energy security, environmental degradation and the ever-increasing state of economic disparity between the northern and southern shores of the Mediterranean. The Strategy does not however offer any specific insight into the specific types of security initiatives that will be introduced to tackle such a broad agenda.

The absence of a Mediterranean centric security arrangement to address security challenges in the Mediterranean is certainly a recipe for an increase

5 ibid., p.35
6 ibid., p.36
of sources of insecurity as this strategic waterway is perceived as a zone where illicit activity can take place unchecked. It is quite ironic that the more interdependent the global security theatre of operations has become the less connected security mechanisms in the Mediterranean have become. If such a trend continues it is clear that the security vacuum in the Mediterranean will result in an even more instability emerging in the Euro-Mediterranean area.

The setting up of a Euro-Mediterranean regional security network would dispel the perception that the Mediterranean has largely been neglected by the international community since the end of the Cold War. The possibility that such a perception becomes further entrenched is particularly high more given that post-Cold War great powers have continued to upgrade their attention towards other regions adjacent to the Mediterranean such as the Balkans, the Arabian Gulf and sub-Sahara Africa, but not the Mediterranean basin itself.

The increase of instability in the Mediterranean makes it clear that it is a strategic error to concentrate your security forces in one region at the expense of securing stability in adjacent regions. International attention towards the Balkans, the Caucasus, and Eastern Europe in recent decades seems to have taken place at the expense of investing diplomatically into a comprehensive security structure in the Mediterranean. The resultant security vacuum has witnessed a multiplication of sources of insecurity thrive across the Mediterranean including illegal migration, drug trafficking and other types of organized crime. Foreign policy strategists that are seeking to establish peace and security around the Euro-Mediterranean area should introduce policies that seek to balance sub-regional interests and not turn regional security into a zero-sum game where sub-regions compete for attention.

When addressing the plethora of security issues in the Mediterranean international actors such as the European Union must guard against promising more than they can deliver. The 2016 EU Global Strategy runs the risk of raising expectations once again too high. The EU must therefore be prepared to work closely with other security institutions such as NATO and the OSCE and also the League of Arab states and countries such as the United States, Russia and China, to develop a functioning security framework in the Mediterranean.

If such an exercise is to be successful it is essential that all Euro-Mediterranean countries become more vocal, transparent and engaged in the
post-Cold War security environment that is evolving around them. Otherwise they will have no one to blame but themselves for becoming further marginalized from the wider security framework that is emerging globally.

Since the new millennium commenced a more interdependent international security system has evolved. Given their geographic proximity and commonality of security interests it is thus in both the EU’s and the countries of the Mediterranean interest to strengthen security relations between them. Measures that can be taken to realize this include proceeding with the next round of enlargement in the Western Balkans in the shortest time frame possible, speeding up the processing of rapprochement with Turkey through its accession negotiations, and ensuring a dynamic and consistent implementation of the Union for the Mediterranean project driven agenda.

When it comes to North Africa and the Middle East it is however also of paramount importance that a common political and security agenda be articulated along the lines that were identified in the political and security basket of the Barcelona Declaration of November 1995. The absence of a comprehensive political and security agenda and a socio-cultural framework as the Union for the Mediterranean focus seems to suggest cannot create the necessary holistic security agenda that is necessary to attract a collective Mediterranean approach to security challenges.


Since the end of the Cold War and especially after the September 11 2001 attacks there has been a continuous perception in Europe of a threat from the Middle East. Alarming headlines in the international media focusing on instability in the Middle East, terror attacks across Europe and the regular arrival of hundreds of illegal migrants from the southern shores of the Mediterranean to Europe highlight such a trend.

The flow of news reports coming from the Middle East predominantly feature threatening images such as extremists preaching hatred against the West, or terrorists displaying contempt for human rights, or brutal dictators seeking to acquire weapons of mass destruction. Such images portray the Middle East as an alien, hostile and backward region. They also help focus attention on the large migrant communities across Europe from these countries. Xenophobia towards migrant communities across Europe has strengthened and given rise to large right-wing political movements in France, Britain and the Netherlands.
During the first decade of the new millennium negative perceptions of the Middle East have been further fuelled by constant images of violence and terror activities including Islamic extremists preaching hatred against the West (Iran, Lebanon), terrorists displaying contempt for human rights (Lebanon, Gaza, Syria, Israel), brutal dictators flush with billions of dollars of oil money often seeking to purchase all types of weapons, and Muslim leaders and masses determined to establish Islamic states with laws that go against secular Western standards of civilization.

Bombardment of such images by the 24/7 media has led European and American audiences to develop more of a racist and xenophobic attitude towards the Middle East during the past decade. As a result a chorus of discontent has emerged across Europe and North America against continuing to provide development and security assistance to such countries. It is no coincidence that this policy option has emerged as one of the most fiercely debated in the 2016 American election campaign between Hillary Clinton and Donald Trump. Both have sought to reassure the American public that America would adopt a more hawkish approach towards the Middle East in an effort to halt global terror attacks.

While it is clear that the Middle East is not an alien, backward and hostile region, the media's portraying of such images has resulted in such a perception emerging and gradually gaining ground. It has also led to a focus on the large immigrant communities of Middle East origin that are already established in Europe and North America. The backlash against migrant communities in Europe has given rise to right wing political movements in all countries that have increased their popularity as tension against migrants has spiralled.

The presence of both contemporary and historical beliefs may conspire to make Europe more receptive to a perception of threat from the Middle East during the next two decades. Deeply rooted folk memories in Europe of the long and bloody battle between Christianity and Islam continue to resonate. Whether real or myths, this history can easily be revived as a political resource by anti-immigrant movements as happened during the referendum in 2009 that resulted in a majority voting against the construction of minarets in Switzerland.

The revival of Islamic extremism easily provokes fears across Europe of a resurgence of the Islamic faith seeking to make up for past battles lost. Political sensitivity to migrant communities is easily amplified as a result of long-term high levels of unemployment in Europe. If not addressed in a concerted manner the Huntington ‘Clash of Civilizations theory’ could become a more realistic perspective in Euro-Mediterranean security discourse.
in the future. This is an outcome that would have catastrophic consequences for all peoples of the Mediterranean and beyond and is therefore a scenario that must be fiercely rejected.\textsuperscript{7}

Addressing the issue of illegal migration through increased cooperation and information exchanges on policing, visa controls and asylum policies through the Schengen framework and the Frontex mechanism has so far only had limited positive results. In reality the economic affluence that Europe enjoys and militarily supremacy especially when compared to its southern neighbours, makes the suggestion that the Middle East is a threat to Europe seem nonsensical. Yet, since the end of the Cold War there has been an increasing perception in Europe and North America that the new enemy after communism would come from the Middle East. Alarmist propaganda fuelled by the media has focused on the emergence of an Islamic jihad against the West, particularly after the 9/11 attacks against the United States. The more recent wave of terror attacks in Europe in 2015 and 2016 has given rise to a regular reference in the media to ‘radical Islamic terrorism’ fuelling the perception of a radical Islamic threat to modern civilization.

This perception has been further bolstered by the ever increasing number of illegal migrants that have sought to seek a better life in Europe by crossing the Mediterranean. A "migration invasion" syndrome gained ground since the new millennium with tens of thousands of migrants from North and sub-Sahara Africa opted for maritime trafficking that more often than not ended up in a futile attempt to arrive in Europe.

The European Union's inadequate response to the flow of a large number of people seeking political asylum or refugee status also underlined the hollow commitment developed countries have when it comes to humanitarian policies and welfare resources. Falling birth rates in Europe coupled with the large number of arrivals from the southern shores of the Mediterranean led many pundits to question what impact such a phenomenon would have on the future identity of the different nation states of Europe.

The mishandling of the mass migration influx into Germany in 2015 and the vote in the United Kingdom to exit the EU for numerous reasons including the mismanagement of migration flows from outside the EU makes it crystal clear that the time has come to introduce a more robust border security mechanism if the EU is to sustain its experiment in regional integration

in future. The free flow of EU citizens within the EU will only be possible if an external land and maritime border is enforced with adequate resources.

At this moment of turbulence and transition across the Euro-Mediterranean region it is essential that the European Union and all other international actors with a capability to influence Euro-Mediterranean regional dynamics seek to steer relations in a cooperative direction instead of a clash that some are seeking. Navigating relations requires an effort to influence them and not just assume an observer status stance. The arc of instability that has emerged in the Mediterranean demands a strategic re-think that seeks to suppress forces of instability.

More than five years since the revolutions swept across the Arab world the EU must come to terms with the fact that it has so far not succeeded in putting forward a Euro-Med strategy that offers the Arab world an opportunity to cooperate more closely with Europe. Failure to propose a collective security paradigm that reflects the interdependent and indivisible nature of Euro-Mediterranean relations is resulting in a return to fragmentation of embryonic regional relations nurtured since the 1990s and the emergence of a number of failed states as seen in Libya and Syria.

Twenty years after it launched the Barcelona Process the European Union must realise that if it is serious about wanting to contribute towards restoring stability in the Mediterranean it is imperative that it adopts a holistic approach towards security along the lines it had when launching the Euro-Mediterranean Partnership in 1995.

Rekindling a comprehensive strategy that offers political, economic and socio-cultural support to neighbouring countries across the southern Mediterranean would provide the European Union with precisely the type of narrative that has been absent since 2011. The EU should adopt a more visible approach towards the Mediterranean and unequivocally support political and economic reforms that are based on a functioning rule of law system of governance. Such a modality must be inclusive in nature and integrate civil society into the fabric of decision-making. While such a strategy could form part of an over-arching Neighbourhood Policy the time has come to admit that the security challenges facing the EU on its eastern and southern borders require separate and more intensive mechanisms that are able to address the fast changing realities on the ground. Adopting a Euro-Med strategy that focuses on trends in the region is essential if the European Union wants to be a credible actor in the Mediterranean.
2. Ten Strategic Euro-Mediterranean Trends

Numerous geo-strategic factors are contributing to an increase of insecurity across the Mediterranean. Ten major issues have had a negative impact on Euro-Mediterranean relations since the end of the Cold War and have prevented the emergence of a more cooperative security culture in this part of the world. Closely examining and systematically addressing the ten trends is essential if the causes of insecurity in the Mediterranean area are to be better managed.

First, there has been a considerable rise in terrorism in the region. The migration of Islamic State (ISIS) from Iraq and Syria to Libya has further consolidated this trend. Continuous acts of terror in all countries across the southern shore of the Mediterranean including the specific targeting of overseas residents as has been the case in Tunisia and Egypt and Turkey has resulted in a state of emergency and high alert that are stretching the security capabilities of the respective states to try and cope with terrorism. This increase in tension has had major economic consequences on tourism receipts and on private foreign investment at a time when such revenues are essential if the Mediterranean developing states are going to be able to provide a better standard of living to their respective citizens. A concerted Euro-Mediterranean counter-terrorism strategy that brings together both soft and hard security resources together is long overdue. A key challenge for all democratic governments will continue to be how to enhance counter-terror measures without undermining the freedom and rights of citizens living in a democracy.

Second, a more robust policy of diplomacy must be introduced to address ongoing conflicts in the Mediterranean. The six decade Israel-Palestine conflict is pivotal to the geopolitics of the Mediterranean and has to be resolved through a policy of compromise.

Since the collapse of the Oslo peace process the Israel-Palestine conflict has been in a state of paralysis. The Israeli-Palestinian conflict remains the main bone of contention in the Mediterranean area. It impacts negatively directly and indirectly on attempts to harness closer political, economic, and social development across the Mediterranean. Before efforts to resuscitate peace negotiations will be successful numerous factors must take place.

The United States must assume a more direct involvement in peace efforts. President Obama signalled a more dynamic and balanced approach towards this conflict upon being elected to the Oval Office but has failed to deliver on such a promise and has not succeeded in bringing the protagonists back to the peace table.
The European Union’s continuous commitment to the Quartet’s peace efforts also rings hollow after more than a decade of no progress. A re-think in this regard is long overdue. The EU needs to introduce a more robust diplomatic strategy that seeks to advance the compromises necessary to achieve a two-state solution to the Israel-Palestine conflict.

In addition, reconciliation between different Palestinian factions is a pre-requisite to the Palestinians adopting a credible negotiating position. A sustainable national unity government or a consensus government must be formed if the Palestinians are to be taken seriously in any future marathon of peace talks with Israel. The al-Fatah and Hamas political movements must be prepared to put the Palestinian people’s greater interest of an independent Palestinian state ahead of their own political interest in any given situation. Failure to do so will relegate the Palestinians to a continuation of suffering.

Israel remains pivotal to the geopolitics of the Mediterranean. Israel continues to serve as a unifying force that brings her opponents together. In this catchment area of the Mediterranean Israel is the only state that has an economic profile similar to that of mainstream European states. Israel is also a leader in technological development and economic development.

Securing a permanent peace with Palestine is in Israel's interest as the open conflict will continue to serve as a continuous security challenge within and from outside Israel. The prospect of a nuclear Iran or nuclear Arab state will also remain an existential threat.

In addition to investing in a more robust diplomatic strategy towards Israel and Palestine the EU should invest a great deal more in diplomatic initiatives that seek to restore order in Syria and Libya. The EU’s large aid budget needs to be coupled by more spending on diplomacy which is actually very cheap in relative terms and can be very effective when compared to defence spending.

Third, the growing call for political freedoms from Arab citizens all through the region that reached a climax in the ‘Arab Spring’ of 2011 needs to be better supported by the international community. As populations across the Arab world have become better educated they now want a say in public affairs, or at the very minimum, a number of basic freedoms including association and expression. Arab citizens in Tunisia, Egypt and Libya do not believe anymore that the alternative is between autocratic regimes or Islamic radicals. Political Islam as one model of politics is to be embraced as long as it does not undermine the basic rights of citizens. The majority of Arab citizens have demonstrated that they want peaceful evolutions after the revolutions. The fascinating Jasmine Revolution in Tunisia in January...
2011 and the overthrowing of the Mubarak regime in Egypt in February 2011 and the Gaddafi regime in October 2011 provided tremendous momentum to this reality. Developments since have stifled this sentiment and it is unclear if this historic moment is going to deliver the inclusive representative system of governance that so many have lost their lives to achieve.

Political reform must remain a priority on the agenda. Governments in the region have to tackle the immense challenge of a now vastly educated population and few political freedoms. This population does not believe anymore in the black and white choice “us or chaos” that they have long been offered by their governments. Islamic extremism is no longer an excuse. Terrorism needs to be fought at the same time that governance is improved, not at the expense of good governance. Political reform in the region is a strategic goal for the EU because the lack of it opens the door for many forms of instability. Political reforms must not go down the priority list of EU countries in the region.

Fourth, there has been a tremendous increase in the trafficking of human beings across the Mediterranean towards Europe which is part and parcel of the sophisticated organised crime network. These networks are well organised, well equipped and connected to security forces throughout the region. The illegal migration racket in the Mediterranean is a 250 million Euros business per year, counting only the “fees” collected by these networks. This figure is to be compared to monthly police force salaries of 150-200 Euros in North Africa.

Since the turn of the new millennium the Mediterranean has increasingly moved into the international spotlight as a front-line area for illegal migration from the African continent towards the European Union. Since 2002, the central Mediterranean has experienced a growing influx of migrants predominately from the Horn of Africa, practically all of which have departed from the Libyan coast towards Europe. Even though, in absolute terms, the total number of sea-borne migrants crossing the Mediterranean has not consisted of a massive exodus from Africa, the continuous flow of migrants has become a permanent feature of the security challenge landscape. Moreover, the challenge of managing illegal migration flows has had an enormous impact on the small state of Malta in proportional terms, given the country’s small size and very high population density.8

Consequently, illegal immigration has become one of Malta’s top policy priorities, nationally as well as at the EU level, where Malta has been calling

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8 Managing the Challenges of Irregular Immigration in Malta, Calleya Stephen and Lutterbeck, Derek, The Today Public Policy Institute, November 2008.
for responsibility-sharing mechanisms and support from other EU countries to help cope with the regular flow of migrant crossings. Malta’s EU Presidency in 2017 will be an opportunity to call for a more dynamic EU migration policy.

Addressing the trafficking of human beings in a comprehensive manner that seeks to separate legal from illegal migration is long overdue and essential as the number of migrants is certain to rise in the decade ahead as sub-Saharan states struggle to cope with the rising expectations of their respective populations. A more forward looking and inclusive EU migration policy must be forthcoming if this human security challenge is to be properly addressed. One should bear in mind that the EU will need 20 million new workers between 2020 and 2030 to sustain current level of productivity, workers that its demographic trends will not produce.

Illegal migration will thus remain a major security challenge for the foreseeable future. This migration originates mostly from Sub-Saharan Africa and Egypt. The 2016 European Union Global Strategy correctly indicates that a triangular partnership between Europe, North Africa and sub-Saharan Africa needs to be implemented. Nowhere is this more evident than when it comes to addressing the trafficking of migrants across the Mediterranean. Adopting a common approach between Europe, the Mediterranean and African countries is the only way to effectively fight criminal networks. The sooner a political dialogue between the EU and its counterparts in the southern Mediterranean and Sub-Saharan Africa is formulated the better.

The collapse of Syria since 2011 has resulted in the exodus of millions of Syrians towards Europe and the Gulf states. The chaotic manner in which Germany sought to accommodate more than a million refugees in 2015 has undermined the confidence of a large sector of the EU population and political spectrum that previously supported such a policy.

Thus far, the European Union has not yet developed any real comprehensive policy on the integration of migrants. For the last few years it has tended to turn a blind eye to what happens to these individuals after their period in detention. But the reality is that the numbers living and working (or wanting to work) in communities across the EU are growing.

At the start of the twenty-first century it is time to come to terms with the fact that illegal migration is a challenge that will continue to dominate security patterns of interaction between the northern and southern shores of the Mediterranean. The reality of extreme poverty and civil strife in Africa coupled with the fact that this may be exacerbated by climate change dictates that serious planning must take place to cope with an influx of refugees in Europe at any given moment.
The knee jerk policy reaction of the European Union towards Turkey in 2015 and 2016 to stem the flow of migrants towards Europe is unlikely to deliver the desired result for a number of reasons. First, how long before Turkey demands more compensation beyond the billions of euros already promised to sustain its efforts to halt the flow? Moreover, will the EU be able to achieve a continent wide consensus to introduce visa liberalization to Turkish citizens? Will the EU be able to guarantee that the rights of those people not being allowed to leave Turkey are safeguarded?

A fifth trend influencing Euro-Mediterranean regional relations is the slowdown in European Union political dynamics, in particular since the signing of the Lisbon Treaty in 2009. The Brexit vote in 2016 caps a long process of continuous paralysis in the EU that has been more preoccupied with trying to address economic challenges through austere measures than providing a regional integration narrative that attracts the support of its member states.

The EU has been able to have a profound positive impact on Euro-Mediterranean regional thanks to its successful enlargement process. The admission of ten states in 2004 and then Bulgaria and Romania in 2007 and Croatia more recently has enabled the EU to stabilise political and economic relations far beyond the original six member states ever envisaged. The EU should now map out a policy that will allow it to admit other Balkan accession states and encourage Turkey to stay the necessary course required to meet the EU accession criteria if it wants to continue to be a source of stability in non-EU member states.

Sixth, the external relations policy of the EU in general and the European Neighbourhood Policy in particular have not delivered the desired results. The ENP review process has gone on too long. The EU needs to adopt a more robust diplomatic agenda in its adjacent regions, especially in the Mediterranean. While the Euro-Mediterranean Partnership launched in the 1990s promised a dynamic Euro-Mediterranean cooperative relationship, the successive European Neighbourhood Policy and Union of the Mediterranean have been perceived as a dilution of the EU’s commitment towards a peaceful and prosperous Mediterranean. If the concept of the ENP is to remain it must be given a Mediterranean specific agenda with clear short-term oriented goals and the necessary diplomatic and economic resources to implement the agenda.

Seventh, Euro-Mediterranean relations can only be improved if a credible border control mechanism is in place to prevent and deter sources of insecurity. The EU must upgrade its land and maritime border capabilities if its
citizen’s faith is to be restored after the numerous experiences of security infringements that have taken place on a regular basis.

The time has come to investigate the feasibility of upgrading the Frontex operation in the Mediterranean into a permanent Euro-Mediterranean Coastguard Agency (EMCA) that would be mandated to co-ordinate the co-operative security network with a mission statement and plan of action similar to those carried out by a coastguard. As with the case of Frontex, it is essential that this initiative should involve collaboration not only between EU countries, but also between EU and southern Mediterranean states.

The significant increase in sources of instability in the Mediterranean ranging from trafficking of human beings to the proliferation of weapons smuggling and terror related activities dictates that Euro-Mediterranean states should focus on introducing a security mechanism that can assist in addressing security challenges that all riparian states are facing. The common bond that all Mediterranean states share is their maritime heritage and the security threats that result from such a common geographical reality.

At the moment there are no elaborate mechanisms to contend with a security crisis that would result from an accidental collision at sea between transport tankers crossing through the choke points of the Mediterranean basin, such as the Straits of Sicily or Straits of Gibraltar. Very little practical measures are also being taken to tackle the alarming rate of degradation that is currently taking place in the marine environmental sector. As a result, marine biology and everything linked to maritime activities, including tourism, is suffering more and more year in and year out.

Two other sources of instability that have benefited from the maritime security vacuum that exists are traffickers in drugs and human beings. The ever increasing proliferation of drug consignments is reaching ever deeper into the civil societies of the Mediterranean. As already discussed above the accentuation of illegal migratory flows from south to north have already negatively affected the lives of millions of people in the Euro-Mediterranean area and risk undermining further the legal structures of all Euro-Mediterranean states.

The geographical proximity between Europe and North Africa requires an early warning Euro-Mediterranean border control coast guard mechanism that can monitor such security risks and threats. Once this has been realised the co-operative maritime security network can be instructed to draw up optional policy positions on security issues that are regarded as the most serious. Such an exercise in itself will raise awareness of the vulnerable position Mediterranean states are currently in and the weak defence mechanism they have at their disposal to cope with such security threats.
This security enhancement initiative should seek to establish a Euro-
Mediterranean Coastguard Agency (EMCA). The EMCA would be man-
dated to co-ordinate a co-operative maritime security network similar to
other coastguards around the world. The EMCA could initially carry out
stop and search exercises in two principal areas: maritime safety and mari-
time pollution. This phase could be enhanced at a later stage by monitoring
other aspects of security that include narcotics trafficking and the transport
of illegal migrants.\(^9\)

It is essential that this initiative should be introduced in as flexible a man-
ner as is possible. Such an early warning mechanism should be open to any
of Euro-Mediterranean states that wish to participate. Those countries with
the most experience in the area of maritime co-operation, such as Italy and
Spain, should share their expertise with other willing and able Mediterra-
nean states. EMCA can also seek the maritime security technical expertise
that has already been achieved by the EU and NATO through their respec-
tive experiences in EUROMARFOR and Operation Active Endeavour in
the Mediterranean.

In addition to strengthening political and security channels of communi-
cation, the establishment of such a Euro-Mediterranean early warning net-
work will assist in cultivating more intense crisis management mechanisms
in an area where these are lacking. Practical confidence building measures
will enhance the level of trust between Euro-Mediterranean states and there-
fore set the stage for a more intricate security strategy to follow.

Areas where partnership-building measures can be introduced include
conducting simulation exercises of oil spills, ensuring that international
standards are observed during the cleaning of oil tankers, and monitoring
the activities of non-Mediterranean fishing boats that are operating in the
Mediterranean with a particular emphasis on over-fishing.

As experiences with irregular migration over recent years have shown,
the challenges of coping with sea-borne migrants concern not only naval
forces, but also fishermen. In the large majority of cases the would-be im-
migrants are first spotted or encountered by fishing vessels, which have a
much larger presence at sea. However, while the fishermen could, in prin-
ciple, play an important role in saving the lives of migrants who are in dis-
tress at sea, fishermen often themselves have felt “under threat” from the
growth in illegal immigration, and have criticized the insufficient support
they have received from governments in coping with migrant encounters at

\(^9\) Calleya, Stephen, Evaluating Euro-Mediterranean Relations, Routledge, 2005,
p.70.
The creation of a Euro-Mediterranean Coastguard Agency would be able to assist the fishermen are having to address by assisting in the complex task of rescuing migrants in situations of distress.

The neglect of such security risks has already had severe consequences in some parts of the world that have seen their entire ecological and service industries wiped out overnight. The natural geographical characteristics of the Mediterranean expose it to even more serious consequences should any of the above security risks continue to take place unchecked. It is therefore in all Euro-Mediterranean states’ interest to seek the creation of a Euro-Mediterranean Coastguard in the shortest time frame possible. Whether the political will to launch such a security mechanism can be found is of course entirely another matter.

Eighth, energy security has already emerged as one of the more prominent factors influencing the international relations of the Mediterranean. In the twenty-first century oil is much cheaper both in absolute terms, in real terms counting inflation and most important in relation to income levels. Therefore people do not mind paying €1.50/litre for normal gasoline. Unless there is even more of a significant price hike there is unlikely to be any downturn in global energy consumption.

The strategic importance of energy security in the Mediterranean is evident as a result of the increase of oil and gas pipelines connecting Turkey, Egypt, Algeria and Libya to Europe and the significant volume of energy transport through the Mediterranean. The consolidation of gas, oil and electric transmission lines around the Mediterranean has created an increasingly important Mediterranean energy market. As a result the interest of global powers including the United States, Europe, Russia and China, in the energy security of the Mediterranean continues to increase.10

Socio-economic development in the MENA region is dependent upon having access to an ever growing demand for energy. The unequal distribution of increasingly limited resources, in particular water and deteriorating environmental conditions further underlines the importance of energy security in the Mediterranean.

By 2030 global gas production is set to double but demand across the southern shore of the Mediterranean is also set to double resulting in several countries becoming net importers of energy.11 Some of the main questions

that will need to be addressed in this regard include: how will the Euro-
Mediterranean region cope with the ever increasing energy needs of North
Africa and the Middle East? How can a balance between human develop-
ment and limiting carbon emissions be achieved? How can a larger share of
renewable energy sources be integrated into the current energy mix? What
model should be adopted to develop a mutually-beneficial and stable Euro-
Mediterranean regional energy market?\textsuperscript{12}

\textit{Ninth}, the forces of economic globalisation with the major expansion of
China and India as global powerhouses have taken its toll on the Mediter-
ranean region, especially in the textile sector. The dismantlement of the tex-
tile agreements in 2005 in countries like Morocco, Tunisia, Turkey and
Egypt has had a major negative impact on the productivity of these sectors.
The competitive rise of countries such as Brazil, Argentina, South Africa,
Russia and Indonesia has also undermined the Mediterranean southern
shore countries' ability to attract the foreign direct investment necessary to
improve their productivity.

The negative downturn of the European economy since 2008 is having a
major negative impact on the southern shore countries of the Mediterranean
which rely on the EU for 50 to 80 \% of their exports and for a large part of
their investment and tourism. A revival of the European economy is essen-
tial to future positive growth of Mediterranean state economies.

Sustainability of democratic reform across the southern shores of the
Mediterranean will require economic development on a major scale for dec-
ades. In order to attract the billions of euros necessary to spur job creation
and improve Mediterranean competitiveness the international community
needs to provide political and economic support that assists in creating the
conducive type of environment that will attract international investors to the
region.

In the past few years regular reference to the so-called BRIC countries
has been made to highlight the spectacular economic progress that these
emerging states have been making. Brazil, Russia, India and China have
established themselves as pacesetters of the developing world and have
been succeeding in consistently boosting their productivity. As a result, an
ever growing number of citizens in each of these states have been able to
benefit from a significant improvement in living standards.

\textsuperscript{12} Koehler, Michael, Energy Challenges in the Mediterranean, 14th May 2011, Euro-
Med Seminars, Malta.

170
It is highly significant that none of the BRIC states are located in the Mediterranean. Since the end of the Cold War no major economic success stories have been registered along the southern shore of the Mediterranean. While it is true that states such as Morocco and Tunisia have restructured their economies to take larger advantage of the more competitive economic climate that has evolved and Libya and Algeria benefitted from a major upswing in revenue whenever energy prices increased, none of the states in this region of the Mediterranean area have emerged as major economic powerhouses.

Tenth, while there has been a resurgence of regionalism globally since the end of the Cold War no such trend has emerged in the Mediterranean. Instead the Mediterranean has become more of a strategic fault-line between competing geo-political forces and a crossroads between different religious and cultural traditions. The absence of regional arrangements in the Mediterranean and more importantly of contemporary initiatives that are seeking to promote regional cooperation in the Mediterranean has resulted in the Mediterranean becoming more of a north-south frontier than a region of cooperative interaction.

In the past two decades numerous initiatives have been proposed to stimulate the concept of regionalism in the Mediterranean. The most prominent of these initiatives are the 5 + 5 sub-regional initiative launched in 1990 that brings together the five southern European states of Portugal, Spain, France, Italy and Malta with their North African counterparts, namely Mauritania, Morocco, Algeria, Tunisia and Libya. Other initiatives include the Arab Maghreb Union which was established in 1989, the League of Arab States which was set up in 1945 and the Union for the Mediterranean launched in 2008 by the European Union as a complement to the Euro-Mediterranean Partnership and European Neighbourhood Policy. The Italian-Spanish proposal of 1989 to establish a Conference on Security and Cooperation in the Mediterranean is another initiative that never progressed beyond the drawing board.13

A lack of consensus among Mediterranean riparian states on foreign policy strategic priorities has undermined efforts to nurture pan-Mediterranean relations. A fundamental factor hindering a resurgence of regional relations is the fact that regional dynamics in the different sub-regions of the Mediterranean remain too asymmetrical to be put into a single institutional

framework. Socio-economic, political and military disparities that exist between the northern and southern states of the Mediterranean are so divergent that it often seems impossible to try and institutionalize so many different interest groups into one regional forum.\footnote{ibid., p. 119.}

In order for a functioning Euro-Mediterranean regional forum to emerge the countries concerned must perceive that they share a common strategic future and ideally a collective identity. Such essential characteristics remain absent or too weak to build a coherent regional framework upon. Addressing long-standing conflicts in the region such as the Arab-Israel conflict will assist in overcoming the common strategic gap that continues to dominate Mediterranean relations. Moreover, Mediterranean security issues do not attract enough international political support to mobilize the necessary resources to start bridging the divide that exists between the northern and southern shores of the Mediterranean. The striking lack of South-South integration must be succeeded by a thrust of regional integration as has happened in most parts of the world since the end of the Cold War.

3. Looking Ahead

Looking ahead towards 2030 the Middle East and North Africa (MENA) will remain an important geopolitical location due to the large oil deposits in this region of the world and the region’s potential as a source of instability. The MENA’s near future will be determined by how the leaders of these countries decide to manage political reform, energy profits, demographic changes, and open conflicts.

The first major immediate challenge Arab states in transition are facing is of achieving growth rates above six per cent annually to absorb the new workforce generation and provide a completely different narrative to the high number experiencing youth unemployment.\footnote{Gaubs, Florence, and Laban, Alexandra, eds., op.cit., pp. 19-20.}

If serious economic, educational, social and legal reforms are implemented and law and order are restored then international investors will be prepared to invest in these states. This process must include integrating moderate Islamic political parties that are certain to multiply during the next two decades.

A ring of failed states in this part of the Mediterranean area would severely undermine the stability necessary to attract foreign direct investment
on a large scale and to ensure the safe passage of commodities through the
global supply routes of the Red Sea and the Straits of Hormuz. The emer-
genence of an arc of crisis across the southern Mediterranean will ultimately
impinge upon all states across the Mediterranean and undermine their posi-
tion in the global political economy of the twenty-first century.

Since the end of the Cold War the global economy has drawn the majority
of states in the international system closer together. Yet growing interde-
pendence has not affected all parts of the globe to the same extent. In fact,
while the intensity of political and economic relations across Europe has
resulted in it becoming one of the most advanced regionally integrated areas
of the world, the Mediterranean remains the least integrated.

The European Union’s Euro-Mediterranean Partnership (EMP) launched
more than twenty years ago in November 1995 and EMP Barcelona Decla-
rathon held great promise of creating a more peaceful, stable and prosperous
Euro-Mediterranean region in the twenty first century. Instead the opposite
has happened. The time has come to reflect upon the Barcelona Declaration
of 1995 and refocus the EU’s energy on specific short-term oriented goals
that were already highlighted in the Declaration.

In many ways the European Neighbourhood Policy (ENP) has diluted the
EU’s focus towards the Mediterranean. The time has come for the European
Union to shift from being a passive observer of the historical moment taking
place in the Mediterranean since 2011 and to become an active player that
nurture confidence across the Mediterranean and supports seriously a
Euro-Mediterranean cooperative security agenda.

It is also important for the European Union to recognize its limitations.
The EU on its own lacks the political and economic means to correct the
socio-economic and political disparities in the Mediterranean. This is even
more the case now that the EU is confronted by the challenge of managing
the exit of its first member state from the Union after the Brexit vote of June
2016.

The United States can certainly help make up for some of Europe’s short-
comings along its southern periphery. After all, co-operating with Europe
in the Mediterranean could be a decisive foreign policy mechanism that as-
sists in strengthening the transatlantic partnership at a stage in history when
its entire raison d’etre is being questioned.

After the tragic events of September 11th 2001 and subsequent wars in
Afghanistan and Iraq, it is in the international community’s interest to avoid
the emergence of new fault-lines such as the one that is settling between the
northern and southern shores of the Mediterranean. Improving the livelihood of the millions of people along the southern shores of the Mediterranean must emerge as a concerted transatlantic foreign policy goal if such a division is not to become a permanent feature of the Mediterranean region.

If the ‘clash of civilisations’ scenario is not to attract tens of thousands of recruits in the years ahead the West must find ways of opening further channels of communication with all governments in the Mediterranean, including possible Islamic regimes. Otherwise the slow process of democracy building in the Maghreb and the Mashreq will come to a halt and the wave of anti-Western radicalization may increase.\(^{16}\)

Some estimates envisage as many as twenty million people in North Africa opting for emigration into Europe in the coming few years, where salaries are anything between eight to ten times higher than in the South. The emergence of a “Fortress like Europe” where borders are sealed in an effort to discourage possible migrants would only exacerbate this problem further. European policy-makers should recall that large communities of workers originating in sub region of the Mediterranean such as the Maghreb, have already made a significant contribution to the success of European industry.\(^{17}\)

While the Euro-Mediterranean Partnership and the subsequent Union for the Mediterranean have sought to arrest the process of polarisation between the northern and southern shores of the Mediterranean, the post-Cold War era has so far not seen a significant reversal of this trend. This structural development is what is stifling the establishment of a co-operative Mediterranean region.

It is also worth noting that political will on its own will not be enough to influence geopolitical relations on such a large scale. Economic support must also be forthcoming. The Americans had spent the equivalent of 125 billion euros in the Marshall Plan towards western Europe between 1947 and 1951 compared to the 20 billion that Brussels had devoted to the Euro-Med Partnership between 1995 and 2005.\(^{18}\)


\(^{17}\) Bryant, R.C., Global Change, The Brookings Review, No. 4, December 1994, p.42.

If the goal of fostering economic development is to take place across the MENA region then an ‘Arab Marshal Plan’ should be created. This fund which will require tens of billions of dollars to be effective could be financed by the rich Gulf States and would be geared towards restoring ailing Arab economies over a period of five year. Such a Fund would provide vital support for Arab states to undertake the necessary reforms in a socially sustainable manner and ultimately help in economic growth and job creation.\textsuperscript{19}

A quarter of century into the post-Cold War era there are clearer signs that the East-West divide of the past is being replaced by an international security system where North-South divisions are becoming the dominant feature. Unlike the European continent where the fall of the Iron Curtain ushered in a period of reconciliation, the Mediterranean remains a frontier area of divisions. European and Middle East international region disparities and conflict continue to be the hallmark of Mediterranean interchange.\textsuperscript{20}

\textsuperscript{19} Gaub, Florence and Laban, Alexandra, eds., op.cit, p. 37.
\textsuperscript{20} Wallace, W., The Dynamics of European Integration, Royal Institute of International Affairs, Pinter, 1990, pp.8-12.
II. Transatlantic leadership in a multipolar world: The EU perspective

*By Stefan Fröhlich*¹

1. Introduction

Talking about transatlantic leadership in today’s world means that we can follow two possible assumptions: Either we assume that there still is a common transatlantic vision, and that this is prerequisite for an effective leadership in light of the challenges posed by emerging economies, or we hold that there is no more transatlantic leadership because The United States (US) and the European Union (EU) disagree about too many issues and because the structural shifts in the relationship since the end of the Cold War have contributed much more to a transatlantic rift than Europe’s passing alienation from the Bush Jr. administration. According to the latter assumption, long before this administration came to power, the spectacular change in America’s international posture—that is, the emergence of unchallenged US supremacy (militarily, economically, and even culturally in a way) and the celebrated “unipolar moment” —had caused discontent, even frustration, among European allies and friends who had to deal with this dominance.

The following article suggests that there is a third, much more likely narrative which holds that the truth is somewhere in between these two most prominent assumptions: Yes, the weakening of the transatlantic bond was, and still is inevitable, as the end of the Cold War reduced Europe’s reliance on the United States for security. Without any doubt, the emergence of Europe’s new transformative power had to have a lasting influence on the transatlantic relationship: it is a power that cannot be measured in military budgets but rather in its long-term transformative impact. The Balkan wars between 1991 and 2001 further obscured the transformation of the transat-

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lantic security alliance, leading the United States to assume that the Europeans would continue to look across the Atlantic to make decisions and that in the end Europe would follow US world leadership.

In addition, in America’s long war in the Greater Middle East, US administrations for a long time misleadingly characterized the struggle as “ideological,” a struggle in which Europeans were (and to a certain extent still are) reluctant to combat alongside the United States. They were critical of the United States for addressing the new international security challenges by fighting militant Islam and trying to bring democracy to the region. Americans, in contrast, had no understanding of what they considered religious discrimination against Muslims in Europe specifically and a malfunctioning integration policy in general; Americans thought such treatment led to the radicalization of extremists, inspiring them to turn against the ‘West’, including the United States. Similarly, the Obama administration today worries about the EU’s reluctance to follow the US pivot or rebalance to Asia as a strategic imperative to counter the Chinese challenge, pushing Europeans to help create a stable balance in this increasingly important region of the world.

Against this background, the following chapters will address the most relevant and pressing challenges to the allies and analyse why and where both sides have to work together despite all differences. It will argue that the rise of the BRICS, particularly China and a re-assertive Russia, the threat from Europe’s southern periphery, the sluggish growth of the most advanced industrial economies, and the systemic challenges posed by autocratic regimes in terms of the future global governance structures will determine the transatlantic agenda in the future.

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2. Common global challenges, different priorities

For the very reason that the EU and the United States face the same challenges and problems that raise critical security, political, economic, and social concerns, they need to work together and make use of their comparative advantages in the military and security sphere and in other global issues more than ever. Meanwhile, both sides, especially the United States, have accepted that traditional security concerns are increasingly intertwined with problems that cannot be addressed by military power alone but that need a common and multilateral approach. Even Washington today accepts the new narrative that there is no way to face challenges arising from weapons of mass destruction (WMD), failing states, halting development, and even climate change as an individual nation-state. In addition, and much more importantly, no matter how much the two sides may differ on the perception of threat related to these challenges, they know about their shared vulnerability and that both still have much more in common than any other bilateral relationship among major powers.

A new pragmatism in transatlantic relations will not necessarily bring the expected results in each case. Europeans do not always emphasize all these challenges in the same way as Americans do, and they deem certain threats to be less imminent than their allies. From time to time Washington and the EU therefore will dissent and have difficulties reaching accommodation, and the coalitions-of-the-willing concept will have to serve as a complementary fall-back option. Europeans never were convinced that America can claim control of events in Iraq and Afghanistan, much less in the Greater Middle East in general. Rather, European political elites have increasingly been losing confidence that the changes in tactics in Baghdad in recent years brought more than a temporary relief long before jihadism reappeared in the form of ISIS, and that things in Afghanistan could really take a turn for the better in the near future.

Another reason for that difficulty is that changes in US foreign policy are very much driven by what one could call the power variable and a risk-taking propensity —thus making it rather proactive in nature —, whereas

6 The so-called “Islamic State of Iraq and Syria”.

179
the EU’s foreign policy approach is rather reactive and maybe fear-driven and constantly evaluating options in terms of gains and losses. Nevertheless, things are changing and positions on both sides are increasingly converging. Though the US has huge potential for shaping global politics and a (more or less) prevailing optimism, it faces the inherent danger of overreach and public frustration with Washington’s foreign policy. At that point, the US effort can all too easily become subject to abrupt policy changes when the former approach (as in the case of Iraq) fails repeatedly or catastrophically. For Europe, the tendency for a long time has been to suggest that it can continue to profit from the status of a ‘soft’ or ‘civilian’ counterpart to the ‘hard’ US approach—due in part to its fewer capabilities and its orientation toward values and process and in part to the lack of consideration of its international responsibilities and the means to master them. Nevertheless, at least partially the EU seems to have given up its traditional reluctance in favour of a more assertive role in global politics, seeking co-equal leadership.

The reason for this is very simple: Europe faces particular new threats to its security from Russia, while at the same time there is misrule, upheaval and sectarian/religious violence south of Europe’s shores, and terrorism threatens European societies from abroad and within. The Mediterranean has become a global crossroads, and an increasingly multipolar scene with Turkey, China, and also Russia (Syrian crisis) becoming more relevant. Particularly in this region, the ‘unipolar moment’ with the US playing the decisive role and Europe following suit has subsided. This has a tremendous impact on transatlantic burden sharing. The US is worried both about China’s rise and new assertiveness in the Asia Pacific region and fearful that, increasingly so, current global economic and demographic shifts challenge the international system in general. As a result transatlantic strategic positions are very different: while the US is concerned about these global challenges, none of them currently threatens its primacy in the global order, and even much less its existence. Europe, on the other hand, is facing a vast array of security threats of a domestic (such as Islamic fundamentalism, migration) and external nature (such as Ukraine, a crumbling postwar regional order in the Middle East and Northern Africa). In other words, Europeans simply are more affected by most of the chaos in the world, whereas the US’ greatest concern is about its diminishing global leadership role -

challenged primarily by Chinese foreign policy that range from island-building in East Asian seas to laying transport lines across Eurasia.

3. The new multipolarity of the 21st century

3.1 The geopolitical power struggle

The rise of the BRICS and other emerging powers marks the beginning of a new geopolitical competition and multipolarity. The greater economic and political strength of these countries has already shifted the international centre of gravity for growth and governance. In this context, however, the question is not whether the United States is and will remain the largest single aggregation of military, economic, and perhaps even cultural power or whether the EU can really become a power centre of comparable potential. The real issue of concern is whether this rebalancing marks a general trend or a relative decline of the West’s position in the world, not only in power but also in influence and independence. Although the United States and the EU together account for roughly half of the world’s gross domestic product (GDP), this percentage is set to decline over time, given the actual and projected differential between US and EU growth rates on the one hand and that of China, India, and many other countries on the other—many of which have recently been growing at more than two or three times the rate of the West. This development will deeply affect the West’s safety and standard of living, and it has already triggered a discussion over the degree to which the rise of these powers can deliver benefits for the United States and the EU.  

In other words, though we still do not know how sustainable developments will be in most of the emerging countries. Although the beginning of the 21st century does not necessarily mean the end of the American/Western era, these trends have weakened the liberal international order (our rule-based system) and it is likely that Western, and particularly US power does not automatically translate into influence and concrete political results in the future and that there are limits to the willingness of other regional powers to receive and follow Western reform proposals. In other words, the

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West is losing ground regarding its most valuable achievement since the end of the Second World War - to build and maintain the international order. Particularly China and Russia challenge in this context both sides of the Atlantic in several ways. Both are emerging markets and value strategic partnerships, which try to balance Western global leadership. And both have become natural allies again (despite an ambivalent relationship)\(^9\) by challenging Western designs for global governance (normative vs. hard power; multilateralism vs. unilateralism; inclusive vs. exclusive policies) and by staking out similar ideological political doctrines: authoritarian regimes at home that combine rapid economic growth and nationalism, along with a self-assertive power in world affairs that sees rising economic power as the basis for righting past humiliations while preaching absolute adherence to the Western principles of non-intervention and respect for national sovereignty. Additionally, America’s setbacks in Iraq and Europe’s inability to act in the assertive fashion of historical great powers have given Russia and China new confidence in the battle of ideas, with the economy being the real foundation of that new assertiveness in the case of China, and energy richness in the case of Russia. In both countries the Russian and Chinese political elites dismiss liberalization and democratization as a trap that could create social instability and instead have officially put the emphasis on stability. In other words, even if they cannot (Russia) or officially do not want (China) to replace or challenge the US directly, the West is losing ground regarding in terms building and maintaining the international order.

For the EU the most immediate threats in this multipolar world certainly emanate from its neighbourhood. There seems to be no immediate security interest in the Asia-Pacific region and, if at all, Brussels and most of the EU members states see themselves as a security provider only in cooperation with other great powers (strategic partnerships) and institutions (like the United Nations (UN) with its different agencies, the International Commission on Intervention and State Sovereignty (ICISS), the Association of South-East Asian Nations (ASEAN), etc. The main reason for this lies in Europe’s limited force projection capabilities and weak security networks which, in turn, are the result of a lack of domestic political interest and as-

piration to become a global security player on the Pacific Rim, and of different threat perceptions (particularly regarding China). ⁰¹⁰ As a consequence, there is no coherent European strategic approach to Asia but there are rather multiple Asian policies by different EU member states. While the EU is struggling to forge a common policy that goes beyond the ‘lowest common denominator’ – in 2012, the EU reached out for Washington as a crucial partner to promote stability and security in Asia – several member states have countered the joint US-EU ASEAN Regional Forum statement in numerous subsequent communiqués, including the Sino-German communiqué in Beijing in August 2012. ¹¹ Only few countries, such as the UK and the Netherlands, seem to be willing to follow the US ‘pivot to Asia’ to maintain the transatlantic security partnership. The majority of countries, however, rejects the Pentagon’s ties in the region and instead prefers an approach to Asia that is driven by diplomatic and economic interests; these countries are reluctant to become entangled in the emerging great power rivalry between Beijing and Washington. Their main concern is that the ‘US pivot’ will be accompanied by a growing reluctance in Washington to focus on security issues on the EU’s periphery, such as the Arab Spring, the Sahel and the EU’s relations with Russia – which in turn will lead to a new burden-sharing in these regions between Washington and Brussels.

That being said, Europe’s primary interest in the Asia-Pacific region is economic, whereas its strategic engagement is the sum of separate activities undertaken by its member states, primarily by the UK, France, Germany, as well as the EU. The UK has been building stronger diplomatic and security relations with US’ allies, such as Japan, Australia and also China, though, together with the Scandinavian members of the EU, it has also been the most stalwart opponent to lifting the arms embargo against China, not least driven by the appreciation of the enhanced security role of the US in the Asia-Pacific region. France is seeking a rather distinct role from the US in the region, pursuing a more economic and diplomatic pivot than the US, while Germany’s (as well as Italy’s and Poland’s) policy is primarily driven by economic incentives. There is, however, a growing awareness at the EU level that Europe as well should have an interest in avoiding the rise of

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China as a regional hegemon as this would not only have negative consequences for the region but could also easily have spill-over effects and lead to challenges to European interests across Central Asia and the Middle East. It is for this reason that the EU has developed a strategic interest in strengthening multilateral institutions, such as ASEAN, to integrate China.\footnote{European External Action Service, Guidelines on the EU’s Foreign and Security Policy in East Asia, 10313/2 Brussels (June 15, 2012). http://eeas.europa.eu/asia/docs/guidelines_eu_foreign__sec_pol_east_asia_en.pdf.}

The relationship with Russia is of a different character. For the EU Russia is an immediate security challenge, an important economic partner and a geopolitical challenge in its neighbourhood to the east. Even if Moscow’s foreign policy traditionally is more about tactics than strategy, the annexation of the Crimea and Moscow’s role in Syria have proven that Russia is nevertheless attempting to expand its global influence and to act as an independent pole (rather than as an integrative power). Though one should not overestimate Russia’s strength (as Putin certainly does), Russia’s assertive diplomacy and use of energy security, punitive trade measures, moneylending and military might have nevertheless weakened EU strategies \textit{vis-à-vis} Moscow.\footnote{Stefan Fröhlich, The New Geopolitics of Transatlantic Relations, Washington D.C. 2012, pp. 98-114.}

Europe will never be secure until Russia becomes a stakeholder in its stability. For that to happen, two preconditions are necessary: first, there can be no tough stance without openness; and, second, there can be no sort of constructive engagement without firm principles. Otherwise, Russia will keep on setting the pace in the relationship (particularly \textit{vis-à-vis} the EU). The current conflict in the Ukraine is a perfect example for this. Putin’s moves in Ukraine have shown that old challenges still remain, and NATO somehow has to create a level of deterrence, but they also left transatlantic allies with different opinions and initial divisions about the proper reactions to the Russian challenge.\footnote{Sven Bsicop, Game of Zones. The Quest for Influence in Europe’s Neighbourhood, Egmont Paper 67, Royal Institute for International Relations, Brussels (June 2014), pp 13-15} As a result, Moscow prevailed in this power struggle with the West and succeeded in all of its three strategic goals: it successfully annexed Crimea; it caused unrest and brought Ukraine to the brink of a protracted civil war; and – as a consequence of this -, it will keep NATO and the EU, at least in the short term, from talking about further expansion.
This does not mean that European (and transatlantic) crisis management was all too bad in this crisis. Nevertheless, it has shown how important it is that the transatlantic partners, and particularly Europe, sends a clear signal to Russia that they are willing to coordinate their positions on the basis of working with Moscow wherever possible, while pushing back on it when necessary. In other words, Europe should not surrender to Russian threats and avoid any linkages – which Moscow has created toward the allies ever since (be it in the case of missile defense, NATO enlargement or gas supplies). In the case of Ukraine this means that it had to be made clear to Moscow straight away that the US and the EU were/are ready to impose far more (and more meaningful) economic sanctions if Russia strikes beyond Crimea; and that they will actively support Ukraine reconstructing its governance structures, its economy and its armed forces. In the medium and long term, it means proving that the allies, particularly Europeans, are ready to defend NATO states nearest Russia (by changing the deployment patterns in the Baltic and the Central and European countries, and by modifying exercise deployments in the Mediterranean and the Black Sea); that they work collectively to reduce Europe’s dependence on Russian gas (Putin’s annexation seems to have convinced Europeans how important it is to integrate their energy markets and increase diversification); and, that they intend to establish close relations with other countries of the Eastern Partnership, particularly those of the Southern Caucasus.

To live up to these challenges, two aspects are important. First, there simply is no need for any European appeasement in the case of Moscow: the EU’s combined economy is almost 12 times the size of Russia’s. Even with all the oil and gas wealth, Russia’s GDP per capita is barely as big as that of Italy or Spain. The EU’s population is three and a half times the size of Russia’s, and even its military spending (despite significant increases of Moscow’s defence budget) is bigger. Trade figures tell a similar story – the EU buys more than 50% of Russia’s exports and supplies 44% of its imports, while Russia buys only 6% of what the EU sells, and supplies just 10% of what the EU buys from abroad. Even in the energy sphere interdependence defines the relationship: Though Russian gas represents more

15 Anthony Cordesman, NATO and Ukraine: The need for real world strategies and for European Partners Rather than Parasites, Center for Strategic and International Studies (CSIS), Commentary (June 5, 2014)
16 The World Bank, GDP per capita (current US$) in 2013. data.worldbank.org › Indicators.
than 30% of EU gas needs, the EU, on the other hand, accounts for 70% of
Russia’s sales; at least, in the medium turn – despite new arrangements with
China and other gas importing countries – Moscow has no practical alter-
native to the EU market.17

Second, though the transatlantic allies have been engaged in a construc-
tive way over the Ukraine crisis, including discussions on its implications
for the organization of future defence in Europe, the case of the Ukraine has
rather intensified the debate on European defence contributions and its re-
liability when it comes to taking concrete actions. Indeed, Europe must pro-
vide its fair share in defence, and stop whining about ‘American decline’.
Whereas the US – though it is cutting military expenditures as it ends the
war in Afghanistan – is still spending as much as it did before it began the
wars in Afghanistan (2001) and Iraq (2003), Western and Central European
countries, according to the Stockholm International Peace Research Insti-
tute (SIPRI), have cut their military expenditures by 6.5% during 2004-
2013. The US has increased its share of total NATO military spending from
roughly 50% at the end of the 20th century to 73% in 2013, while the Euro-
pean NATO members’ share has fallen accordingly from 50 to 27% in this
period.18 No wonder, that Washington is eager to see Europeans to invest
more into the alliance, and particularly wishes Germany and Poland to take
the lead on Europe’s Eastern flank – of course, with solid US backing.19
And no wonder also that the renewed focus on deterrence has raised fears
in Washington that as a consequence of this Europe might lose sight of de-
veloping the necessary force projection capabilities and thus contribute to
an even greater gap between what both sides expect from transatlantic se-
curity cooperation and collective defence at a time when Washington’s
main strategic objective is located in Asia.20

3.2 The geo-economic challenge

17 Stefan Fröhlich, Die EU als globaler Akteur, Wiesbaden 2014, pp. 236-255.
18 Trends in world military expenditure, 2013, Sam Perlo-Freeman and Carina Sol-
mirano SIPRI Fact Sheet. books.sipri.org/product
19 Ulrich Speck, German Power and the Ukraine Conflict, Carnegie Europe, March
26, 2015. carnegieeurope.eu/.../german-power-and-ukraine-co.
20 The German Marshall Fund of the United Sates (GMF), Reconciling National and
Transatlantic Interests. Creating Political Will to Address the Great Challenegs of
Transatlantic Security Cooperation. Transatlantic Security Task Force Series,
The divide between the sluggish growth of the advanced industrial economies in the US and (particularly) Europe and the expanding emerging countries led by China - not only a result of the world’s financial and economic crisis - has been the number one geo-economic challenge to Europe in recent years. It is likely that global recovery will be sustainable only if either the United States once again, with China, leads the world out of recession/stagnation or, in case Washington finds itself in a situation similar to that of Japan in the mid-1990s, Asia and Europe replace global demand in the years to come. As both scenarios are full of uncertainties, the cooperative efforts of both Americans and Europeans on the one hand and emerging markets on the other could provide the best answer to the challenges of managing the post-crisis world. In the United States, as in the United Kingdom and some other high-income countries, the highly indebted private households have been trying hard to lower their indebtedness and raise their savings over the last three-four years. At the same time, however, public sector borrowing, which had been substituted for private sector borrowing on an unprecedented scale, continued for some time as well, increasing risks that domestic balance-sheet problems would remain without global rebalancing. The surplus countries, though, above all China, until recently have shown only limited interest in making the needed policy changes to strengthen world demand. Rather, they stayed mercantilist, urging the United States and (meanwhile) the EU through the European Central Bank (ECB) to further stimulate the domestic and world economy with continued expansionary policy.

There is, however, no doubt that neither the US import-and-consume business model nor the Chinese, German, or Japanese export-and-save strategy will provide the right solution to the still pending crisis and global imbalances. Europe’s (and the transatlantic) fate is not in its own hands. Although China may have been the chief beneficiary of the financial crisis and the latest challenger to US hegemony, its dependence on exports to the United States and Europe limits Beijing’s room for manoeuver as well. What is needed is sustainable demand, no matter where it comes from, and a functioning financial system, one that is adequately capitalized and transparent enough to reassure investors.

Plenty of arguments support a scenario in which China, as the biggest surplus country, expands demand faster than its potential output, which is in fact in its long-term interest. China’s policy of cheap capital (through cheap credit and low corporate taxes) in combination with an expensive foreign exchange (by currency interventions) has led to income transfers
from private households to industry. As a result, exports and capital-intensive industry have surged, but job creation has lagged. In addition, household disposable incomes have decreased, while corporate investments and savings have been huge, allowing current account surpluses to soar. In the long run, such a policy of cheap labour and distorted exchange rates at the expense of domestic demand—together with China’s uncomfortable demographic prospects—will end up creating overcapacity and will amount to a huge challenge for Chinese policy makers.

China’s total debt has already risen from $7 trillion in 2007 to $28 trillion in 2014.\(^\text{21}\) It accounts for more than one-third of growth in debt globally making China’s debt now even larger than that of the US. This is the result of the government’s stimulus programme in response to the 2008 crisis which took the form of an explosion in direct bank lending, mainly to state-owned enterprises and local governments, followed by a boom in shadow banking finance.

Fortunately, Beijing recently has started at least some sort of adjustment process to shift the Chinese economy to consumer demand and to herald a period of slower growth as the new normal.\(^\text{22}\) But what is most important now is unlocking productivity as a fresh driver of growth and industrial upgrading, as the demographic dividend of cheap labour has come to an end—a development that will afford market forces to be the decisive factor in resource allocation.

Respective gradual adjustment processes are in the interest of both the United States and the EU. China’s economy, although it is the second largest in the world, cannot take over the role of the lead economy in the short run. Nor can the other BRICS — Brazil, India, and Russia, whose trend growth rate is slower than China’s and who are currently stumbling because of looming interest rate increases in the US (proving that their economies are not resilient yet to such necessary adjustment processes). As a matter of fact, the US and the EU are still far ahead of the rest of the world both in aggregate numbers — GDP, share of global imports and exports, foreign


direct investment (FDI), defence spending, and the like — and in investments in key industries and technologies, higher education, and R&D. The power disparity between these countries (with the exception of China) and the US and the EU is yet too great as to challenge them — provided we take their future cooperation and alliance for granted: Russia is too dependent on commodity exports and this does not build an economy. Its population is in decline, its economy less diversified. Its strength is built on residual power categories such as the permanent seat in the UN, its nuclear power status and vast gas and oil resources. China for its part, as the second largest economy, which holds three trillion $ reserves and is embracing certain Western rules and institutions for defensive purposes, is reluctant to assume global responsibility and leadership.

The United States, however, should not overestimate the impact of the Federal Reserve’s policy of quantitative easing on US growth and instead let fiscal policy do some of the lifting, not only to prevent a double-dip recession but also to rebalance the global macroeconomic situation and avoid a series of competitive devaluations. US debt is projected to grow to about 100 percent of GDP by 2020 under the present policies, and the deficit is projected to exceed 10 percent of GDP every year in that period, according to the Congressional Budget Office. That massive debt burden will not make the United States stronger over the long run relative to the EU, where the push is very strong to cut all deficits to less than 3 percent of GDP in the next several years.

What is still needed against this background in the Euro area (and worldwide) is a gradual adjustment process allowing indebted nations to develop reasonable budgets and work toward higher growth, more employment, reduced social transfers, and higher tax revenues. And while EU institutions and national governments have reformed the Stability and Growth Pact by eliminating past bailout shortcomings, Germany and other net payers, whether they like it or not, in the short term will have to keep on saving


ailing Euro area countries with their own tax money. The alternative, breaking away from the Euro, would lead not only to the economic implosion of the peripheral EU countries but also to tremendous political and economic costs for Europe. For Europe and the United States (heavily intertwined with European markets), economic recovery, however, will be even more decisive than rebalancing the global macro economy and avoiding further competitive devaluations. While emerging countries are booming, peripheral Europe and the United States must both grow faster and start working on fiscal solidity. At the same time, core European countries need to stabilize healthy growth, while also working on the monetary stimulus front.

4. Global governance and responsibility

Last but not least, it is essential for the transatlantic partners to come up with own positions in the relevant bodies of the international system in order to obtain better compliance from China and other emerging countries. Such commonality will be the key to increase the participation and involvement of those countries in the deliberations of various multilateral organizations, like the G-7 (or the G-20), the Organization for Economic Cooperation and Development (OECD), the World Trade Organization (WTO) or the International Monetary Fund (IMF), and it would also help generate greater political pressure on China and Russia at the UN Security Council (as in the case of possible sanctions) or in cases of their non-compliance in relation to arms sales or technology transfer.

The issue is particularly relevant for the EU. In several institutions – the G7, the OECD, the International Energy Agency (IEA) – Europe is overrepresented. Thanks in part to the small average size of EU countries, the membership of EU countries in these institutions accounts for more than the share of the EU in total GDP or population. The Commissioner for Economic and Financial Affairs and the Finance Minister of the country holding the EU Presidency participate in the G7 finance meetings, in addition to those of France, Germany, Italy and the United Kingdom, and that the president of the ECB replaces the three governors from the Euro area countries for discussions on multilateral surveillance – in other words, the EU is playing a key role in the G7/8. An exception is the pattern in the G20 (embracing Australia and the US, 11 emerging countries, plus the EU), which was cre-
ated to correct the prevailing bias in the G7 and to engage the major emerging economies in an informal dialogue. But here as well, the EU is well represented.25

In the WTO, or the Bretton Woods institutions, the EU accounts for a significant share of their membership: 28 out of 162 WTO members and 25 out of 184 IMF and World Bank members. There is no weighting of votes in the WTO but in the Bretton Woods institutions there is. Here the votes could add to a voting weight of the EU at about 30 %, but the problem is that the EU member states are scattered over several voting constituencies. This is in line with the share of the EU in current-dollar world GDP but significantly more than its share in purchasing power parity-based world GDP or population. It is also far more than the 17% quota of the US and the 15% blocking minority. Moreover, the true power of the EU is the swing voter power when behaving as a bloc – then the potential is 50% higher than its voting weight; as a coalition, the EU’s voting power index would be 48 % (compared to the US with 7 %).26 And as the managing director of the IMF by tradition is European and the G7 routinely behaves as a caucus within the international financial institutions (representing more than 45% of the vote), Europeans additionally hold considerable clout. All in all, the EU is the winner in the distribution of international institutional power – BRICS votes are about 20% below those of Italy, Belgium and the Netherlands, while their combined GDPs is 23 % higher. Maybe that is why the EU still claims to be the champion of multilateralism, whereas the US has a very pragmatic approach to the issue. Nevertheless, a distinction has to be made between, on the one hand, the EU as a powerful institutional bargaining mechanism, where bargaining gains can be achieved through Europe’s sheer (theoretical) weight within negotiating frameworks (structural power), and, on the other hand, the ideological-political impediments to European coherence and unity in practice, that is the EU’s success in deploying its principles and values in an endeavour to change the behaviour of third states. The very practical obstacles to this unity, such as the double representation of the EU at the G 20 by the President of the European Commission and the President of the European Council and, of course, the fact that the EU’s competence varies depending on the policy field, respectively the

26  Ibid.
individual G 20 topics (implying that the existence and nature of EU competences ultimately determines EU representation in the G 20) suggests that there is a huge gap between the theoretical-structural weight of the EU on the one hand, and the political-practical impact of the Union within the global governance framework on the other hand, and that there is much potential left for the strengthening of the EU’s role and voice in these institutions.27

5. Outlook - transatlantic cooperation and leadership

To conclude, following this paper’s question about the potential for future transatlantic cooperation on the most pressing issues two final observations can be made: first, though priorities may vary, the transatlantic partners are not only facing the same challenges, but also have been slightly converging their positions and responsibilities at least in a way that they have realized that there is no consensus on a feasible ‘quick fix’ for the most pressing issues on both sides of the Atlantic: Though the US continues to play a larger security role in the world and would wish Europeans - particularly Germans - to take on a more active (military) role on the European and global stage, it has also become less risk-prone (“leading from behind”) and realized that military power alone (Iraq, Afghanistan) has very little utility when it comes to solving complex socio-political problems, while attitudes in Europe (particularly Germany) also appear to be changing. Germany has become Europe’s powerhouse (raising great expectations with regard to its new leadership role in Europe despite all tensions raised in the refugee crisis) and developed a stronger foreign policy profile, while the US is struggling with questions of widening social and income inequality at home and its leadership in the world. Since 1949, the US has been the guarantee power of Europe. This role, however, has been questioned over the last decade. The result is an emerging security vacuum, in which both the US and the EU are less capable militarily in Europe and have left a strategic space that could potentially be filled or at least exploited by Russia.

Second, the leadership question is crucial in this context: we have to recognize that Europeans can only seek to achieve the maximum possible degree of strategic uniformity, without illusions about perfection. Germany is certainly going through what many have called a strategic moment - it has announced extensive reforms to scale up the Ministry of Foreign Affairs’ crisis management capabilities; it is arming the Kurdish Peshmerga, sending trainers to Iraq, playing a larger role in NATO, and, above all, increasing its defense budget. But is it ready to lead? Not yet, if at all it will be ever capable to develop the right mix of deterrence, defence and diplomacy to not replace but at least complement the US’ diminished engagement in Europe. The UK, traditionally robust and interventionist-minded, can no longer be sure of an ‘unfettered executive prerogative’ in the realm of military deployments. France as well -though seemingly the most reliable partner for the US - simply lacks the resources necessary to maintain levels of readiness commensurate with the threats in Europe’s surroundings. In sum, even the UK and France have become ultra-pragmatic in their military planning and Europe is still far away from anything like a coherent and strong foreign and security policy. Europe needs the US to stick with it - in case of the unlikely event of war, but also for a credible deterrence - to improve its own capabilities (in terms of software (intelligence, analysis, foresight, planning and coordination) for their hard power, and to create resilience at the national and the EU level.

On the other hand, Americans are tired of war and wary of new entanglements (and even a Republican government would not bring a turnaround). In other words, even without a significant change of the EU’s foreign and security profile, the US will need to work with EU member states on a very pragmatic case-by-case basis through changing and flexible ‘coalitions of the willing’ - not least because of the fact that Europe is the only reliable partner in the world and dealing with Russia or the Middle East alone simply would be more costly and wearying. Apart from that, in reality there is much more successful cooperation on key security issues (despite of all criticism from Washington of the EU’s handling of the Greek crisis, European reluctance in the case of Syria/Iraq in particular and the Middle East in general, which is certainly not completely different from that of the US). In Ukraine on the issue of sanctions, where Washington together with Berlin, Paris and Warsaw forged a consensus; on Iran, where the P5 and Germany managed to bridge different interests; on ‘soft’ issues such as climate change, energy security or sustainable development, where the US has become more “European” and progressive than in the past.
In other words, even though the relationship has become more pragmatic, the EU and the US still need each other (not to mention the economic interdependence), and maybe more than ever in these days. This certainly takes into account that both sides differ more often than in the past and that they have to forge strategic partnerships with many others as well, and that Europe’s unwillingness to allocate funds and unfold leadership is the most valuable indicator (and not the successful completion of the Transatlantic Trade and Investment Partnership - TTIP) of how seriously it is taking the underlying strategic issues. It is this unwillingness that has hampered Europe’s geostrategic influence in its neighbourhood, the US value of security guarantees, and the future of the liberal order.

III. International Negotiations: The Foundations

By René A. Pfromm¹

Literature on negotiation and diplomacy dates back to the early 18th century, indicating how important the subject has been seen over centuries. In 1716, François de Callières, diplomat at the court of King Louis XIV, wrote the first handbook on modern diplomacy and the art of negotiating with sovereigns.² During the Cold War, economists looked at negotiations from a game theory perspective, assuming purely rational negotiation behavior.³ The Harvard Negotiation Project, created in 1979 and (despite its continuously strong influence on negotiation theory and practice today) arguably most famous for its first work by Roger Fisher⁴, brought the science of negotiation into the focus of academia and a multi-disciplinary world. Today’s book market is filled with texts on negotiation theory and practice, covering all areas of negotiations, from professional to private and from politics to business. These works are brought to the public from an equally broad background of authors, reaching from diplomats to businessmen and lawyers, from academics to former hostage negotiators and full-time trainers.

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² François de Callières, De la manière de negocier avec les souverains (1716). Many aspects relevant to negotiation strategy and techniques were already discussed earlier, dating back as far as Sun Tzu, The Art of War (around 500 BC). Ancient clay tablets show that negotiators in the Middle East were negotiating and exchanging treaties some 5,000 years ago and shed light on the forms, conventions and substance of negotiations at the time, cf. Paul Meerts, Diplomatic Negotiations – Essence and Evolution (2015), p. 50.
Though disguised in situational apparel and seemingly considerable differences between contexts, choices, and individual styles, the underlying structure and general principles of negotiations are quite similar and apply in diplomacy as well as in business, on a domestic level as well as on the European and global scene.\(^5\) No matter what the setting, negotiators must make strategic choices based on a limited toolkit of available styles and techniques (i.e., avoid, accommodate, compromise, compete/dominance or collaborate),\(^6\) they face similar challenges (e.g., information asymmetry, uncertainty, perceived power imbalances, psychological traps), and must overcome the negotiator’s dilemma of whether to negotiate in a distributive or integrative manner.\(^7\) Once negotiators have understood that success does neither require nor equal winning, but rather achieving one’s goals and maximizing the overall value of the agreement, the intuitive approach to negotiation strategies, techniques and tactics often becomes a more structured one. This article provides an overview of the foundations of international negotiations and suggestions of how to structure the negotiation preparation and process, how to design solutions, and how to conduct negotiations with the right personality and mindset.\(^8\) It focuses on the – often over-


\(^6\) Other concepts include the five negotiation modes model, consisting of push (offensive/open), pull (offensive/concealed), reject (defensive/open), avoid (defensive/concealed) and stand still (no move), cf. Alexander Mühlen, International Negotiations – Confrontation, Competition, Cooperation. (2013), pp. 175 et seq., and the avoid-adopt-adapt-adhere-advance model, cf. Christopher W. Moore/Peter J. Woodrow, Handbook of Global and Multicultural Negotiation (2010), pp. 64 et seq.

\(^7\) The negotiator’s dilemma builds upon the prisoner’s dilemma and shows that there is a tension between cooperative and competitive elements in negotiations. The best individual outcome for one person is not necessarily the best outcome for the other or the overall value of both.

looked – main principles that apply to all negotiations (e.g., intra-state, business to public, business to business, not for profit, private), whilst additional aspects may matter in specific circumstances (e.g., influences by diplomatic protocol and etiquette).

1. Preparation

“You have to know what you want, and be able to articulate it in your own mind with precision. This sounds self-evident, but you’d be surprised how many people don’t actually know what they want with the kind of precision that a negotiation demands. Then, you have to think about the 2,000 ways to get where you want to go: what the trades might be, what the arguments might be, what the moves might be on the other side. And you watch carefully, and listen carefully, talk less, and remain persistent.” (US Trade Representative Charlene Barshefsky)

Though often falling short in practice, the value of preparation for negotiations must not be underestimated. A proper preparation does not only cover aspects of the intended agreement, but also (or even: in particular) negotiation strategy and tactics.

1.1 Goal setting & internal alignment

The first step in negotiation preparation is the internal alignment and goal-setting process. This process aims at identifying the needs and goals of the organization, its internal stakeholders (e.g., departments, individuals, regions), its external constituency, and potential other players, ensuring that all relevant stakeholders are heard and that their interests, needs, goals and positions are considered in the final negotiation strategy. Looking both at short-term and long-term, specific and broad, fundamental and minor needs and goals, and focusing on relevant and the most important issues, the purpose of this step is to clearly define what to achieve in the upcoming negotiations, and what to avoid.9

A helpful starting point and approach is to first jointly assess and prioritize the internal – possibly differing – goals (“What do we want?”) and then

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to think about external influences. The defined goals are not only the basis for the strategy and roadmap, but also serve as a control question for every move during the upcoming negotiation (“How does this move or milestone help us to achieve our goal?”).

1.2 Diagnosing the situation

The second step in negotiation preparation aims at a thorough analysis of the negotiation situation, in particular its issues and parties, their interests and alternatives, as well as barriers to agreement and action-forcing events. This analysis takes place pre-negotiation and internally, though external advisors can be of significant value to facilitate and streamline the process. Negotiators can tap a broad array of sources, including internal knowledge, public sources (media, internet), external advisors and experts, non-governmental organizations and special interest groups, as well as personal and professional networks.

1.2.1 What are the issues?

Issues are the topics of a negotiation, including the material aspects of the parties’ goals and needs, the process as such, or conflicts in the past that need to be resolved before agreement (or even a negotiation) is possible.10 Beside visible and acknowledged issues there may be latent ones and hidden ones.

Negotiators should have a clear understanding of what issues need to be discussed to achieve their own goals, and how these issues are valued and prioritized. Skilled negotiators analyze and identify the issues that the other parties will likely bring up (including their valuation and prioritization), as these define the basis for the upcoming negotiation and the required trades at the table. They also think about the issue sequence and whether to discuss issues one-by-one or in packages, to take advantage of different valuations.

It is also helpful to analyze whether the current negotiation is (or may be) linked to other past, present or future negotiations, as such linkages can be used as precedent, to build momentum, or as a basis for linked solutions.

10 An interesting work on negotiating with perceived evil is Robert Mnookin, Bargaining with Devil – When to Negotiate, When to Fight (2010).
Skilled negotiators create favorable linkages and neutralize unfavorable ones.  

1.2.2 Who are the parties and stakeholders?

A detailed analysis of the relevant parties and stakeholders allows negotiators to better understand the scope of the upcoming negotiation and to influence its set-up. Parties and stakeholders may comprise the negotiating organizations, their delegations and individuals, their constituencies, and other stakeholders (e.g. the public, media, NGOs, special interest groups, etc.). Negotiators should research each of the parties and stakeholders, their background and history, reputation, individual goals, needs and incentives, their political, economical, cultural or intellectual constraints, their internal decision making and dependencies, as well as their expected strategic and tactical moves in the upcoming negotiation.

In complex negotiation settings, three tools can help to drive the process, approach the right parties and individuals in the right sequence, and to avoid deadlock: party mapping (i.e., graphically outlining who are the already involved, potential and hidden parties and stakeholders), relationship mapping (i.e., graphically outlining what relationships among the parties and individuals exist and of what quality they are), and backward-analysis (i.e., identifying the ultimate decision maker, looking into who influences her, and then stepping backward one by one).

Coalitions and alliances may have a significant impact on the outcome and on the momentum to reach agreement. A critical analysis of potential and existing, internal and external, winning and blocking coalitions before and during a negotiation is necessary to avoid unexpected surprises and to move the outcome in a favorable direction. Building coalitions should start early and negotiators may use the full array of compatible interests, framing

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11 On linkages, see Michael Watkins/Susan Rosegrant, Breakthrough International Negotiations, pp. 33 et seq., pp. 110 et seq.
12 An excellent approach to negotiation set-up is presented in David A. Lax/James K. Sebenius, 3D Negotiation – Powerful Tools to Change the Game in Your Most Important Deals (2006), pp. 53 et seq.
13 For an overview of the challenges of multilateral negotiations and its process, see Alexander Mühlen, International Negotiations, pp. 83 et seq.
14 Cf. in more depth: Michael Watkins/Susan Rosegrant, Breakthrough International Negotiations, pp. 211 et seq.
choices, altering incentives, eliminating options and using social influence to build a winning coalition.\textsuperscript{15}

1.2.3 What are their interests & goals?

One of the most important preparation aspects is analyzing the interests of the parties involved. Whilst many negotiations start with specific demands of what a party wants (positions), a thorough understanding of the underlying objectives, motivations and goals of that party (interests) may help to find solutions and is the basis for value creation. While positions may be irreconcilable, underlying interests may not. Therefore, negotiators should identify and assess the short-term and long-term considerations of all parties, their respective needs and goals, their priorities, resources and capabilities, their individual incentives, as well as their non-negotiable needs (breaking points) and process interests (e.g., minimizing transactional cost, enhancing relationship, etc.).\textsuperscript{16}

Particularly in international cross-cultural environments, goal setting and decision-making may not be entirely logical, but influenced by the cultural context and its impact on perceptions, goals and approaches. Negotiators should be careful not to make assumptions, but to test their understanding regularly and to take cultural differences into consideration.\textsuperscript{17}

A helpful tool to facilitate interest-based solution finding is to write the other side’s victory speech. By thinking about how a proposed agreement will help the other party’s interests and goals, and how they will sell it to their stakeholders and constituencies, can help to design and frame solutions in a more effective way.

\textsuperscript{15} Michael Watkins/Susan Rosegrant, Breakthrough International Negotiations, pp. 213 et seq. For alliance building in the EU, see Klaus-Jörg Heynen, Frustration or Success: How to Negotiate EU Law, pp. 265 et seq.

\textsuperscript{16} On the diversity and the understanding of national interests in the EU, see Klaus-Jörg Heynen, Frustration or Success: How to Negotiate EU Law, pp. 274 et seq.

1.2.4 What are their alternatives?

A party’s alternatives to the outcome in the current negotiation define its leverage and walk-away position in the negotiation. The better a party’s alternatives are and the less dependent the party is on the outcome of the current negotiation, the more leverage it has. Among all the options the party has in case of a non-successful negotiation, its Best Alternative To a Negotiated Agreement (so-called BATNA, or simply Plan B) serves as the standard against which the proposed agreements will be measured. Therefore, negotiators should analyze what will happen if the parties are unable to reach agreement.\(^\text{18}\)

1.2.5 What are the barriers to agreement?

Barriers to agreement may be diverse, but often they are structural, institutional, strategic, psychological, or cultural:\(^\text{19}\)

<table>
<thead>
<tr>
<th>Barrier</th>
<th>Characteristics</th>
<th>Solutions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Structural barriers</td>
<td>• wrong, too many or missing parties;</td>
<td>• change and optimize parties;</td>
</tr>
<tr>
<td></td>
<td>• blocking coalitions; too narrow or too broad set of issues;</td>
<td>• change and optimize agenda and issues;</td>
</tr>
<tr>
<td></td>
<td>• constraining linkages to past, present or future negotiations;</td>
<td>• delink negotiations or create new, favorable linkages;</td>
</tr>
<tr>
<td></td>
<td>• communication challenges among the parties</td>
<td>• introduce new channels of communication</td>
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<tr>
<td>Institutional barriers</td>
<td>• internal political or organizational dynamics;</td>
<td>• use backchannel communication</td>
</tr>
<tr>
<td></td>
<td>• principal-agent-challenge</td>
<td>• use multi-phase negotiation processes</td>
</tr>
</tbody>
</table>

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\(^\text{18}\) Alternatives have to be seen in context of perceived choices and consequences, cf. Roger Fisher/Elizabeth Kopelman/Andrea Kupfer Schneider, Beyond Machiavelli, pp. 51 et seq. For an overview of sources of power, cf. Christopher W. Moore/Peter J. Woodrow, Handbook of Global and Multicultural Negotiation, pp. 120 et seq.

\(^\text{19}\) The following overview is based upon Michael Watkins/Susan Rosegrant, Breakthrough International Negotiations, pp. 56 et seq.
Strategic barriers

- negotiator’s dilemma;
- uncertainty about available information;
- limited trust among the parties or regarding the enforceability of agreements and the compliance monitoring of the agreement’s implementation
- introduce verification regimes;
- use deterrence mechanisms or outside guarantors

Psychological barriers

Perception and judgment biases (e.g., overconfidence, loss aversion, partisan perceptions\(^\text{20}\))

- use third parties to introduce and assess facts
- deal with biases

Cultural barriers

Differences in communication styles, norms and worldviews\(^\text{21}\)

- use cultural consultants
- familiarize yourself with the culture

1.2.6 How does timing influence the negotiation?

Timing and action forcing events may have significant influence on the progress of negotiations. At the same time, negotiators often underestimate time pressure and its impact on the quality of negotiation results. Awareness of action forcing events and the related time pressure, discipline and strong time management are of utmost importance. Skilled negotiators consider the impact of time, and time-related costs on the parties constantly during the negotiation, build momentum by shaping the other sides’ perceptions of time-related costs, and use external deadlines and linkages with other negotiations to force action.\(^\text{22}\)

\(^{20}\) For ways to explore and deal with partisan perceptions, see Roger Fisher/Elizabeth Kopelman/Andrea Kupfer Schneider, Beyond Machiavelli, pp. 21 et seq. Also see their remarks on understanding messages, ibid., pp. 43 et seq.

\(^{21}\) On culture, cf. fn. 17 above.

\(^{22}\) Michael Watkins/Susan Rosegrant, Breakthrough International Negotiations, pp. 35 et seq.
1.3 Defining strategy & drafting roadmap

Based on the aforementioned information and insights, negotiators define their overall negotiation strategy. This strategy should include when, where, and with whom to negotiate, potential coalitions, the sequence, setting and timing of the anticipated negotiation rounds, potential external moves and action-forcing events, as well as preparation for unexpected events.

Negotiators are well advised to also prepare a roadmap for their upcoming negotiations that defines the roles, responsibilities, and style of the negotiation. Such a roadmap serves as point of reference for the team, and may have to be adapted as circumstances change and evolve.

Internally, negotiators should finally manage the expectations of their delegation, organization, constituents and other stakeholders. Maintaining proper communication streams and information routines reduces internal pressure and eases decision making under time pressure. In doing so, negotiators will continuously have to decide what information to disclose and what the impact of a willful or accidental disclosure by other parties might have on the negotiator’s stakeholders.

2. Process

“With this procedural understanding, issues could be discussed in the privacy of the negotiation process. (…) It was a test case if they accepted what I said that nothing is agreed before everything is agreed.” (Nobel Peace Prize laureate, former Finnish president and UN diplomat Martti Ahtisaari)

2.1 Away from the table

Negotiations begin long before the parties meet at the table. Decisions taken away from the table and often early in the process may have a stronger impact on the negotiation outcome than what happens during the negotiation at the table. Skilled negotiators embrace every opportunity to shape the negotiation structure, to design the process and to define the negotiation’s parameters. By choosing the parties to attend and the sequence of negotiations, drafting the agenda, establishing the basic rules, and setting the scene, negotiators take control over the process and can influence the outcome.
They will also have to assess and decide the benefits and risks of outside campaigns to influence the negotiation’s outcome. Options include back-channel communication, inside and outside advocates, media and influencers, public opinion, action-forcing steps, and coalition building.23

2.2 At the table

Negotiations at the table can be broken down into several phases:
- **Welcome, agenda & opening**: the beginning of at the table-negotiations is marked by welcoming and introductory remarks, summarizing the goal of the negotiation, outlining the agenda, establishing basic rules, and setting the tone. Clarifying the roadmap, mandates and expected outcome helps to align the parties’ expectations.
- **Information gathering**: this phase aims at getting missing information and a better understanding of the other parties’ motivations, interests, goals, perceptions, and reasoning. By using direct and indirect questioning techniques, combined with a thorough observation and analysis of verbal and non-verbal clues, negotiators may generate additional insights and valuable cornerstones for the solution design phase. The information-gathering phase may occur at a later stage if the parties start with the positional and confrontational phase.
- **Positions, demands & stale-mate**: if the negotiation’s subject is controversial, negotiations sooner or later move into a confrontational phase, characterized by the parties’ positions and demands. This phase usually consists of maximum positions (ideally backed by rational considerations) that aim at signaling strength, testing the other side’s leverage, and using the anchoring effect. Once exchanged, parties often get stuck with their polarized positions in a stalemate, a necessary strategic milestone on the way to final agreement.
- **Solution design**: to overcome this confrontational deadlock and to transition the negotiation from confrontation and unrealistic demands to co-

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operation and feasible solutions, skilled negotiators possess a broad array of techniques to handle these challenging moments.24 Once negotiators have understood what criteria have to be met before a decision can be made, workable solutions are often achieved in a three-step process. The first step should be a long break that gives parties room for lobbying and away from the table negotiations. In a second step, the conceptualization phase, negotiators build upon creative options and make interest-based proposals to overcome the stalemate and lay the ground for an agreement that closes the gap between the parties’ positions and, ideally, increases the overall value of the solution. If accepted by the other sides in principle, the parties may, in a third step, work out a detailed solution including the necessary technicalities, considering implementation and compliance monitoring, and dealing with the remaining uncertainty. In this step, the parties will also have to move from value creating to value claiming, and divide the pie among them.

- **Closing:** the closing phase leads from the parties confirming their mutual understanding of the achieved outcome, via summarizing the agreement to formalizing and documenting the agreement (ideally in a specific, firm, implementable, measurable and enforceable form). If necessary, the parties may also plan their next session and agree on a mutual public message. Skilled negotiators leave the glory to the other side, recognizing and reinforcing their efforts and praising them for their professionalism.

- **Logistics & side program:** particularly if negotiations continue over a longer period, logistics and the away from the table side program can have a significant impact on how the negotiation parties work together at the table. This reaches from breaks, logistics and little courtesies during the negotiation to evening and side programs aimed at getting to know each other better.25

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24 Alexander Mühlen, *International Negotiations*, pp. 53 et seq., assumes an additional phase between confrontation and cooperation: during the competitive phase arguments and conditional compromise offers are presented, and parties move somewhat away from their starting positions.

3. Solution design

“Negotiation is the art of letting them have your way.” (Italian diplomat Daniele Vare)

3.1 Overcoming stalemate

Techniques to overcome stalemate include parking certain subjects for later discussion, reframing the issues, modifying the negotiation subject (e.g., increase, decrease, substitute, combine, modify, change issues), changing the rules, changing the players, using breaks, taking a walk, setting ultimatums, building golden bridges that save face, using a tactical break-up of the negotiation, or agreeing to disagree. Where conflicts and emotions are in play, negotiators have to manage and overcome conflict by avoiding escalation, defusing tension, transforming conflict into a mutual problem-solving process, and assessing whether involving a third party to facilitate the process would be beneficial.

3.2 Creating value

In the conceptualization phase, negotiators seek creative options by building upon the similarities and differences among the parties. The goal of this phase is to overcome zero sum negotiations (“my win is your loss”) and to increase the overall value of the agreement. Value creation can be achieved by building upon the parties’ interests and preferences, valuations and expectations, risk preferences, time horizons, capabilities and resources. If an option comes with lower cost, downsides or importance for one party, but higher value, upsides or importance for the other, the parties can exploit these differences and gains jointly. Equally, different perspectives, expectations or attitudes can be used to all parties’ benefit. To develop such options, negotiators may choose an internal brainstorming process or work together with the other party.26

26 For suggestions on how to structure the process of brainstorming and generating fresh ideas (four quadrant analysis, seven elements of a conflict situation), see Roger Fisher/Elizabeth Kopelman/Andrea Kupfer Schneider, Beyond Machiavelli, pp. 67 et seq.; for problem solving and option generation see also Christopher W. Moore/Peter J. Woodrow, Handbook of Global and Multicultural Negotiation.
3.3 Claiming value

When it comes to value claiming, the parties have to divide the negotiation’s total value among each other. As the ultimate agreement is likely to split the difference between the parties’ initial demands (mid point rule) and as the first positions influence the other parties’ perception of the bargaining range stronger than any demand that comes thereafter (anchoring), negotiators should start with maximum plausible demands. To avoid being seen as arbitrary or unreasonable and triggering defensive reactions by the other parties, demands should always be combined with plausible rationales, objective criteria or standards.²⁷

Once initial positions are established, the parties embark on the “negotiation dance” (Raiffa) towards either agreement or impasse. As skilled negotiators are aware of the signals they send and receive through opening demands and concessions, they plan their concession patterns (size, sequence, timing) and craft plausible supporting rationales to influence the other sides’ perception of the bargaining range.²⁸

Negotiators are more persuading when they communicate purposefully at all times, ensuring that the impact of their communication and expressions achieves the intended effects and impact on the other parties. To strengthen impact and avoid being perceived as justifying one’s demands, negotiators should start with presenting their rationale, then name their demand, and then use silence whilst observing the other parties’ reactions. Arguments²⁹ should be built upon a strong factual foundation, moving from a broader perspective to detailed aspects, using examples to illustrate arguments. Due to psychological biases, certain arguments stick stronger than others (i.e., the first, last, repeated and surprising arguments). Further persuasion techniques include storytelling, metaphors, themes and visuals, establishing common ground, and framing solutions through the other parties’ perspective and based on their goals and interests.

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²⁷ For standards, decision criteria and assessing options, cf. Christopher W. Moore/Peter J. Woodrow, Handbook of Global and Multicultural Negotiation, pp. 343 et seq.
²⁹ For an overview of the challenges of multilateral negotiations and its process, see Alexander Mühlens, International Negotiations, pp. 83 et seq.
3.4 Timing & building momentum

Progress in negotiations is not linear, but shattered with slow-downs, deadlocks, and phases of progress. With 80% of concessions made in the last 20% of time, the conscious use of timing and action-forcing events may have a significant impact on whether and when agreements are reached. Skillful negotiators know how to take the right moves at and away from the table to create incentives and foster progress towards agreement, to erect barriers against back-stepping, and have a seventh sense for the right moment that allows for the move to agreement. 30 On the way to agreement, they build momentum through continuous learning of and shaping the other parties’ perspectives, influencing the negotiation structure, confidence-building measures, forming coalitions, and weakening the other parties’ BATNA.

4. Personality

“As an old British diplomat once told me, the secret of negotiation is this: every time you visit a country, you talk to as many people there as you can and learn as much as you can about its history and culture, since you never know when you’ll have to negotiate with them.” (UN Envoy Extraordinary Lakhdar Brahimi)

The last piece in the puzzle remains the negotiator’s personality. Preparation, process and solution design are only half of what it takes to succeed at the negotiation table. Even the best strategies and techniques remain a blunt sword if not combined with the right personality, mentality, and individual skillset. Though there are many skills that make a great negotiator, the following are likely at the core.

4.1 Shaping structure & process

Skilled negotiators are confident to take an active role in influencing the process and structure of their negotiations. They control the parties and involve the right players, tailor the agenda, create linkages that increase their leverage, and introduce action forcing events. They act pro-actively rather


208
than react, and focus throughout the negotiation’s lifecycle on how the structure and process could be favorably improved.

4.2 Information & detail

Skilled negotiators are thoroughly familiar with the key facts, issues and details of the subject matter. They possess a high intellect, an extraordinary memory, and come to the table with a sound understanding of the parties’ internal factors (e.g., relationships and organizational structures), external factors (e.g., political and economic environment) and the negotiation history (e.g., context, record of prior interactions, background and reputation of parties, etc.).

Skilled negotiators know that their preparation will never be complete and that information asymmetries will remain in all negotiations. They avoid making assumptions, but constantly inquire, listen, identify, assess, test and verify the other parties’ interests, objectives, priorities, and goals, and test hypotheses through questions. They continuously evaluate the power balance at the table and constraints of the parties.

4.3 Language & phrasing

Skilled negotiators are masters of language and phrasing. They possess the ability to communicate with the necessary amount of clarity and ambiguity, to read between the lines, understand the not said, and are able to make proposals in wordings that ease compromise and agreement. Like the ability “to agree to not agree”, a skilled negotiator uses wordings to advance her negotiation success. Negotiators are well advised to ensure that their teams comprise some members who possess extraordinary language skills and some who speak the language of the other negotiation parties.

4.4 Empathy & perspective

In addition to the necessary assertiveness, perseverance, emotional control and flexibility, skilled negotiators also understand the cultural backgrounds, customs, styles and formalities of the other parties. They show empathy, when helpful, and they know and respect the other parties’ sensitivity points, constraints and deal breakers. Skilled negotiators possess the ability
to look at negotiations from the other side’s perspective and to frame issues in a way appealing to their view of the situation. When it comes to managing conflict, they anticipate conflicts, diagnose its sources, find ways to defuse tensions, to avoid or overcome escalation, and to help parties to overcome perceived vulnerability and distrust. Where necessary or helpful, they are also open to involve third parties (e.g., mediators, facilitators, moderators, arbitrators) to help move the process forward.

4.5 Credibility & trust

Last, but certainly not least, skilled negotiators build upon and work with their reputation, sincerity and trustworthiness. Though they are aware that any information received and any promise made by the other parties requires verification and safeguards, skilled negotiators demonstrate trust and their willingness to deliver on what they promise during the negotiation. They build personal relationships with the other side, show courtesy, interact thoughtfully and purposefully, and substantiate their messages with substance. By abstaining from misleading, exaggerating and untruthful behavior, they set the moral standard they expect from the other parties at the table.

5. Conclusion

From United Nations conference rooms to the corridors of European Union institutions, negotiations are the basis for conflict resolution and decision-making processes. Negotiations impact the wellbeing of people, the collaboration among states, the profits of companies, and individual careers. Maneuvering the challenges and pitfalls of international negotiations requires a thorough and practical skillset of strategies, techniques and tactics combined with the right personality and mindset. Strong negotiation skills can make a difference, in particular as today’s conference rooms, corridors and

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31 An excellent work on managing conflicts in international negotiations remains Roger Fisher/Elizabeth Kopelman/Andrea Kupfer Schneider, Beyond Machiavelli.
32 For third party intervention options, see Christopher W. Moore/Peter J. Woodrow, Handbook of Global and Multicultural Negotiation, pp. 389 et seq.
offices are still populated with many negotiators, who feel insecure, dislike negotiations, and whose frustration and ineffective negotiation techniques may spoil outcomes beneficial to other stakeholders. Working on and improving one’s negotiation skills does not only lift oneself on a level playing field with the skilled and well-trained negotiators around, but it is a well chosen investment for personal advancement and wellbeing.

34 For an overview of the consequences frustrated negotiators may have on the EU decision-making process, see Klaus-Jörg Heynen, Frustration or Success: How to Negotiate EU Law, pp. 262.
Part two: Regulation in the European Union

D. Legal Pillars
I. The Art of Regulation & The Ethics of Competition and State Aid

*By Christian Koenig & Bernhard von Wendland*

“We found a continent scarce in natural but rich in human resources and their produce!” That or the like might be the glowing first report of a discoverer of modern day Europe. That account would most likely disregard that humans are not only ‘resources’ but the source of wellbeing and that human dignity is an end in itself. Likewise, our pioneer would most likely miss the cultural, religious and philosophical sources of the old continent, and that its wealth rose from centuries of wars, strife, revolutions and toil. Voyaging deeper into the continent, the discoverer would learn that most of its nations are united in a political and economic Union, which is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. Our voyager’s second and more enlightening report might then say that the essence of Europe’s wealth is rooted, to a large extent, in intelligent supranational governance and public regulation.

The ethics of EU supranational regulation is strongly characterised by the objective to work for sustainable economic development and social progress. In his Apostolic Exhortation, *Evangelii Gaudium* (The Joy of the Gospel) of November 26, 2013, Pope Francis is much clearer: He calls for overcoming an economy of exclusion as the ultimate goal of regulation in the economy and for better man-made regulation to achieve this:

“In this context, some people continue to defend trickle-down theories which assume that economic growth, encouraged by a free market, will inevitably succeed in bringing about greater justice and inclusiveness in the world. This opinion, which has never been confirmed by the facts, expresses a crude and naïve trust in the good-

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ness of those wielding economic power and in the sacralized workings of the prevailing economic system. Meanwhile, the excluded are still waiting.” [Evangelii Gaudium, paragraph 54]

“While the earnings of a minority are growing exponentially, so too is the gap separating the majority from the prosperity enjoyed by those happy few. This imbalance is the result of ideologies which defend the absolute autonomy of the marketplace and financial speculation. Consequently, they reject the right of states, charged with vigilance for the common good, to exercise any form of control.” [Evangelii Gaudium, paragraph 56]

“The right of States to exercise any form of control” includes regulatory powers. Good regulation can prevent the abuse of both capital and economic dominance. Any such abuse would undermine a functioning market as the economic foundation of justice, sustainability and inclusiveness. Pope Francis voices his concern over the abuse of private capital, but does not appropriately address the public cause of abuse. Neither did Karl Marx before him. Those who in the meantime have criticized the public cause of capital abuse were all too often labelled as neo-liberals. Abuse of public capital, though, is as omnipresent as the abuse of market dominance by private capital. Indeed, the State has vast resources at its command and can use them to intervene in the market. Such interventions may be necessary e.g. to provide infrastructure and services of general economic interest, or to give necessary incentives to industry where the market fails. The wasteful allocation of public monies, however, could do immense harm: It could crowd out private investment, distort private incentives and help foreclosing markets. In any case, it deviates scarce funds from those who most need them. The abuse of public capital thus undermines sustainability and inclusiveness, the very values the State shall protect. Examples for the abuse of public funds abound: Underutilised airports, mega stadiums for third-league matches, and operating aid to ailing industries that are plagued by overcapacity. The margin for abuse in so-called innovation partnerships, where public procurers may limit the choice of suppliers even before product development has even started, remains to be gauged.

Successful supranational regulation to reach sustainable wealth is an art. EU State aid control in the area of electricity from renewable sources encapsulates that art’s complexity: Support to energy from renewable sources is raised through charges which are subsequently passed on to consumers and undertakings. This may put certain undertakings in a difficult competitive situation. Hence, Member States may wish to grant partial compensation for additional costs to avoid relocation of industries outside the EU and thus the loss of jobs and, not least, carbon leakage. There is a dilemma: On
one hand, failure to provide adequate compensation may lessen public acceptance of ambitious renewable energy support measures. On the other hand, compensation that is too high or awarded to too many undertakings may equally affect public acceptance. Regulation therefore on one hand has to precisely target State aid to sectors that are exposed to a significant risk of carbon leakage due to the funding of support to energy from renewable sources. On the other hand, State aid regulation must not compromise environmental sustainability.

This journal, too, is an account of an on-going discovery: The voyage into the heart of markets that once were dominated by State monopolies and are now undergoing transformation and liberalisation. State aid is part of the solution, but can be part of the problem, too. Therefore, ‘good’ regulation of State aid is just as essential as regulation against the abuse of market dominance by private capital. The ethics of competition and State aid must be guided by the vow to build an inclusive economy. Broadband coverage of remote areas or affordable electricity prices exemplify the art of regulation.

This article was first published as an Editorial in the European Networks Law & Regulation Quarterly, ENLR Vol. 3., Iss. 2, 2015. Reprinted with kind permission of Lexxion Verlagsgesellschaft mbH.
II. The Role of the European Council in the European Union’s Institutional Framework

By Richard Crowe

I. Introduction

The regular summits of Heads of State or Government that came to be known as the European Council have been an essential feature of the European Union’s decision-making structures for more than four decades. Yet, it was only with the entry into force of the Treaty of Lisbon on 1 December 2009 that the European Council was legally integrated into the institutional titles of the Treaties as one of the seven institutions of the Union, alongside the European Parliament, the Council, the Commission, the Court of Justice, the European Central Bank and the Court of Auditors.

Following Lisbon, the European Council is composed of the Heads of State or Government, the President of the European Council, and the President of the Commission. It meets at least twice every six months and, according to Article 15(1) TEU, it “shall provide the Union with the neces-
sary impetus for its development and shall define the general political di-
rections and priorities thereof.” However, it “shall not exercise legislative
functions.”

The role and influence of the European Council in the Union’s decision-
making processes has long been a source of inter-institutional tensions, not-
ably in legislative matters, but following the entry into force of the Treaty
of Lisbon, it is now possible to frame those tensions more clearly in legal
terms. As a Union institution, the European Council is now subject to the
rule in Article 13(2) TEU that: “Each institution shall act within the limits
of the powers conferred on it in the Treaties, and in conformity with the
procedures, conditions and objectives set out in them. The institutions shall
practice mutual sincere cooperation.”

Article 13(2) TEU essentially codifies the principle of ‘institutional bal-
ance’, which the Court of Justice has said is based on “a system for distrib-
uting powers among the different [Union] institutions, assigning to each in-
stitution its own role in the institutional structure of the [Union] and the
accomplishment of the tasks entrusted to the [Union].” The practices of
one institution may not have the effect of depriving other institutions of a
prerogative granted to them by the Treaties.

In light of that principle, this article assesses the role of the European
Council in the Union’s institutional framework in the post-Lisbon era. It
will be seen that several legal ambiguities persist regarding the scope of the
European Council’s competences and the nature of its role in the Union’s
institutional framework.

2. The formal competences of the European Council

2.1. General definition of its role: Article 15(1) TEU

This wording of what is now Article 15(1) TEU evolved through several
key reports and amendments to the Treaties over the past four and a half
decades. The communiqué of the Paris summit of December 1974, which
established the European Council, presented the initiative as a response to

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6 For a discussion of the situation pre-Lisbon, see Editorial Comments, ‘An ever
mighty European Council – Some recent institutional developments’, 46 CMLRev
2009, p. 1383-1393.
8 Wybot, 149/85, ECLI:EU:C:1986:310, para. 23.
“the need for an overall approach to the internal problems involved in achieving European unity and the external problems facing Europe.” In 1975, the Tindemans Report explained that “the Heads of Government will collectively use the authority which they have at the national level to give from within the European Council the impetus which is needed for the construction of Europe.”

In similar vein, the Solemn Declaration on European Union adopted at Stuttgart on 19 June 1983 stated that the European Council “provides a general political impetus to the construction of Europe” and “defines approaches to further the construction of Europe and issues general political guidelines”. This wording formed the basis for a new Article D TEU, introduced by the Treaty of Maastricht in 1992, which stated that: “The European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof.”

This text was revised by the Convention on the Future of Europe in 2003 and the amended wording was incorporated into the Draft Treaty establishing a Constitution for Europe as a new Article 20(1). In the revised text, the phrase “general political guidelines” was replaced by “general political directions and priorities” and a new sentence was added to state that: “It does not exercise legislative functions.” These amendments were retained in the final wording of Article 15(1) TEU in the Treaty of Lisbon, but the words “does not exercise” were replaced by an imperative “shall not exercise” in the final sentence.

This prohibition on the exercise of legislative functions may be understood as a response to concerns expressed within the Convention by representatives of the European Parliament, who suggested that the phrase “general political directions and priorities” could “be misunderstood as going too far already into legislative matters which should be exclusively dedicated to the Council.” The prohibition is also consistent with the deletion by the Treaty of Lisbon of all references in the Treaties to the Council meeting in the composition of the Heads of State or Government. After Lisbon,

13 Explanation accompanying the amendment tabled by Mr Brok, Mr Santer and others to the draft Constitutional Treaty article on the European Council. See http://european-convention.eu.int under Proposed amendments/Article 20.
the European Council and the Council have distinct compositions and competences. The hypothesis according to which the European Council could legally substitute itself for the legislative Council is now definitively ruled out.14

2.2. Decision-making powers of the European Council

In addition to its role of giving impetus and general political direction, the European Council is also empowered to adopt legally-binding decisions and strategic guidelines. The European Council was first granted decision-making powers by the Treaty of Amsterdam.15 The Treaty of Lisbon greatly expanded their number, with the European Council taking over many of the decision-making competences that were previously exercised by the Council meeting in the composition of the Heads of State or Government.16 The specific decision-making powers of the European Council may be classified into six main categories, as set out below.

2.2.1 Decisions relating to the revision of the Treaties

Under Article 48(3) TEU, the European Council may decide to convene a Convention to examine amendments to the Treaties or, if it decides not to convene a Convention, it may define the terms of reference for an intergovernmental conference. Under Article 48(6) TEU, the European Council may itself decide on a simplified revision of Part Three TFEU.17

2.2.2. Decisions relating to membership of the Union and of the euro area

According to Article 49 TEU, the European Council shall agree on conditions of eligibility for membership of the Union. Under Article 50 TEU, the

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15 In the Amsterdam Treaty provisions on the CFSP.
16 For example, decisions in the context of a procedure for establishing a serious and persistent breach of the Union’s principles under Article 7 TEU and the proposal of a candidate for Commission President under Article 17(7) TEU.
17 The validity of such a decision was upheld by the Court of Justice in Pringle v Ireland, C-370/12, ECLI:EU:C:2012:756.
European Council plays a key role in the procedure leading to the withdrawal of a Member State from the Union, including by drawing up negotiating guidelines for the Union’s negotiators. Under Article 7 TEU, the European Council decides on the existence of a serious and persistent breach by a Member State of the Union's values, which may lead to a suspension of certain of the membership rights of that Member State. Under Article 355(6) TFEU, the European Council may adopt a decision amending the status of certain overseas countries and territories. Furthermore, under Article 140(2) TFEU, the European Council shall have a discussion before a decision is taken that a Member State with a derogation can join the euro area.

2.2.3. Decisions concerning the application of certain passerelle provisions

According to Article 48(7) TEU, the European Council may adopt a decision authorising the Council to act by qualified majority in areas governed by Title V TEU or by the TFEU for which unanimity is currently required. Similarly, where the TFEU provides for the adoption of legislative acts by the Council in accordance with a special legislative procedure, the European Council may adopt a decision allowing for such acts to be adopted by the ordinary legislative procedure. Article 31(3) TEU also allows the European Council to adopt a decision authorising the use of qualified majority voting in the CFSP. Finally, Article 312(2) TFEU allows the European Council to authorise the Council to act by qualified majority when adopting the multi-annual financial framework regulation.

2.2.4. Decisions relating to the composition of the institutions and appointments to senior institutional posts

Under Article 14(2) TEU, the European Council adopts, upon the initiative of the European Parliament and with its consent, a decision establishing the composition of the Parliament. It also fixes the Council presidency configurations in accordance with Art 16(9) TEU and establishes the list of Council configurations on the basis of Article 236 TFEU. Under Article 17(5) TEU, it decides on the system of rotation of Commissioners if the number of Commissioners is ever lower than the number of Member States. In relation to appointments, Article 17(7) TEU provides that the European Council shall propose to the Parliament a candidate for the post of President of
the Commission. On the basis of Article 18(1) TEU, it appoints the High Representative. On the basis of Article 238(2) TFEU, it appoints the President, Vice-President and other Executive Board members of the European Central Bank.

2.2.5. Decisions laying down strategic guidelines in certain sensitive areas of policy

In the context of the Union's external action, Article 22(1) TEU states that the European Council shall "identify the strategic interests and objectives of the Union". Article 26(1) TEU states that the European Council "shall identify the Union's strategic interests, determine the objectives of and define general guidelines for" the CFSP. According to Article 42(2) TEU, it is for the European Council to decide on the establishment of a common defence. More generally, the ‘solidarity clause’ of Article 222(4) TFEU requires that the European Council "shall regularly assess the threats facing the Union in order to enable the Union and its Member States to take effective action."

Article 68 TFEU envisages that the European Council “shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice." In economic policy, the second subparagraph of Article 121(2) TFEU states that the European Council “shall, acting on the basis of the report from the Council, discuss a conclusion on the broad guidelines of the economic policies of the Member States and of the Union." Similarly, in relation to employment, Article 148(1) TFEU provides that the European Council "shall each year consider the employment situation in the Union and adopt conclusions thereon, on the basis of a joint annual report by the Council and the Commission."

2.2.6. Decisions taken as a supreme political arbitrator to which legislative procedures may be referred if they become blocked or if especially sensitive interests of a Member State are at stake (the 'emergency brake' mechanism)

Article 48(5) TEU provides for a referral to the European Council if four-fifths of the Member States have ratified a revision of the Treaties and one or more Member States have encountered difficulties in proceeding with ratification. In the CFSP, Article 31(2) TEU allows for matters to be referred to the European Council where a Member State declares that, for vital and stated reasons of national policy, it will oppose the adoption of a decision to be taken by qualified majority.

In a limited number of policy fields, legislative files may be referred to the European Council by way of an ‘emergency brake’. These situations are: where the balance of a Member State’s social security system may be threatened (Article 48 TFEU), where a proposal concerning judicial cooperation in criminal matters may affect fundamental aspects of a national criminal justice system (Articles 82(3) and 83(3) TFEU), where the establishment of a European Public Prosecutor's office is proposed (Article 86(1) TFEU),19 and where proposals are made in the area of police cooperation (Article 87(3) TFEU).

3. Assessment of the European Council’s role in light of its formal competences

The European Union is founded on treaties concluded between states.20 In the famous words of the Bundesverfassungsgericht, the Governments of the Member States are the Herren der Verträge.21 In accordance with the principle of conferral (Article 5 TEU), the Union acts within the limits of the competences conferred upon it by the Treaties. Competences not conferred upon the Union remain with the Member States. The Member States may amend the Treaties so as to extend or restrict the competences conferred upon the Union.

19 Article 86(4) TFEU also makes the European Council responsible for any decision to extend the powers of the European Public Prosecutor's office.

20 As confirmed by the failure of the Treaty establishing a Constitution for Europe and the subsequent adoption of a classical amendment of the Treaties in the form of the Treaty of Lisbon.


https://doi.org/10.5771/9783845286723
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However, the amendment of the Union's primary law is a cumbersome process, often requiring long and contentious negotiations and difficult ratification procedures. Successive amendments of the Treaties over the past thirty years have therefore sought to make the Union’s treaty framework more flexible and open to adaptation in the future, while at the same time safeguarding the collective interests of the governments in retaining direct influence over fundamental decisions that impact on sensitive matters of national sovereignty.

The functions of the European Council may be understood as a means to achieve that objective. The European Council is the highest political instance representing the interests of the Member States in the Union’s institutional framework. Through the European Council, fundamental decisions on matters such as simplified revisions of the Treaties, membership of the Union, shifts from unanimity voting to qualified majority, shifts from special legislative procedures to ordinary legislative procedures and the composition of supranational institutions may be adopted relatively quickly, within the Union’s institutional framework, and without having recourse to an intergovernmental conference.

As far as policies are concerned, the areas where the Treaties provide for the European Council to adopt strategic guidelines and where the ‘emergency brake’ may be applied concern matters that, for the most part, fell within the old second and third pillars of the pre-Lisbon Union. While the European Council is likely to continue to play a special role in the CFSP on a permanent basis, its specific powers with regard to legislation in the area of freedom, security and justice may be understood as residual elements in a process of full ‘communitarisation’ of this policy area that is almost complete. In the economic domain, the European Council’s strategic guidelines may be understood as mechanisms for peer review and open coordination between governments in policy areas where competence remains with the Member States.

The existence of the European Council thus allows for the adoption of fundamental decisions of a constitutional nature within the Union’s institutional framework and without recourse to full revisions of the Treaties. It also enables the governments to accept ever-greater ‘communitarisation’ of certain sensitive policy areas, while at the same time being assured that,

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22 See Article 10(2) TEU.
23 See Art 5 TFEU: The EU’s competence in economic and employment policies is limited to coordination.
through the European Council, they collectively retain a direct influence over the general direction of those policies.

4. The role of the European Council in practice

In accordance with the formal powers outlined above, the role of the European Council entails the provision of impetus and general political direction, the adoption of fundamental decisions of a constitutional nature and the exercise of functions of strategic guidance and unblocking of legislative procedures in a limited number of sensitive policy areas. Practical experience shows, however, that the European Council itself has a broader understanding of its own role with regard to legislative matters, based on an open-ended interpretation of its competence to define “general political directions and priorities”, as provided for in Article 15(1) TEU, rather than the more limited elaboration of its tasks set out in individual policy chapters of the Treaties. This can give rise to tensions, already evident long before the Treaty of Lisbon,24 in situations where Conclusions of the European Council engage so deeply with legislative matters that they appear to impinge on the competences of other Union institutions. A few examples from the post-Lisbon practice will serve to illustrate the issues.

In the first instance, it is increasingly evident that the European Council is the dominant institution when it comes to promoting new legislative initiatives, arguably to the detriment of the Commission’s right of legislative initiative. Conclusions of the European Council in areas ranging from the banking union25 to environment26 to the refugee crisis27 are sometimes so detailed and precise in specifying the legislative initiatives that must be brought forward and the timetable for their adoption that they appear to go far beyond the setting of mere “general political directions and priorities”. Indeed, some governments even take the view that the legislative institutions would act contrary to Union law if they were to adopt legislation that

25 See, in particular, the Conclusions of 29 June 2012 (EUCO 76/12) and President Van Rompuy’s description of the banking union initiatives in ‘The European Council in 2012’, General Secretariat of the Council, January 2013, p. 8.
26 See, for example, the Conclusions of 24 October 2014, EUCO 169/14.
27 See, for example, the Conclusions of 18 December 2015, EUCO 28/15.
does not follow precisely the indications provided by the European Council.\textsuperscript{28}

It can be recalled, in this regard, that the President of the Commission is a Member of the European Council and Commission Presidents have sometimes welcomed the advance impetus that the European Council can provide for legislative initiatives that they have already prepared behind the scenes.\textsuperscript{29} However, the tendency to lay down ever-more detailed Conclusions regarding the legislative proposals that should be presented and the timeline for their adoption does illustrate the uneasy relationship between the European Council’s competence to provide impetus and define general political directions on the basis of Article 15(1) TEU and the Commission’s right of legislative initiative on the basis of Article 17(2) TEU.\textsuperscript{30}

Recent years have also seen the European Council acting to unblock stalled legislative procedures, even in policy areas where no possibility of referral to it is foreseen in the Treaties. For example, with a view to unblocking a stalled legislative procedure leading to the adoption of a unitary patent protection system on the basis of Article 118 TFEU, point 5 of the European Council Conclusions of 28/29 June 2012\textsuperscript{31} recommended the deletion of Articles 6 to 8 of the draft regulation of the Parliament and the Council. The European Council’s unblocking of a stalled legislative procedure may well have positive effects, and in this case the regulation was finally adopted in December 2012.\textsuperscript{32} Once more, however, this practice does not fit well with the texts of the Treaties. If the Treaties have specified a limited number of policy areas where stalled legislative procedures may be referred to the European Council, then it would appear to follow that procedures in areas where no mention is made of it, including those under Article 118 TFEU, may not be referred to it.

\textsuperscript{28} See the arguments of the governments in cases C-643/15 Slovakia v Council, C-647/15 Hungary v Council, and C-5/16 Poland v Parliament & Council (all pending before the Court of Justice).

\textsuperscript{29} On the approach of former Commission President Jacques Delors, see Philippe de Schoutheete, supra note 23, at p. 6.


\textsuperscript{31} EUCO 76/12, 29 June 2012.

Of greater practical concern are those instances where the European Council has adopted detailed positions on legislative proposals of the Commission in a manner that effectively substitutes its position for that of the Council. The most obvious example concerns the multiannual financial framework (MFF) legislative package for the period 2014-20, where the European Council deliberated behind closed doors over several months and two summit meetings before issuing Conclusions that were forty-eight pages long and that set out in great detail the precise amounts and detailed contents to be included not only in the MFF Regulation, but also in the accompanying sectoral regulations in areas such as agriculture and cohesion policy, which fell to be adopted under the ordinary legislative procedure.33 The General Affairs Council then took over those Conclusions, without any further public deliberation, as its mandate for the legislative negotiations with the European Parliament.34

Article 312(2) TFEU provides that the MFF Regulation shall be adopted by the Council, acting unanimously, after obtaining the consent of the European Parliament. That article does not foresee any role for the European Council in the special legislative procedure.35 The involvement of the European Council in the MFF process was justified before the European Parliament by its then President in the following terms: "Under the Treaty, [the MFF] is a matter for the Council of Ministers and your Parliament. However, we all know from past experience that this is one of the areas in which the European Council will inevitably be called on to fulfil its role, under Article 15 of the Treaty, of ‘defining the general political directions and priorities’.”36

The European Council’s reliance on Article 15(1) TEU to justify a detailed intervention in an ongoing legislative procedure is troubling from the perspective of institutional balance. In the first instance, a forty-eight page Conclusions document which lays down the precise figures to be inserted in the MFF Regulation and which contains, for example, thirteen pages of detailed directions on the contents of legislation in cohesion policy and a further seven pages on legislation in agriculture, can hardly be considered

34 Meeting of the General Affairs Council of 22 April 2013.
35 The second paragraph of Article 312(2) TFEU allows the European Council to decide that the Council shall act by qualified majority when adopting the MFF Regulation, but this is a one-off decision and not part of the legislative procedure.
36 Speech by Herman Van Rompuy, President of the European Council, to the EP, 3 July 2012, EUCO 129/12, PRESSE 312, pp. 3-4.
to lay down mere “general” directions and priorities. Moreover, while there may be good reasons to think that a deliberation by the national leaders is politically necessary to facilitate an agreement on such a significant dossier, the fact remains that Article 312(2) TFEU does not foresee any role for the European Council in the special legislative procedure. If the governments intended the European Council to play a role in the MFF procedure, then why did they not state this in the Treaty of Lisbon, as they did, for example, in the articles governing legislative procedures where an ‘emergency brake’ may be applied?

It can be added that the Rules of Procedure of the European Council provide that its meetings shall not be public and its deliberations are covered by an obligation of professional secrecy. Although the Council formally respected its obligation to deliberate in public, as required by Article 16(8) TEU and Article 15(2) TFEU, when it met to adopt its position on the MFF package, in reality there was no public debate on the substance and all the most essential elements of the Council’s position had already been decided behind closed doors in the European Council. This is hardly compatible with the requirement in Article 10 TEU that decisions must “be taken as openly and as closely as possible to the citizen.” The detailed engagement of the European Council in legislative matters thus risks not only distorting the institutional balance for legislative decision-making laid down in the Treaties, but may also allow for a circumvention of associated rules on accountability and the transparency of legislative procedures.

5. Competing understandings of the European Council’s role

The increased tensions that are emerging with regard to the activities of the European Council in the legislative domain since the entry into force of the Treaty of Lisbon reflect a divergence between competing understandings of what role the European Council should play in the Union’s system of governance.38

The European Parliament, representing the citizens directly, and the Council of Ministers, representing the Member States, can increasingly be viewed as the two chambers of a bi-cameral parliamentary system at Union level. The Commission may be seen as the executive. Where then does the European Council fit in? One view is that “[t]he European Council is situated at the place where, in the national systems you would find the presidency, in this case, a collective presidency.”

In fact, the idea that the European Council plays the role of a sort of collective president for the Union may be the vision that best fits with its formal tasks as laid down in the Treaties. The European Council adopts fundamental decisions of a constitutional nature, provides general political guidance and direction, and exercises express powers to unblock legislative procedures in a limited number of sensitive policy areas. However, the powers of a Head of State, although significant, tend to be strictly circumscribed. In the Union context, any constraints on the powers of the European Council are not easily enforced, while voluntary self-restraint in the exercise of power is not a concept that sits easily with the gatherings of national leaders, especially if that self-restraint is to be exercised vis-à-vis a Council of Ministers comprised of hierarchical underlings from the national governments and a European Parliament rather than the national parliament.

An alternative understanding of the European Council is to view it as an emerging European government. Jean Monnet himself promoted the idea of a European Council as “a provisional European government”, which would meet every three months and which “would decide on the necessary instructions to the ministers of the Council”. The idea of the European Council developing into a European government also appeared in Joschka Fischer’s famous speech on the finality of European integration at Humboldt University on 12 May 2000 and continues to be the subject of lively academic inquiry.

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39 Speech by Klaus Welle, Secretary General of the EP, at the École nationale d’administration, Strasbourg, 16 January 2013 (available online).
40 See Philippe de Schoutteete, supra, note 23, at p. 4.
41 ‘From Confederacy to Federation – Thoughts on the finality of European integration’, Speech at the Humboldt University, 12 May 2000.
debates. However, to view the European Council as an emerging European government raises the question of the future role of the Commission, whose previous President rather saw his institution as the emerging “European economic government” and whose current President states overtly that his Commission is a political and not merely a technocratic institution.

Moreover, whereas the Commission is accountable to the European Parliament, the European Council is not subject to any democratic controls at Union level. The government leaders are of course accountable to their national parliaments and Union law acknowledges the goal of striving to place national and supranational democracies in a mutually reinforcing relationship. However, decision-making in a European Council composed of representatives who are mandated only to defend national red lines can quickly descend into an intergovernmental power-struggle that results in lowest-common denominator solutions and that may take insufficient account of the common European interest.

In this context, a strong parliamentary counterweight with a pan-European outlook could serve to counterbalance the collective expression of national self-interests that currently emerges from the European Council. If the European Council were to interpret its role restrictively, in line with the strict wording of the Treaties, then the European Parliament could provide that parliamentary counterweight vis-à-vis the Council. If, on the other hand, the European Council continues to develop in the direction of becoming a European government, then it would appear appropriate to consider making it accountable to the European Parliament or possibly even making it subject to co-decision procedures in certain of its deliberations.

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42 See, for example, Tom Eijsbouts and Monica Claes, ‘From confederacy to convoy: Thoughts about the finality of the Union and its Member States’, 6 EUConst (2010), pp. 1-5.
45 Article 15(5)(d) TEU requires the President of the European Council to present a report to the European Parliament after meetings of the European Council, but the Parliament has no powers of control over him or over his institution. See Henri de Waele and Hansko Broeksteeg, ‘The semi-permanent European Council Presidency: some reflections on the law and early practice’, 49 CMLRev 2012, pp. 1039-1074, at p. 1053.
6. Conclusion

More than forty years after its creation and several years after its legal integration into the institutional titles of the Treaties, the place of the European Council in the Union’s institutional architecture remains hard to define. In formal terms, it provides impetus and general political direction, adopts fundamental decisions of a constitutional nature and exercises functions of strategic guidance and unblocking of decision-making procedures in a limited number of sensitive policy areas.

In practice, however, it interprets its competence under Article 15(1) TEU to “define the general political directions and priorities” of the Union very broadly as entitling it, notwithstanding the prohibition on exercising legislative functions laid down in the same paragraph, to adopt detailed Conclusions on the legislative proposals that should be brought forward by the Commission, on the specific contents of legislative proposals and on the unblocking of stalled legislative procedures, even where no referral to it is foreseen in the relevant chapters of the Treaties.

If the European Council is to persist in this expansive interpretation of its competences with regard to legislative matters, then the fundamental principles of open and democratic exercise of power at Union level would appear to require that its proceedings are made more transparent and that its relationships with the European Parliament and with the Commission are reassessed. The Union’s institutional balance remains in flux and a satisfactory equilibrium has yet to be found.

This is an abridged and updated reprint of the article ‘The Institutional Role of the European Council after the Treaty of Lisbon’, which was first published in Evropeiski praven pregled (Bulgarian European Law Review), Volume VI, 2013, pp 9-25.
III. Frustration or Success: How to Negotiate EU Law

By Klaus-Jörg Heynen

1. Introduction

In Brussels nothing drops from the sky: not a directive, regulation, decision, green book, white book, recommendation, opinion, communication and so on. Everything is the result of the EU specific decision making process. This process is directed and controlled by negotiations. We can influence it to a high degree if we effectively participate in these negotiations.

A regulation on environmental standards for example - after difficult negotiations adopted in Brussels today - will be published in the EU’s Official Journal tomorrow. The day after tomorrow this regulation will represent directly applicable legislation for more than 400 million citizens. If we want to make sure that our interests, the interests of our institution or our national interests are taken into account, we have to negotiate effectively. That’s one reason why good negotiating is so important in the EU.

Good bargaining in the EU is much more than pushing through our own interests, as the negotiations in the EU have to reconcile the very different interests of all participants. Only if all participants negotiate well, can the negotiation result be acceptable to all EU partners in the long run. Most of the critical developments in the EU from the empty-chair policy in the sixties to the crises in recent years may be explained as the result of negotiating mistakes. This is why good negotiating skills form a fundamental basis of the functioning and stability of the EU.

Hundreds of negotiations are taking place every week in all kinds of EU bodies. It is always amazing to see that one part of the negotiators enjoys negotiating and is successful in doing so, while the other part does not succeed and is disappointed and frustrated.

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1 Dr. Klaus-Jörg Heynen is a former Head of Department (Ministerialdirektor) at the German Federal Ministry of Food, Agriculture and Consumer Protection.
On the one hand there are negotiators who know what they are doing on the European stage and who also know their importance. They assert the interests they represent as much as possible in EU decisions. Nevertheless, their relations with the other delegates are good. On the other hand, there are those who keep getting frustrated. They do not succeed in negotiations and they are unpopular with their bargaining partners.

This is why the latter do not like to participate in EU negotiations. They show their frustration and make the EU responsible for their failure. They say that the other delegates do not understand them. They say that the European Commission representatives are always working against them. They say that they are not provided with the necessary information and documents. To them EU policy-making seems to be obscure, undemocratic and Kafkaesque anyway. They accuse Brussels to incapacitate and to patronize them politically, as it had been heard constantly during the Brexit-Campaign.

This dichotomy is remarkable only at first glance. If you analyze the bargaining techniques of the delegates in detail, it soon becomes clear that the ones who work successfully in EU bodies are those who take into account the characteristics of the EU's decision-making process, while the others don’t. If the secret to being successful at EU level is to take into account the particularities of EU decision making, we must try to better understand them and increase our ability to draw consequences from that for our negotiating approach.

With the view of insiders we have to make some considerations and give recommendations that may at a first glance seem to be self-evident and some of them even trivial. We accept this, convinced the considerations and recommendations will be useful for the players involved directly or indirectly.
2. The particularities of decision making in EU bodies: consequences for negotiating

2.1 Multitude of possibilities to interfere and to act

For each Member State, every other Member State is a negotiating partner. After the Brexit that makes 26 partners. There are many more parties involved in the negotiation, e.g. the European Commission, the Parliament, the Presidency and the Council Secretariat. Negotiations do not only take place at the level where we have to negotiate. If we negotiate an item e.g. in an EU working party, the same item will be dealt with also at other levels, i.e. in the Permanent Representatives Committee (Coreper), in the Council itself as well as in the Commission, and in the bodies of the EP. At Member States level there are also numerous bodies relevant for EU negotiating. So the number of bodies and persons involved multiplies.

Each participant, each individual delegate of each Member State is influenced by many other persons and bodies interested in the negotiated issue and may influence the others. The multitude of players seems to be confusing. We have to think about whether and how we may be able to use them. If we don’t make use of all negotiation possibilities, our negotiating partners will use them to achieve their own goals and possibly against us.

2.2 Best places to negotiate

Negotiations take place during the meetings in the conference room. To us, this seems to be the normal thing. It is obvious that many delegates concentrate their negotiating effort on the length of the meeting and on the conference room.

However, only a small fraction of the persons and bodies involved in an EU negotiation is sitting in the Brussels meeting room. This makes it clear that our negotiating possibilities are very limited in an EU conference room. There are several reasons for that:

With 26 delegations aside from the Presidency, the Commission and the Council Secretariat with their staff, negotiations are rather difficult to assess in an EU conference room. The delegates don’t bargain directly with each other. They don’t speak directly to each other but rather via
microphone and headset. Often their “dialogues” are mediated by interpreters. Often they can’t see each other due to the increased number of participants and the distance between them.

One of the main bottlenecks of the problem is the lack of time in the meeting room. During a meeting of 27 delegations each delegate has much too little time to bring forward his position, interests and arguments. At all negotiation levels up to the ministers, the speakers are restricted to two minutes in principle in the meeting room. Before and after each meeting there are a number of possibilities to influence decision making more effectively. Each formal meeting is the short culmination of lengthy preparatory work and the short starting point to a long period of follow-up operations. We must not limit our negotiating efforts to the length of the meeting and to the conference room.

In an EU encompassing 27 Member States, negotiations have become a management task, most of which has to be conducted outside the meeting room, started by reflections in the office of the negotiator in his capital, continued by e-mails and telephone calls, negotiations in the offices of the Presidency, Commission services and other delegations. It is our job to bring together all the relevant information, to see and understand the interests of the other parties involved and analyze what possibilities we have for exerting influence. Those who essentially restrict their negotiations to the official meetings forfeit the most and best opportunities to exert influence.

2.3 Best level and best time to negotiate

Once the required majority is achieved in a working party or in the Coreper, a minister will have little chance to introduce changes at Council level. In most cases, he or she cannot even stop the decision-making process at this level, let alone turn it around as desired. This is a consequence of the EU specific procedures. Once a Commission proposal has found the necessary majority in a working party or in the Coreper, it is passed on to the next level generally as an item in transit. Coreper and the ministers adopt all these items en bloc without any discussion. Thus the lowest negotiation level is often the most important one. It is never too early to negotiate, but often too late.
3. Voting by majority, weighting of the Member States votes

3.1 We have to win allies

In international negotiations, important decisions can only be made if all participants agree. Yet the EU takes a different approach. Here, negotiations in general are legally concluded when a qualified majority has been formed. Now in principle unanimity is retained only for decisions of the European Council and at the Council for a few areas including tax, foreign affairs, defense and social security.

An essential conclusion from this for our conduct of negotiations is: We must realize that we cannot achieve anything alone in the EU. As a single delegation and as a single Member State we even cannot prevent anything alone. But that does not mean that we are politically incapacitated: We only have to win allies in order to get a qualified majority for a decision we want or to form a blocking minority against a decision we don't want.

Even the group of the biggest Member States needs other Member States to prevent a decision by a blocking minority. The delegates of the bigger Member States often run the risk of forgetting this. In order to use our options at the bargaining table and to protect us from unpleasant surprises, we must always be aware of the respective majority conditions in the EU bodies Every good EU negotiator therefore, has a kind of calculator in his head constantly recording the number of votes.

3.2 How to win allies

We must work for establishing good human relations with our bargaining partners. There are multiple ways to approach them and we should use them all, if possible. Joining the meeting of a working party for the first time we should introduce ourselves to the representatives of the Presidency, the Commission, the Council’s General Secretariat and all delegations and hand out our business card. We should greet each of them personally, if possible, at every meeting. We should offer and provide information and contacts. We may call and visit. We may go to the canteen, coffee bar, pizzeria or a pub together with members of other delegations. All of this seems trivial, yet these activities are a precondition for winning delegations. Even though these are important activities, they remain neglected. If we don’t cooperate with the others, they may side against us.
3.2.1 Best time

It is easiest to win somebody as a friend when you don't need him urgently. The same is true if you want to win somebody as your negotiating ally. Indeed, this insight is not particular to EU bargaining. However, it is so often neglected in EU negotiations that it is worth being mentioned.

In the EU decision making many players are involved. So it becomes more difficult to develop a common position. What is worse, once they have painfully made up their minds and agreed upon a position, it will become much harder, often even impossible to change it. If an opinion or - even worse - a majority has formed against us it is too late to effectively bring in our interests. It is never too early but often too late to win allies.

3.2.2 Best arguments

Every player involved in EU bargaining is driven by his own interests. So we have to address these interests. We must try to include the interests of as many negotiating partners as possible in our own argumentation and not to exclude other delegations and their interests. Additionally, it is convincing if we include the interests of the EU itself in our argumentation. Sometimes you hear arguments that are not only useless but dangerous and harmful e.g. when a delegate violates the mandatory requirements of EU legislation such as the ban on discrimination or the acquis of the internal market.

Many delegates like to present legal arguments attacking a controversial position. Such legal arguments are likely convincing only for delegations already likeminded. If we ask for an opinion of the Legal Service of the Council the answer is often disappointing when we really need its help: Whenever a political orientation finds a qualified majority in a Council body the Legal Service refuses to give an opinion on the solution that is in line with this orientation. It simply refers to the possibility of a legal ex-post control by the ECJ.

3.3 Weighting of votes: big vs. small, small vs. big?

The usual principle underlying international organisations is "one state, one vote". Here again the EU takes a particular approach. Its Member
States are formally unequally represented. Their votes are weighted according to the number of population. This is a key characteristic of the decision-making process in the EU. It is easier for us to achieve a qualified majority or a blocking minority if we can win the support of the large Member States for our position than if we are only supported by small Member States. Obviously most delegates try to obtain the support of large Member States. Some of them treat their colleagues from smaller Member States as “quantités négligeables”. In fact, some delegates’ behavior shows that the small and medium-sized Member States are not really taken seriously as negotiating partners.

Winning the support and the votes of smaller Member States pays off. They are important negotiating partners and sometimes more useful and reliable than the bigger ones. 22 of the 27 Member States are small or medium-sized. In negotiations they can exert an important influence. They have relatively more votes, more Commissioners, more members in the EP, more members of staff in the institutions than the large Member States.

In the meeting room the smaller Member States have the same negotiating rights and possibilities as the largest Member State: number of delegates, microphones, the same possibilities to intervene and the same time to speak. They have access to all the other delegations, to the Commission units and to the Presidency. Often smaller Member State are less directly concerned by the negotiated proposal than the large Member States. In this case their arguments appear to be less self-interested and more credible. In addition, they often have a popularity bonus with the other delegates, which benefits negotiations. That is why the delegates of smaller Member States are often the leading characters in a working party. We should join them. Small is useful.

If a small Member State is only marginally or not concerned at all, it is easier to win its support. This is especially useful in difficult negotiating situations, e.g. when we are the only delegation to advocate a concern. Then it is of great benefit if a small Member State with its credibility takes the floor and expresses support or at least understanding for our isolated position.

Large Member States have a higher number of national EU staff. Statistically their staff is better trained, skilled and prepared. Due to their higher administrative and scientific capabilities, they have better information on the negotiated items. They often have a dense national network and more contacts in the EU network. Big is useful.
The smaller Member States are skilful enough to utilize these advantages for their own interests. We don’t have to explain their opportunities to them. On the other hand, we have to remind the medium and large countries from time to time how useful smaller countries can be as allies.

3.4 The worth of a blocking minority

It is our aim to achieve a qualified majority for our interests. If this is not possible we must strive to prevent a majority against us by a blocking minority. This is relatively easy as our arguments have only to be directed at the deficiencies of the Commission proposal.

With a blocking minority we have reached an important intermediate objective but nothing else. The vast majority of partners, the Presidency and the Commission are working toward breaking up the blocking minority as soon as possible and at the lowest possible price. A blocking minority is always at risk. It is "volatile" and always breaks up in the end. The only open question is when it will break up and to whose benefit or detriment. It becomes worthless in the course of time.

3.5 Unanimous decision-making despite the option of a majority decision

“The Council shall act by a qualified majority except where the Treaties provide otherwise” (Art. 16 TEU). In practice, EU negotiations are mostly continued with the aim of reaching a broader majority, and if possible unanimity. EU decisions are mostly adopted unanimously even if majority decisions are legally possible.

The explanation for this particularity is again the self-interest of the negotiators: If a Member State votes against a decision, its further response remains a risk. Often its negotiators on all levels up to the minister will publicly demonize the decision, the Presidency, the Commission and all the partners consenting to the final compromise. This Member State gives its authorities a pretext to prevent or delay the implementation and to bring an action before the EJC.

Those who agree to a decision in Brussels will defend it publicly. They cannot voice complaints later, even if they encounter problems at home. They will ensure that this decision is implemented in due time by its authorities and will not jeopardize it. The existence and effect of a
legal act adopted by a majority is thus legally and politically less secure than that of an act adopted unanimously.

Last but not least, after negotiating a politically difficult dossier and finally voting for a decision it is better to come home with a unanimous decision than with a decision taken by the majority. Nobody can accuse us of having made a possibly contentious decision with our vote. In a legal sense, our votes did not count any more. Hence we ourselves were not the cause of potentially undesirable consequences for a sufficient majority had been achieved without our votes. On the contrary, we followed national interests by “selling” our votes. This is a valid argument in discussions with politicians and with business representatives who are dissatisfied with the decision.

Hence all negotiators are prepared to “reward” a hesitant Member State getting on board at a late stage. A good negotiator never definitively says “no”. As long as his negotiating partners hope to get him on board they will listen to his arguments and take them into account if possible. They are prepared to pay to get him on board. The presidency has multiple possibilities to help us "softly", e.g. by a review clause, time limitation, delayed phasing in, statement to the minutes, wording of the recitals. This gives us high negotiating potential. But if a delegation makes it clear that it will not accept a decision under any circumstances, Presidency, Commission and the other Member States do not only negotiate without it but even against it.

Of course it is possible that the internal political situation does not allow an EU negotiator to agree to a decision which cannot be avoided due to majority proportions even if the proposal was going to be largely amended. In this case it is still much better from the perspective of negotiating tactics to abstain than to vote against. We can also obtain some “reward” for our abstention. For all negotiators our abstention is more desirable than an outright rejection. Generally, to reject definitively an agreement and to vote against a decision is a sign of having not fully used all of our negotiating opportunities.

4. Role of the European Commission

4.1 Monopoly on proposals

EU legislative acts may only be negotiated and adopted on the basis of a Commission proposal, except when the Treaties provide otherwise (Art.17
TEU). The Commission has a monopoly on proposals. In fact, no Member State, nor the Council, nor the European Parliament, nor the European Council, can initiate legislation even if there is unanimity. This monopoly is a crucial characteristic of the EU decision-making process and gives the Commission a strong bargaining position. It endows the Commission with the possibility to decide which interests will be taken into account when shaping its legislative proposal. This right of the Commission comprises the substantive content of the proposed rule, its legal form and its legal basis.

4.2 Modifying proposals

The Commission can modify its proposal in the course of the procedure of negotiations. But for a practitioner - a negotiator, a lobbyist - it would be utterly reckless to rely on this. Even if the responsible Commission official can be persuaded that the proposal must be amended, these amendments are usually very hard to achieve inside the Commission. This is due to the complex procedure inside the Commission.

In principle, the Council can deviate from the Commission’s proposal, but only if it reaches unanimity on a different content, on the legal form and the legal basis (Art.293 TFEU), which is practically impossible.

This shows that we must start to negotiate before the Commission has submitted its proposal. As every Commission proposal exerts a decisive influence on the course and outcome of negotiations, it must be our aim that the proposal takes our interests into account. If a Commission proposal protects our interests, this places us in a favorable position. It only requires our negotiating skill to prevent changes which are negative for us. This is because in all the following negotiations the Commission representatives will defend the proposal and thus our interests.

If in an individual case the majority conditions necessitate an amendment to the proposal that is not in our interests, we are still in a comfortable position. The amendments appear as a kind of sacrifice for our position. This sacrifice should be offset by favorable arrangements on other points. We have to get the “first-mover advantage”.

For this we need contacts in the Commission units. They can be established in all possible ways: visits, phone calls, letters, sending information and position papers, formulation aid, expert opinions or statistics. The lowest level is often the most important (decentralized, numerous, near to the subject, easy to reach). Contact can also be established indirectly e.g.
v i a a MEP, his assistant or an association representing our interests or our Permanent Representation.

We can participate in the expert parties which advise the Commission when it prepares proposals. Our work must always be done on time. It is a bad and inefficient negotiating style if we do not respond on time and then lament a bad Commission proposal and make the Commission the scapegoat.

4.3 Other elements strengthening the negotiating power of the Commission

There are more particularities underlining the important negotiating power of the Commission. The Commission has often the best possible access to all information. It has the upper hand as an objective body, while the rest of the negotiators are often viewed as selfish. It has the role of custodian of the general interest of the Union and of EU law, while the rest of the negotiators are supposed to defend only their national interests. It often slips into the role of defender of the interests of the smaller Member States. All of this underlines how important it is for us to negotiate on good terms with the Commission before and after the proposal.

5. Role of the European Parliament

The “Ordinary Legislative Procedure” gives the EP and the Council equal responsibility for the adoption of legislation in most policy areas. The EP acts together with the Council on the basis of a proposal the Commission has submitted to them simultaneously. Parliament and Council try to find a joint position. If Council and Parliament cannot agree on a piece of proposed legislation, it is put before the ”Conciliation Committee” composed of representatives of the Council and equal number of members representing the European Parliament.

Not all national delegates acting in Council bodies seem to know that the EP is a decisive negotiating partner. This is understandable insofar as the EP is not directly involved in their negotiations. The representatives of the EP don’t work in the same meeting rooms. Most of the delegates don’t see an opportunity to come in contact with members of the EP.

But it would be shortsighted for a negotiator to neglect the EP’s far reaching influence on EU legislation. First of all, a negotiator must always be informed about the direction in which the EP probably will proceed. For
this direction may strengthen or weaken his own bargaining position in his committee.

Secondly the national delegate must know how to influence the decision making process in the EP and its composite bodies. The Presidency and the Commission are in contact with the EP at an early stage. To make the co-decision procedure work, they meet in “Trialogues”. The early mutual exchange of information, the limitation of participants, the informal character and the common interest in compromising have reinforced cooperation particularly between Council and Parliament. We must follow the early steps of this cooperation and try to influence it.

For a negotiator it is important to know that the major part of the detailed work of the EP is done within its numerous policy-specialized committees. Here all legislative proposals are examined under a high level of autonomy. A “rapporteur”, appointed by this committee, follows the proposal to the conclusion of the procedure. The rapporteur is highly influential. We should make as early as possible profit of the negotiating possibilities this procedure offers.

6. Role of the Presidency

Every six months another Member State assumes the Presidency in the Council bodies of the EU. The Presidency fixes the program of work for the Council and all its preparatory bodies during this six-month term and provides the chairpersons in all Council bodies. The respective chairperson of a Council working party draws up the program for his group and the agenda for each meeting, chairs the meeting, allows others to take the floor, decides if and when a vote is taken and can submit compromise proposals. This chairperson therefore has a lot of influence. All of this is not really a particularity of EU bodies.

However, due to the peculiarities of decision-making in the EU, the influence of the chairman goes far beyond what a chairman might otherwise have in multilateral negotiations. His especially strong position results as a reflex to the strong position of the Commission on the one hand and the fragmentation of the influence of the individual Member States on the other hand. Single Member States cannot prevent a Commission proposal, nor can they put through an arrangement deviating from the proposal. As the Member States largely pursue different interests, it is practically impossible for them to agree on an arrangement against a Commission proposal. In this sense Member State influence in EU decision making is
"atomized". As a rule, even for the Commission, due to its internal procedures, it is difficult to amend its proposal. And amendments which do not result in a qualified majority are useless concessions from the Commission's perspective. Furthermore, they often provoke further demands and therefore they are - from the point of view of the Commission - counterproductive.

This is why the Presidency has such a particularly important role in the EU decision-making process. It is the sole instance that can pool Member State influence toward the Commission. Thus the Presidency is the antipode to the Commission. While the Commission has to stick to its proposal the Presidency can be more flexible, constructive and useful for us. In practice, difficult negotiations in the EU are mostly concluded on the basis of compromise proposals made by the Presidency. Thus we have to find and use all opportunities to make the Presidency our ally. We must keep the chairman and his staff precisely informed about our own interests and arguments. We have to help them to be “our” broker and to cover our interests by their compromise proposal.

7. Diversity of national interests

7.1 Understanding the interests of our partners

Generally speaking, negotiating successfully means bringing different interests into line. In order to do so, one needs to understand the interests of the negotiating partners and make sure the partners understand one's own interests. This is not as easy in EU negotiations. Here it is rather difficult to find out the interests of our partners and to assess them correctly. It is also rather difficult to make our partners understand our own interests.

There are several reasons for this. One reason is that the spectrum of interests of 27 delegations participating in EU negotiations is often very broad. If there are different opinions in the EU bodies, the delegates usually present their opposing positions only and not the interests they really pursue. However, these interests are the decisive factor.

Only a small part of a partner's real interest emerges, much like the tip of an iceberg. It is necessary and, through active negotiating, also possible to find out, to realize and to understand the remaining part. But we can only find out the real interests of our partners if we approach them. During
the official meeting in the conference room this is almost impossible. Here, every delegation keeps repeating its position.

In the margins of the meeting's official course, however, this is different. If we speak with our partners during a break of the meeting they will say more. They can hardly read out their speaking notes to us once again. We can question what is really behind their arguments. We have to keep trying to put ourselves in our partner's shoes and look behind the façade. It is always necessary to make additional efforts to recognize the real interests. We will be more successful outside the conference room. It is usually easy to find out the interests of your partner while having a cup of coffee with him at the coffee bar, or a common lunch in the canteen, or a glass of beer in the next pub.

The Council Secretariat, the Commission's services and our Permanent Representation are important information sources. Particularly, the representative of the Council Secretariat is usually experienced in the dossier and has established good contacts with all delegations, and therefore knows their interests.

7.2 Explaining our own interests

As important is to make our partners understand our own interests. We have to disclose our interests proactively. We must approach all other in order to achieve this. We must talk, call, write and travel. Our partners are interested in knowing what we think, want and need. Information is our capital. Once again, we have to act at an early stage. We have to assert our interests and not a position. For the Member State, interests are stable. The Member State position has to develop as negotiations develop.

8. EU language regime

Those who negotiate at an international level expect that linguistic problems might arise. We do encounter linguistic problems in the EU bodies too, but they are different. In an important part of the EU bodies, every delegate speaks in his own native language. A great number of excellent interpreters and translators see to that.

Thus it is the language coverage in its bodies which distinguishes many EU negotiations from other international negotiations. As convenient as this full-language coverage might be, it harbors risks. First of all we have
to accept that due to the full language coverage, many good pieces of advice from books on rhetoric are of no use in the EU negotiations. Our negotiating partners do not hear us directly, but only the interpreters. Our sophisticated body language is ineffective. Obviously, interpretation and translation increase the risk of message distortions, omissions and mistakes.

We have to make our own contributions translatable. We must use simple language, short sentences, verb first format, slow speech, pauses and repetition of key statements. We have to establish contacts with the interpreters and send them technical texts in advance. The Commission’s D G " Interpretation" gives “Tips for speakers”.

Don't be afraid to bring your or your minister’s speaking notes to the interpreters. They are always treated with the utmost confidentiality. We should ask our colleague to listen to the interpretation of our contributions into the other languages, and we should do the same for our colleague, boss or minister.

9. Durability of negotiating relations

Negotiating relations in the EU tend to be durable. If we negotiate today in a committee about a regulation of environmental standards for cars, we could be negotiating about perhaps animal welfare next week. Presumably, we will be negotiating for several years in a row in our working party or in the Coreper. Even when leaving his group, the delegate will normally continue to work on EU items and thus stay in the “Brussels old boys’ network”.

If a partner is dishonest in EU negotiations the trust is permanently destroyed. We must always be aware of the fact that our conduct in today's bargaining will influence the relations to our partners in all future negotiations. It must be our aim to improve the relations with our partners in every bargaining situation and in every meeting, if possible. If this is not possible, our conduct must on no account worsen this relationship. If we have to argue very firmly against another delegation, we should reflect on how we can still maintain our personal relationships and a basis of trust for the future. This is best done on the fringes of a meeting. We should inform our partner if we have to leave a coalition with him. Since the sudden U-turn of an ally may be painful for him. In EU negotiating, the ongoing relationship with our partners may be more important than the outcome of any particular negotiation.
Klaus-Jörg Heynen

Once a delegation casts a vote in support of a decision, it must stick to it. Occasionally as a negotiator you are tempted to withdraw your approval of a political agreement after having experienced trouble at home because of the approval and to prevent the still outstanding formal adoption. If you do this you will violate a taboo and lose your credibility in the long run. As the negotiating relations in the EU are marked by sustainability, mean tricks never pay off. They backfire on those using them. This often includes avoiding a brisk bargaining style and even irony. Credibility is our capital.

10. Permanent coalitions among member states

We need allies. It is a great advantage if we have allies we can count on. Therefore, from the very beginning of the EU, Member States were seeking countries to form permanent coalitions with. This applies to Belgium, the Netherlands and Luxembourg, using the Benelux Union as the first of these permanent coalitions. From time to time, new “permanent” coalitions are emerging in different policy fields.

Regular coalitions are useful in the early stages of negotiations. They enable an uncomplicated exchange of ideas and to build up confidence. They also facilitate the formation of blocking minorities.

But we should also see the limits and risks of these coalitions. Most of them are less permanent and less effective than expected. Usually, they only continue before each delegation has determined its own interests. At the end of bargaining when we have to decide whether we will ultimately agree to a final compromise, only our own interests will matter.

Who only talks with like-minded people obtains a unilateral view. He overestimates his own position. Those who bring about a blocking minority with these negotiating coalitions gain only a temporary victory. A permanent coalition holding together its blocking minority to prevent an important regulation can easily build up a reputation for blackmail politics.

A special example for a sustainable coalition is the Franco-German relationship. According to the Elysée Treaty of 1963 both countries should through intensive consultations reach an aligned position regarding European issues. Contrary to some other negotiating coalitions, the coordination between France and Germany starts out with widely divergent interests on concrete issues. Therefore the media often declares this relationship dead.
Yet this special relationship still plays a role in EU negotiations. France and Germany often represent complementary interests. When they want to reach an agreement, they must regularly reconcile the conflict of interests existing among all Member States. When France and Germany have agreed on a compromise despite widely varied interests at the beginning, the result is often seen as acceptable and advantageous to other Member States. This may be the reason why this special relationship is often seen as positive regardless of occasional public criticism.

11. Conclusion

We have identified some characteristics of the EU decision making process and drawn conclusions for our negotiating approach. In principle, these characteristics are the same wherever EU decision making and negotiations take place including the working party and the senior preparatory bodies, the Council and the European Council. Negotiating EU law is a complex and often long process in which numerous players are involved. Only a small part of it is done in the conference room and during formal meetings. To be successful, we need an intelligent and realistic strategy which is developed as early as possible and developed according to the progress. EU negotiations are not a matter of rhetorical skills; rather they are a management task.

It is always satisfying to get one’s own interests through by negotiating successfully. It is particularly satisfying when negotiating EU law. Here the negotiators most of whom are civil servants who don’t have senior positions have a privileged task. They are directly participating in the negotiations over EU legislation which will become directly applicable for more than 400 million citizens. They don’t feel inadequate by Brussels. And negotiating EU law is much more than pushing through one’s own interests. The skills of all negotiators form the fundamental basis for a functioning and stable EU. By skillfully and successfully negotiating EU law, we can contribute to this and to the construction of the “new legal edifice, a construction which will be in harmony with the requirements of these new times” (Grossi, P., A History of European Law. Making of Europe, p.162).

This is an updated reprint of “Klaus-Jörg Heynen, Negotiating EU Law. Particularities and Conclusions, ZEI Discussion Paper C207/2011”
E. Sector-Specific Regulation
I. Cartels and Restrictive Agreements in the Liberalized Telecommunication Sector – EU and National Competition Law Enforcement

By Robert Klotz1

1. Introduction

When the telecommunications markets were fully liberalized in the European Union in 1998 and competition started to emerge, incumbent operators had find strategies to minimize market share losses. As a consequence, competition disputes arose between them and the new entrants who quickly started to complain about anti-competitive behaviour by the incumbents. In the first years after full liberalization, although EU and national competition rules existed alongside sector-specific regulation, the competition authorities however did not enforce them with many formal decisions. The focus of the enforcement practice rather was on the national telecoms regulators with their specific competences and tools to intervene ex ante.

In some national jurisdictions, the competition rules were explicitly or implicitly side-lined, based on the view that ex ante and ex post control would exclude each other. In that context, US case law was sometimes referred to – notably the Trinko case2 - to back up this claim. Under EU law, the same trend could be observed, albeit in a less formalized manner than in some of the Member States. While the European Commission did not formally exclude the application of the competition rules in the regulated telecoms sector, its tools were not used very forcefully for a number of years, while the markets evolved quickly and some new entrants got lost on their way into the new world of competition. When the European Commission realized that the sector-specific rules were not fully suited to promote effective competition in all areas of the telecom sector, and had to be overhauled substantially in 2002, very few competition cases had been taken to

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a formal decision, both by the European Commission and the national competition authorities.

A turning point occurred in when the more decentralized approach for the competition law enforcement under Council Regulation (EC) No. 1/2003\(^3\) started to apply. Since then, the number of competition investigations and formal decisions against telecommunication companies has increased considerably, notably at national level. The commitment decision procedure was introduced into EU competition law at the same time, with Article 9 of Regulation 1/2003. Since 2004, the European Commission therefore has the possibility to conclude competition law cases by way of a formal settlement and to accept commitments to meet its competition concerns without coming to the finding on an infringement and imposing a fine. Many Member states have introduced similar procedures since then.

At present, the telecommunications sector provides a good example of the increasing degree of harmonization between EU and national competition law enforcement. It is particularly interesting to observe that in certain areas the European Commission, with its formal decisions, has paved the way for comparable national decisions, while in other areas, national authorities have taken the lead, which in return appears to have inspired the European Commission to enter new grounds. For instance, national competition authorities have been more active, and earlier, than the European Commission in pursuing cases of restrictive agreements or concerted practices between telecoms operators, falling under Article 101 TFEU or the equivalent provisions under national law. On the contrary, cases of abusive unilateral conduct by dominant companies falling under Article 102 TFEU have first been pursued and concluded by the European Commission, and later on by the national authorities.

This paper will focus exclusively on the EU and national enforcement practice under Article 101 TFEU. In the early days of liberalization, restrictive cartel agreements segmenting supply territories and customer groups of fixing quantities and prices did not come up to a large extent in the telecommunication sector. This might be due, at least in the fixed telephony markets, to the diverging interests of the operators concerned. After the market opening, incumbents first need to adapt to the new setting while keeping a strong market position. New entrants on the other hand pursue their own

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business strategies, trying to gain customers and market shares from the incumbents. These diverging interests hardly offer any incentives for cartels or other restrictive agreements among such competing operators. In addition, the essential elements for their business relationship, such as network access and related conditions, are subject to sector-specific regulation.

On the mobile telephony markets, these considerations however applied only to a lesser extent, because these markets emerged in most Member states under competitive conditions, less influenced by the former State monopolies, and with a lower degree of sector-specific oversight by national telecoms regulators. It is therefore not surprising that the first formal decisions under Article 101 TFEU were adopted against mobile telephony operators, while the first such cases against fixed telephony operators appeared only much later, as will be described in further detail below.

2. Formal decisions taken at national level

2.1 Dutch mobile operators

2.1.1 Information exchange

The Dutch competition authority (NMa) adopted a first formal decision on 30 December 2002 against five national mobile operators, T-Mobile Netherlands, Orange Nederland, KPN Mobile, Telfort and Vodafone Libertel\(^4\), for an exchange of confidential business information and coordinated behaviour, resulting from a joint meeting after which all of them simultaneously lowered the standard payments to retail traders for entering into or selling mobile telephone subscriptions. This was considered as a horizontal agreement among competitors preventing clients from switching operators and led to a fine of 88 million Euros, later reduced to 52 million Euros by the internal appeal body of the authority.

After the Rotterdam Court had partially annulled the decision and ordered the NMa to re-examine the matter, it was brought before the Dutch Trade and Industries Appeal Tribunal, which decided to stay proceedings and refer the case for preliminary ruling to the European Court of Justice.

\(^4\) Nederlandse Mededingingsautoriteit, Case No. 2658-344, Decision of 30 December 2002.
Robert Klotz

(ECJ). On 4 June 2009, the ECJ ruled\(^5\) that a single meeting can indeed be sufficient to cause an infringement of Article 101 TFEU, so that the competition authority was right in its initial assessment.

Based on this ruling, the Appeal Tribunal on 12 August 2010 ordered the Dutch competition authority to reassess the evidence produced by the mobile operators to rebut the presumption of a causal link, to re-examine the actual effects of the infringement on the market and to reset the level of the fine. On 27 October 2011, the authority held that the mobile operators were not allowed to exchange information about the dealer remuneration levels, not even once, and thus confirmed their liability for the concerted practice dating back to 2001. On this basis, the authority ultimately imposed fines of 7.9 million Euros on KPN, 4.6 million Euros on T-Mobile and 3.7 million Euros on Vodafone.

2.1.2 Price fixing

The same three operators again came under the scrutiny of the Dutch competition authority. In 2013, the Authority for Consumers and Markets (ACM) concluded an investigation into suspected price-fixing agreements.\(^6\) Although there was no evidence for actual price-fixing, the ACM did establish that public statements about future market behaviour could have anticompetitive effects. The authority found that statements made in public by the mobile providers about planned price variations for consumers could lead to indirect collusive behaviour, because other mobile operators could align their behaviour which could be harmful to consumers.

The three companies in question then offered commitments to the ACM, consisting of a promise to refrain from making such statements in public to avoid any risk of anticompetitive behaviour in the future. These commitments were also to be included in their internal compliance programs to ensure that they became a matter of general company policy. The commitments were accepted by the ACM in January 2014, which led to the closure of the probe against the three mobile operators.\(^7\) This case provides a good


\(^{7}\) Autoriteit Consument & Markt, Case No. 13.0612.53, Decision of 7 January 2014.
indication of how far companies can exchange views about their future endeavours before there is a risk of collusion or other anticompetitive behaviour.

There is however something almost paradoxical about this case. Although the companies stated that they merely intended to be transparent, the Dutch regulator found that such transparency did not come without a threat to competition. According to the ACM, the risk was due to the uncertainty that the companies would implement the statements they had made regarding future actions, although no internal decision had been made to this effect. It followed that the ACM’s decision consisted in a prohibition against verbal or written statements in the public domain about future prices and other commercial conditions before these had been made. On 22 December 2016 the ACM lifted the binding commitments imposed on KPN, T-Mobile and Vodafone. In letters addressed to each of them, the authority notified them that the commitments have been lifted, but that it still expects them not to make such statements in the future.8

2.2 French mobile operators

2.2.1 Horizontal agreements

The French competition authority (Conseil de la Concurrence) adopted a formal decision on 30 November 2005 against three French mobile telephony operators, Orange France, SFR and Bouygues Télécom, for engaging in an anticompetitive horizontal agreement.9 The fine imposed reached a total of 534 million Euros. The investigations revealed that every month between 1997 and 2003, the operators had exchanged detailed confidential information on the number of new and lost customers, to which they could not have gained access otherwise. This was used as an important source of information for their commercial strategies. This information sharing agreement allowed the operators to monitor the progress of the "market pacification" policy they had adopted, to the detriment of consumers. In addition, the operators also entered into an agreement aimed at stabilizing the development of their respective market shares.

9 Conseil de la concurrence (now: Autorité de la concurrence), Décision relative à des pratiques constatées dans le secteur de la téléphonie mobile, Decision No 05-D-65 of 30 November 2005.
The authority considered this as a very serious infringement, in view of the damage to the economy, the three-year duration, the size of the market and the high barriers to entry, given that mobile operators are required to obtain a license and no service providers, such as mobile virtual network providers, were granted access to the operators' networks during the period in question. The competent appeal Court (Cour d’Appel de Paris) confirmed the decision in 2006, stating that the oligopolistic structure of the market, combined with the regular exchange of precise and non-public information on a systematic and closed basis, altered the remaining competition between the operators, especially since such behaviour had the effect of revealing, on a daily basis and to all competitors, the market positions and strategies of each one of them.\(^{10}\)

The French Supreme Court (Cour de Cassation) partly over-ruled this judgment in 2007, in so far as the Cour d’Appel had not considered whether the authority had demonstrated that the information exchange had a concrete anticompetitive object or effect.\(^{11}\) According to the Cour de Cassation, an exchange of information is not prohibited per se. The anticompetitive object or effect cannot be induced from the sole consideration that information was exchanged. For the prohibition to apply, the information exchange must enable each operator to adapt its strategy to that of the predictable behaviour of their competitors. Hence, the potential or actual anticompetitive object or effect of an alleged anticompetitive conduct must be supported by a detailed assessment, which the Cour d’Appel had failed to deliver. The Cour de Cassation however upheld the previous ruling concerning the market share freezing practices which justified the major part of the 534 million Euros fine.

On 11 March 2009, the Cour d’Appel confirmed the authority’s finding of infringement with respect to the exchange of information and confirmed the 92 million Euros fine imposed. On 7 April 2010, the Cour de Cassation upheld this ruling on substance but quashed it regarding the fine of 41 million Euros imposed on Orange, due to a lack of arguments on the harm done to the French economy. On 30 June 2011 the Cour d’Appel once again confirmed the decision.\(^{12}\)

\(^{10}\) Cour d’Appel de Paris, Decision of 12 December 2006, RG n°2006/00048.
\(^{11}\) Cour de Cassation, Decision of 29 June 2007.
2.2.2 Vertical agreements

In December 2009, the French competition authority concluded another case in the telecoms sector, this time concerning a vertical restriction of competition, and imposed a fine of 63 million Euros on Orange Caribbean and France Télécom for engaging in anti-competitive practices in the French West Indies, which led to foreclosure of the market through exclusivity contracts with independent distributors.13 According to the decision, this agreement had raised the rivals’ cost of entry and prevented access by competitors, which had the effect of deterring consumers from switching operators at the only moment when it could be contemplated. The practices also limited the use of customer loyalty points to the purchase of new handsets and conditioned this to a new subscription.

As a consequence, France Télécom and Orange Caribbean were found jointly liable for this infringement and were fined 52.5 million Euros, in addition to 10.5 million Euros imposed on France Telecom for a margin squeeze. The Cour d’Appel de Paris, on 23 September 2010, upheld the fine of 52.5 million Euros for the restrictive agreement between the two undertakings, and reduced the fine for the margin squeeze to 7.5 million Euros.14

2.3 Polish mobile operators

On 23 November 2011, the Polish office of Competition and Consumer Protection (UoKìK) stated in a formal decision that the four biggest national mobile operators, Polkomtel, PTK Centertel, PTC and P4, had engaged in anticompetitive practices.15 The operators had agreed on the common conduct towards Info-TV-FM, a wholesale operator of mobile television, which delayed the development of mobile TV services on the Polish market. The authority ordered to discontinue the practice while imposing a total amount of fines exceeding 28 million Euros.

The operators had established a consortium, Mobile TV, for participating in the tender to obtain a license for allocating frequency bands necessary to provide mobile television services in the digital video broadcast technology.

13 Autorité de la concurrence, Décision relative à des pratiques mises en œuvre par Orange Caraïbe et France Télécom sur différents marchés de services de communications électroniques dans les départements de la Martinique, de la Guadeloupe et de la Guyane, Decision No 09-D-36 of 9 December 2009.
Having lost the tender, the four companies would have had to buy the service from the winner of the tender, Info-TV-FM. The operators however remained reluctant and refrained from the negotiations with the winner of the tender. The authority determined that the operators were participating in several meetings where they assessed the financial and business aspects of the ITF’s offer, discussed how to jointly undermine the offer and agreed on their common behaviour. Although during the meeting they agreed on the economic disadvantages of the offer, they remained in individual negotiations with ITF and thus delayed access to the mobile services market in Poland. Taking into account the long lasting negotiations and the meetings among the four mobile operators, the authority concluded that their conduct constituted an anticompetitive agreement by object and effect, as it restricted competition on the retail market for mobile telephony and on the wholesale market for mobile television.

The joint venture which had first been established for the participation in the tender so as to obtain the license for mobile television services, was then transformed into a restrictive practice between its members, going beyond the scope of lawful arrangements being permitted between the members of a joint venture. The authority considered the anticompetitive conduct as being adopted with the intention to minimize the risk that one of the four operators would offer mobile television services to customers, and thus would gain a competitive advantage over the others. The decision clarified the need for members of a joint venture to be cautious in their common business actions as they may fall under Article 101 TFEU. 2.4 Czech fixed telephony providers

On 25 March 2005 the Czech Office for the Protection of Competition (UOHS) adopted its final decision on a price fixing agreement between Český Telecom and two suppliers of ADSL modems, Joyce and Lucent. Under this agreement the contractors were bound not to supply these products to other purchasers in the Czech Republic for a better price than provided to Český Telecom. In addition, the agreement contained a system of volume discounts granted to Český Telecom. The Office imposed a fine amounting to 10 million CZK (approx. 393,000 Euros).\(^\text{16}\)

In its decision, the authority described the negative effect on competition of the commitment by both suppliers not to supply modems at a better price to any competitor of Český Telecom. This agreement was seen to have an adverse effect on competition due to the fact that Český Telecom limited its competitors’ possibilities to reach better prices in the case of contractual

relations with these two suppliers. The authority did not evaluate the competitors’ possibility to purchase the modems from other producers whose products were perfect substitutes. Moreover, the competitors were indeed entitled to conclude an agreement with the suppliers under the same price conditions as Český Telecom. Hence, the problematic issue in this case was not the mere fact that the competitors were limited by the incumbent, but rather the combination of this limitation with the volume discounts provided to Český Telecom.

2.5 Italian mobile telephony operators

Following a complaint by the Italian network operator Bip Mobile in 2012, the Italian competition authority (Autorità Garante della Concorrenza e del Mercato, AGCM) opened an investigation against the network operators Telecom Italia and Wind Telecomunicazioni. Bip Mobile alleged that the network operators had prevented it from entering the Italian mobile telephony market with this horizontal agreement. In an attempt to prevent a negative decision, Telecom Italia and Wind Telecomunicazioni offered to change the wording of their contracts with alternative providers as commitments, so that the agreements no longer tied certain benefits to conditions such as activating a minimum number of SIM cards. Previous agreements had allowed Telecom Italia and Wind Telecomunicazioni to either terminate agreements or withdraw incentives such as discounts if dealers entered into contracts with their competitors.

In December 2014, these commitments were accepted by AGCM which closed its investigation regarding Telecom Italia and Wind Telecomunicazioni.17 Accordingly, Wind Telecomunicazioni is obliged for five years not to withdraw from agreements if dealers enter into contracts with mobile phone operators that were not previously their customers so long as those operators hold a smaller market share than Wind Telecomunicazioni. Telecom Italia is obliged not to include clauses in its contracts with distributors that foresee additional incentives being cancelled if those distributors sign commercial agreements to sell services of operators competing with Telecom Italia for three years.

17 AGCM, Decision No. 25229 of 11 December 2014, ostacoli all'accesso al mercato di un nuovo operatore di telefonia mobile.
2.6 Danish mobile telephony operators

The Danish Competition Council on 29 February 2012 adopted a commitment decision against two mobile operators, Telia Denmark and Telenor A/S, after they had offered five commitments which the authority then made binding upon them.\(^\text{18}\) The decision concerns a horizontal network sharing agreement via a joint venture, set up by the mobile operators in order to jointly operate a radio access network. The cooperation put in place by this agreement covers the entire Danish territory and the parties will remain separate mobile operators on both the wholesale and retail markets.

The authority concluded that such a network sharing agreement is capable of having an anticompetitive impact on the Danish telecom market. However, the issues which gave rise to such a conclusion have been solved by five commitments offered by the parties. Interestingly, in addition to imposing these commitments, the authority also applied Article 101(3) TFEU, pursuant to which the anticompetitive agreement between the undertakings could be exempted from the application of Article 101(1) TFEU. Consequently, the authority decided that there was no sufficient ground for further action.

2.7 Spanish mobile telephony operators

On 2 July 2009 the Spanish competition authority (Comisión Nacional de los Mercados y la Competencia, CNMC) stated that parallel rate increases implemented by the three Spanish mobile operators Telefónica, Vodafone and France Telecom were not the consequence of a restrictive agreement or concerted practice between them, and ceased its proceedings.\(^\text{19}\)

Under the Spanish Law on Consumer Protection, a three months period (starting on 30 December 2006) was granted to the mobile operators for adapting their pricing policies. Additionally, under the general consumer protection legislation, any modification of the terms and conditions of consumer services must be notified to consumers at least one month in advance. Consequently, Telefónica notified its new mobile phone rates to its customers on 20 January 2007 and disclosed them to the public on 23 January 2007.

\(^\text{18}\) Konkurrence-og Forbrugerstyrelsen, Decision of 29 February 2012, Radio Access Network sharing agreement between Telia Denmark A/S and Telenor A/S.

\(^\text{19}\) CNMC, Decision No. AEM 2009/465 of 2 July 2009, Propuesta de Resolución sobre la tasa de coste del capital a aplicar en la contabilidad de France Telecom España, S.A. en el ejercicio 2009.
Following this announcement, Orange and Vodafone adopted their rates accordingly which resulted in very similar rates for the mobile phone services of all three mobile operators.

In its decision the authority stated that direct or indirect communication unilaterally started by one company and targeted at competitors regarding future commercial strategy shall only qualify as an anticompetitive practice if the competitors actually follow the announced strategy. Moreover, the authority added that it is not relevant whether the company announcing its future strategy has absolute certainty on the degree of follow-up by its competitors at the moment of the announcement. The authority, however, considered Telefónica’s announcement followed by the modification of the commercial strategy by Orange and Vodafone as mere parallel conduct. The authority also considered that the modified tariff system, in particular per-second charging from the first second of each call, was directly imposed by the law, so that there was no other alternative for the mobile operators.

The authority concluded that, in order to maintain their revenues, the mobile operators have the right to adapt their strategy to the one that they have verified or foresee that their competitors would follow. Concerning the application of higher rates for national, roaming and international calls, the authority found that it has not been affected by the announcement as it was internally adopted by Orange and Vodafone in advance. After examining all specific circumstances of the case, the authority thus concluded that the announcement by Telefónica prior to the deadline cannot be regarded as an intentional step towards reducing competition in the market. The conduct of the mobile operators was in compliance with the law governing the modification and prior announcement of the rates and thus without any anticompetitive object or effect.

3. Formal decisions taken at EU level

As already described above, the European Commission has been less active than national competition authorities in pursuing restrictive agreements falling under Article 101 TFEU since the telecommunications markets were opened for competition. Despite a number of dawn-raids in 2001 and 2002,
the attempts to prove the existence of restrictive agreements between mobile network operators in various Member States regarding the level of their international roaming tariffs failed due to the lack of conclusive evidence.\textsuperscript{20}

3.1 Cross border market sharing in Spain/Portugal

In the field of Article 101 TFEU, only one formal prohibition decision has been adopted to date by the European Commission against a cartel agreement or concerted practice among telecoms operators. The proceedings had been started in January 2011 against the incumbent operators Telefónica and Portugal Telecom, regarding their agreement not to compete on the Iberian telecommunications markets. The agreement had been concluded in 2010 as part of Telefónica's acquisition of sole control over the Brazilian mobile operator Vivo, previously jointly owned by both parties. The European Commission held that the object of the agreement was to partition markets, resulting in potentially higher prices and less choice for consumers.

Such clauses lead to significant violations of the competition rules. The non-compete clause can lead to higher prices and to a decrease of choice for consumers. The European Commission has as one of its objects the creation of a single telecommunications’ market in the European Union, and therefore it does not tolerate this type of clauses which block the integration process of this market.

On 23 January 2013 the European Commission adopted its decision\textsuperscript{21}, finding that the non-compete clause infringed Article 101 TFEU because of its wording, the economic and legal context of which it formed part and the actual conduct and behaviour of the parties concerned, and that it amounted to a market sharing agreement. Even though the parties limited the scope of the clause and removed it on 4 February 2011, the European Commission did not consider that was sufficient to prevent the competitive risks for the liberalized telecommunications market. Indeed, the infringement lasted for about four months (from 27 September 2010 until 4 February 2011).

\textsuperscript{20} In 2004 and 2005, the European Commission initiated proceedings under Article 102 TFEU against network operators in Germany and the UK. These cases were closed in 2007, following the adoption of the Roaming Regulation, which since then provides for maximum roaming prices at wholesale and retail level.

The European Commission also noted that, contrary to what the parties argued, there was no need to take into account the effects of the agreement since it was a violation by object. So, the negative effects of this agreement, that was signed with the object to exclude or limit the competition on the Spanish and Portuguese markets did not need to be demonstrated with specific evidence, due to the serious nature of this restriction.

The European Commission estimated that the non-compete clause could not be exempted under Article 101(3) TFEU, due to the lack of any efficiency resulting from that specific clause. Telefónica and Portugal Telecom were fined 66 million Euros and 12 million Euros, respectively, for this infringement.

The decision was challenged by both parties before the General Court. In its judgments of 28 June 2016, the General Court dismissed almost in their entirety the actions brought by the two operators.22 The parties claimed that the European Commission failed to prove a restriction by object resulting from this clause. According to them, it was necessary to demonstrate that they were potential competitors, which the European Commission did not do in the decision. On the contrary, the Court stated that there was no obligation for the European Commission to analyse this in-depth to reach the conclusion that a restriction by object had occurred.

Moreover, the Court stated that, to calculate the fines, it was necessary to exclude the company’s sales outside the competition relationship and therefore, outside the scope of the non-compete clause. Notwithstanding, the European Commission will have to determine once again the sales linked directly and indirectly to the infringement in order to calculate the amount of the fines, taking into account the findings of the General Court as set out in its ruling.

3.2 Network sharing in the Czech Republic

An ongoing EU investigation under Article 101 TFEU concerns the terms and conditions of a network sharing agreement between two Czech mobile operators. The Czech Competition authority referred a case to the European Commission in March 2015 concerning an agreement between O2 and T-Mobile, having 75% of the Czech mobile market, to share their networks. The two operators had first agreed to share parts of their 4G LTE mobile

networks, and then also their 2G and 3G networks, as it had been signalled to the authority in a complaint by Vodafone, a competitor on the Czech mobile network market.

In October 2016 the European Commission announced that it has initiated formal proceedings against O2 Czech Republic and T-Mobile Czech Republic.23 The European Commission will investigate the network sharing cooperation and ancillary agreements in order to establish whether they restrict competition in the Czech Republic or generate efficiencies, such as reduced deployment costs and may allow for network expansion to previously unserved areas.

The agreements have been ongoing since 2011 and cover almost 85% of the country. Furthermore, the Czech mobile networks market is highly concentrated with only three major players, O2, T-Mobile and Vodafone. The European Commission will now assess whether the cooperation agreement between O2 and T-Mobile risks hindering competition by slowing quality improvements in existing infrastructure and preventing the development of new technologies and services. Should it find that the agreement has a negative impact on these factors, the agreement might be contrary to the rules that prohibit anticompetitive agreements.

3.3 Network sharing in Germany and the UK

Already before Regulation 1/2003 entered into force in 2004, the European Commission had dealt with several cases of notified network sharing agreements between mobile telephony operators, for the purposes of negative clearance or individual exemption pursuant to Article 101(3) TFEU.24

For instance, on 16 July and 30 April 2003, the European Commission approved two agreements regarding third generation (UMTS) mobile network sharing in Germany and the UK.25 With these agreements, T-Mobile

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24 This possibility existed under Article 19(3) Regulation 17/62, the predecessor of Regulation 1/2003.
and O2, had decided to share site infrastructure and to roam on their UMTS networks in the UK and Germany. After examining the agreements, the European Commission concluded that the site sharing between the companies did not restrict competition because the agreements were limited to sharing basic network infrastructure such as masts, power supply, racking and cooling. However, the European Commission found a restriction of competition regarding the reciprocal provision of national roaming services, stating that such services between network providers limited network-based competition with respect to coverage, retail prices, quality and transmission speeds. The European Commission also found that these services promote market entry, which leads to better and quicker 3G service coverage. Accordingly, the European Commission granted the parties individual exemption pursuant to Article 101(3) TFEU.

It is noteworthy that in this case, the decision regarding Germany was challenged before the Court of First Instance (CFI) by one of its beneficiaries, O2 Germany, who contested the qualification of certain clauses as restrictive agreements in the sense of Article 101(1) TFEU. In its ruling of 2 May 2006, the Court stated, in favour of the applicant, that the European Commission had failed to take into consideration the fact that the competitive situation would not have been the same if the agreement had not been concluded. In the absence of the agreement, the company would not have been able to ensure better coverage, quality and transmission rates for UMTS services, and thus to be an effective competitor. The CFI concluded that much of the economic analysis currently conducted under Article 101(3) TFEU should instead have been conducted under Article 101(1) TFEU by the European Commission. The Court thus annulled the decision in this respect.

4. Conclusions

After almost twenty years of full liberalization of the telecommunication sector in the EU, the markets keep evolving and require ongoing supervision with all the legal instruments available. Although the focus of this article is clearly on competition law enforcement and not on sector-specific regulation, both of them must still be considered as complementary tools, rather than excluding each other. Both are being implemented at EU and

national level and the decisions adopted so far can be seen as a joint achievement by all competent authorities with considerable deterrent effect on all players in the market.

In hindsight, it is striking to observe that the cases of cartels and restrictive agreements did not appear immediately after full liberalization of the telecommunication markets in the EU in 1998. This might be due to the fact that such practices, in order to be commercially or strategically meaningful for the market players, pre-suppose rather mature markets, which cannot be assumed in the early days of liberalization. This may also, to a certain extent, explain why fixed telephony services have been less concerned by such investigations than mobile telephony services, which were offered under more competitive conditions from earlier on, and where the regulatory oversight was less stringent than in fixed telephony.

Looking ahead, it is particularly interesting to follow the competition law enforcement practice in times of ongoing convergence between the telecoms operators and media as well as Internet companies, all engaged in a fierce battle with more and more attractive multiple service offerings to the consumers. Although even here, Article 102 TFEU has so far played a more prominent role than Article 101 TFEU, this may change, with more incentives for companies to engage in restrictive agreements, due to the co-existence of regulated and unregulated players and market activities.

This article is a revised and amended version of a publication in „Concurrences 1-2013“.
II. Regulating the Railway: innovative and competitive railways in Europe: Infrastructure usage charges and the principle of non-discrimination

By Kristina Schreiber¹

Transport infrastructure is crucial for the economic prosperity in the European Union. The Council of the European Union stressed “that investments in the real economy – to upgrade, maintain and develop transport infrastructure and complete the trans-European transport network – will create jobs, facilitate mobility and improve the efficiency of logistics chains, thereby preserving and strengthening strategic assets for the competitiveness of the Union and increasing its growth and jobs potential“.² Without the possibility to transport people and goods all over the European Union, economic growth is impossible. Thereby, especially transport markets are challenged by the need of public services on the one hand and by the need of competition for most efficient services on the other hand. Due to this situation, relevant transport markets are regulated extensively, esp. railways. Regarding one important question of regulating the railways, Advocate General Mengozzi issued his Opinion in the ECJ-Case no. C-489/15 on 24 November 2016.

1. Sector-Specific Regulation on transport markets

Competitive markets are more innovative and more consumer-friendly than monopolistic markets. Effective competition in the different geographic and industrial markets all over the EU is a main driver to complete an internal market as set out in Article 3 (3) TEU: “The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.”

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Therefore, in general, the rules of competition in Articles 101-109 TFEU prohibit the prevention, restriction or distortion of competition within the internal market. They are applied regardless of the nature of the goods or services which are offered in the different markets.

Therefore, in particular, sector-specific regulation applies to a specific sector only and takes note of the sector’s particular features. For example, such special rules apply in the railway sector. Both kinds of rules, the general ones and the particular ones, aim to guarantee a system of genuine competition. Additionally, sector-specific regulation aims to insure some other purposes as well, e.g. to ensure the availability of services of general interest on reasonable terms and conditions and to ensure operational safety.

"Whilst general competition rules apply equally to all economic actors, sector-specific rules apply only to certain actors, e.g. to those holding a natural (and/or historical) infrastructure monopoly such as an electricity or gas transmission/distribution grid or railway network. Additionally, a key difference between general and sector-specific competition regulation is the competence of national regulatory authorities in ex ante intervention in the market in certain sectors (to govern for example network access and usage as well as price regulation). Ex ante regulatory instruments prescribe from the start official methods and standards to which market behaviour must adhere. In contrast, ex post regulatory instruments leave the determination of methods and means to the market and only afterward are such approaches analysed by national authorities."\(^3\)

2. EU-secondary law for Railways

Historically, the railway sector is a state industry. Railway operators are still owned by the state in numerous cases all over the European Union. Furthermore, the railway infrastructure itself is a natural monopoly.\(^4\) It is not feasible to duplicate the grid out of financial and environmental reasons. The objective of the infrastructure „by its nature allows only operation by one or a limited number“\(^5\).

In such a situation it is not possible to establish competition between railway infrastructures. But it is possible to establish competition between railway undertakings all using one infrastructure (competition on the infrastructure).

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4 Recital 40 of Directive 2001/14/EC.
5 ECJ, Judgement of 30 April 1974, Case 155/73, ECLI:EU:C:1974:40, p. 419 - Sacchi.

Council Directive 91/440/EWG of 29 July 1991 on the development of the Community's railways already provided certain access rights for railway undertakings and international groupings of those. As a result, the railway infrastructure could be used by multiple users. Council Directive 95/19/EC of 19 June 1995 on the allocation of railway infrastructure capacity and the charging of infrastructure fees sets out a broad framework for the allocation of railway infrastructure capacity. But these Directives did not prevent a „considerable variation in the structure and level of railway infrastructure charges and the form and duration of capacity allocation processes“ 6. The sector needed more efficient instruments to implement effective competition on the railway infrastructure. Therefore, the First railway package went far beyond what was stipulated in the 1991-Directives. The Second railway package of 2004 7 and the Third railway package of 2007 8 developed those

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6 Recital 4 of Directive 2001/14/EC.
instruments set in 2001. Finally, the Recast of the First railway package went, once again, beyond what was known before: Directive 2012/34/EU of 21 November 2012 establishing a single European railway area included further developed instruments that stimulated the competition. Since 2013, the Commission’s Proposals for the Fourth railway package9 are discussed on EU-level.

Typically, regulatory authorities need three different core regulatory instruments to enable competition on a monopolistic infrastructure: Access rights, infrastructure charging and unbundling.

First of all, access rights are mandatory. An undertaking that wants to provide railway freight transport or railway passenger services must be entitled to gain access to the railway infrastructure in order to provide those services. Without such access rights the undertaking would rely on the infrastructure operator’s goodwill.

Secondly, access has to be granted under fair and reasonable terms and conditions. Otherwise, access rights may be useless: If access is granted under unfair conditions, a competitor will not be able to offer competitive services. This covers reasonable infrastructure charges:

„It is important to ensure that charges for international traffic are such as to permit rail to meet the needs of the market; consequently infrastructure charging should be set at the cost that is directly incurred as a result of operating the train service.“10

Finally it is helpful to separate (to unbundle) the infrastructure operator and the service operator: „In order to ensure the future development and efficient operation of the railway system, a distinction should be made between the provision of transport services and the operation of infrastructure. Given that situation, it is necessary for these two activities to be managed separately and to have separate accounts. Provided that those separation requirements are met, that no conflicts of interest arise and that the confidentiality of commercially sensitive information is guaranteed, infrastructure managers should have the possibility to outsource specific administrative


10  Recital 38 Directive 2001/14/EC.
tasks, such as the collection of charges, to entities other than those active in railway transport services markets."\textsuperscript{11} Such unbundling aims to ensure that the infrastructure operator does not act in favour of its integrated service provider and discriminate against third service providers.

To enforce those instruments, an independent national regulatory body should be established. Furthermore, effective instruments to enforce the regulatory instruments must be installed, at least the right to appeal to the regulatory body and the right to have its actions judicially controlled.

3. Advocate General’s Opinion on railway infrastructure usage charges and other regulatory instruments

Some special aspects of the sector-specific regulation of railways are the subject matter of actual legal disputes: In European Court of Justice’s Case no. C-489/15 a private rail transport undertaking and the German public railway infrastructure operator „DB Netz“ discuss whether special practices of DB Netz are in line with the sector-specific law. Main aspects are questions of infrastructure charging and the principle of non-discrimination as well as the question in which way a competitor may allege infringements: The private rail transport undertaking did not rely on its right to appeal to the regulatory body but directly filed a claim to court based on civil law.

Recently, the Advocate General Mengozzi issued his Opinion in this case.\textsuperscript{12}

3.1 Facts and circumstances

The Advocate General summarizes the relevant facts and circumstances in his Opinion: „DB Netz makes its railway infrastructure available to its customers in return for payment on the basis of ‘infrastructure usage agreements’. The infrastructure usage agreement is a pro forma document governing the principles of the contractual relationship between rail transport undertakings and DB Netz. It forms the basis of the individual usage agreements which have to be concluded for the specific use of train paths. Its terms are incorporated into each individual usage agreement.

\textsuperscript{11} Recital 6 Directive 2012/34/EU.
\textsuperscript{12} ECJ, Opinion of 24 November 2016, Case C-489/15 – CTL Logistics GmbH ./ DB Netz AG.
Under such infrastructure usage agreements, use of the DB Netz railway network is made subject to the payment of train path prices calculated on the basis of the price list in force. The train path price lists, also known as the ‘train path pricing system’ (‘TPS’), are fixed by DB Netz in advance for given periods of time, without the involvement of the rail transport undertakings.

The parties are in dispute over certain cancellation and modification charges which DB Netz unilaterally included in the TPS and which applied whenever CTL Logistics sought to modify or cancel a previously booked train path. CTL Logistics is seeking reimbursement of the charges it paid between 2004 and 2011, which it considers to have been set at an unfair level.  

A national court asked the ECJ in a preliminary ruling whether such a claim may be filed to a court based on civil law directly or whether the right to appeal to the regulatory body is an exclusive right which excludes the possibility to file a civil law based claim without a decision of the regulatory body. Furthermore, the ECJ is asked to concretize some aspects of infrastructure charging in line with the Directives.

3.2 Fair infrastructure charges and controllability

Based on the questions raised by the national court, the Advocate General divides his legal Opinion into two parts: The first group of questions answered by the Advocate General is „concerned with matters of substantive law and are intended to enable the referring court to assess the compatibility of the review […] with the provisions of the directive that define the criteria for calculating such charges.“  

The second group of questions answered deals with „the procedural and schematic issues“.  

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13 ECJ, Opinion of 24 November 2016, Case C-489/15, para 4-6 – CTL Logistics GmbH /. DB Netz AG.
14 ECJ, Opinion of 24 November 2016, Case C-489/15, para 20 – CTL Logistics GmbH /. DB Netz AG.
15 ECJ, Opinion of 24 November 2016, Case C-489/15, para 19 – CTL Logistics GmbH /. DB Netz AG.
3.2.1 Substantive law: infrastructure charges

Analysing the matters of substantive law, the Advocate General summarizes the main principles of infrastructure charging: „The basic economic criterion underpinning railway network charges in EU law, so far as ‘minimum’ access is concerned, is therefore charging ‘at the cost that is directly incurred’, that criterion leaving the Member States some discretion with respect to its transposition and application in national law.“.16 Exceptionally, an infrastructure operator may „levy mark-ups on the directly incurred cost, provided that ‘the market can bear this’, that is to say provided that the railway undertakings can bear the mark-ups“.17 Such possibility is only given if a Member State has implemented it into its national law „in order to allow the infrastructure manager to pursue the objective of recovering all the costs incurred and thus achieve the aim of financial equilibrium […] with minimum State funding.“.18 Therefore the Directive „leaves to the Member States a broad margin of discretion in the choice of structure for their charging schemes, provided that those principles are observed.“.19

In the present case, national law „presupposes […] the application of an assessment criterion based essentially on an analysis of the direct costs of the service provided by the infrastructure manager, that is to say the marginal costs generated by using the infrastructure“.20 „Such a criterion does not appear to be incompatible with the charging principles laid down by Directive 2001/14 […] in particular the basic principle adopted by that directive to the effect that charges ‘shall be set at the cost that is directly incurred as a result of operating the train service’.“21

Summarizing the analysis, it should be emphasised that Member States are allowed to opt for a charging system based on the „total costs principle“ to determine the infrastructure charges but are not forced to do so. It is also

16 ECJ, Opinion of 24 November 2016, Case C-489/15, para 26 – CTL Logistics GmbH /. DB Netz AG.
17 ECJ, Opinion of 24 November 2016, Case C-489/15, para 27 – CTL Logistics GmbH /. DB Netz AG.
18 ECJ, Opinion of 24 November 2016, Case C-489/15, para 27 – CTL Logistics GmbH /. DB Netz AG.
19 ECJ, Opinion of 24 November 2016, Case C-489/15, para 28 – CTL Logistics GmbH /. DB Netz AG.
20 ECJ, Opinion of 24 November 2016, Case C-489/15, para 29 – CTL Logistics GmbH /. DB Netz AG.
21 ECJ, Opinion of 24 November 2016, Case C-489/15, para 30 – CTL Logistics GmbH /. DB Netz AG.
and especially in line with the Directive to rely on criterions only accepting „costs directly incurred“. In „order to comply with the objectives pursued by Directive 2001/14, the infrastructure charge constitutes […] a minimum, corresponding to the cost that is directly incurred as a result of operating the railway service […] and a maximum, arising from the total costs incurred by the infrastructure manager.“\textsuperscript{22} Furthermore, „one of the objectives pursued by Directive 2001/14, in particular in giving the infrastructure manager a margin of discretion in the determination of charges, is to allow the latter to use the charging scheme as a management tool to optimise the use of the infrastructure.“\textsuperscript{23} The relevant Article not only states that charges must be appropriate, but also that those should provide incentives for an efficient use of capacity.\textsuperscript{24}

The EU legislature’s overlaying concern is „to ensure that the charges applied do not reach a level at which fair access to the network is no longer guaranteed“.\textsuperscript{25} The Directive does not define under which conditions such „fair access“ is no longer guaranteed, but lays down numerous criteria which help to guarantee exactly this. These criteria guide the national legislators as well as national courts: „Consequently, civil courts which are called upon to verify the fairness of charges for the use of railway infrastructure […] and, if appropriate, to set the level of those charges ex aequo et bono, must, on the one hand, when required to apply the national legislation governing railways, interpret that legislation in a manner consistent with Directive 2001/14 and, on the other hand, when departing from that legislation in their assessment of the fairness of the charges, take into account the criteria established by that directive and the objectives which it pursues, and ensure that the practical effectiveness of its provisions is preserved.“\textsuperscript{26} The same applies to the directives in force today, esp. Directive 2012/34/EU.

\begin{itemize}
\item \textsuperscript{22} ECJ, Judgement of 28 February 2013, Case C-556/10, para 85 – Commission ./ Germany.
\item \textsuperscript{23} ECJ, Opinion of 24 November 2016, Case C-489/15, para 45 – CTL Logistics GmbH./. DB Netz AG.
\item \textsuperscript{24} ECJ, Opinion of 24 November 2016, Case C-489/15, para 46 – CTL Logistics GmbH./. DB Netz AG.
\item \textsuperscript{25} ECJ, Opinion of 24 November 2016, Case C-489/15, para 35 – CTL Logistics GmbH./. DB Netz AG.
\item \textsuperscript{26} ECJ, Opinion of 24 November 2016, Case C-489/15, para 41 – CTL Logistics GmbH./. DB Netz AG.
\end{itemize}
3.2.2 Right to appeal: extent

Analysing the question of the controlability of infrastructure charges, the Advocate General notes that the sector-specific EU-law „does not contain any provision which prohibits railway infrastructure usage charges from being made the subject of a judicial review to verify retrospectively whether they are fair“. Nevertheless, the regulatory body is in charge to control infrastructure charges, since this control falls within its powers. It is questionable whether these powers are undermined by the judicial review of infrastructure charges before a national civil court.

However, giving convincing reasons, in the end it is the Advocate General’s opinion „reason that neither the establishment of a regulatory body acting as an appeal authority, notwithstanding that it is independent and has the technical expertise necessary to perform the task assigned to it, nor the conferment on it of a general power to review the charges adopted by the infrastructure manager, including, in principle and on the terms indicated, the assessment of their fairness, can have the effect of depriving railway undertakings of a judicial remedy, made available to them by a provision of national law as interpreted and applied by the courts of the Member State concerned, allowing them to ask the civil court to verify the fairness of the contractual charges unilaterally set by the infrastructure manager with a view to obtaining reimbursement of those charges to the extent that they exceed the level deemed fair by that court“. Reason for this lies inter alia in the Directive’s system: „while the centralised monitoring of railway infrastructure usage charges by the regulatory body established in accordance with Article 30 of Directive 2001/14 is undeniably of fundamental importance in the general scheme of that directive […] it is my view that the uniformity requirements associated with the creation of such a monitoring system do not in themselves constitute grounds on which the Court should be minded to close the door to a judicial remedy under national law which railway undertakings are able to use in order, in accordance with the principles established by that directive, to safeguard rights which they enjoy under it, in particular the right of access to the railway infrastructure on economy terms“.

27 ECJ, Opinion of 24 November 2016, Case C-489/15, para 54 – CTL Logistics GmbH / DB Netz AG.
28 ECJ, Opinion of 24 November 2016, Case C-489/15, para 55 – CTL Logistics GmbH / DB Netz AG.
29 ECJ, Opinion of 24 November 2016, Case C-489/15, para 57 – CTL Logistics GmbH / DB Netz AG.
equitable terms.\textsuperscript{30} Those requirements set in the Directive „do not make it impossible“ to review the charges by both, administratively and judicially.\textsuperscript{31} Finally, „the risks to the consistency and uniformity of the charging review system […] should not be overestimated“\textsuperscript{32} and the Directive does not preclude a judicial review just because the civil courts „have no specialist knowledge“.\textsuperscript{33}

4. Conclusion

The Advocate General’s Opinion deals with some detailed questions of sector-specific regulation. Nevertheless, the Opinion clarifies the fundamental importance both of such sector-specific regulation and the well-balanced application of the substantive law. To enhance competition in the railway sector it is of fundamental importance to implement an appropriate regulation of infrastructure charges and an effective possibility for competitors to enforce those sector-specific regulatory instruments.

\textsuperscript{30} ECJ, Opinion of 24 November 2016, Case C-489/15, para 60 – CTL Logistics GmbH \textbar DB Netz AG.
\textsuperscript{31} ECJ, Opinion of 24 November 2016, Case C-489/15, para 61 – CTL Logistics GmbH \textbar DB Netz AG.
\textsuperscript{32} ECJ, Opinion of 24 November 2016, Case C-489/15, para 63 – CTL Logistics GmbH \textbar DB Netz AG.
\textsuperscript{33} ECJ, Opinion of 24 November 2016, Case C-489/15, para 66 – CTL Logistics GmbH \textbar DB Netz AG.
III. Competition and the water sector

By Alexander Gee

A debate has developed in recent years in several Member States (including the UK, France, Germany and Portugal) and in the European Parliament on how best to organise the water sector and introduce more transparency and competition. The European Commission should have a voice in such a discussion given that EC competition and internal market rules have an important impact on the water sector. This article looks at the reasons for the growing interest in the water sector, the obstacles to competition, and what the EC rules can do to address these problems.

1. Interest in the water sector

The water sector has attracted attention recently for both economic and competition reasons.

From an economic point of view water is an important sector of the economy where there are growing competitive pressures. First, the water sector is reported to have an annual turnover in the EU of about € 80 billion, which is more than the turnover of the gas sector. Secondly, the Water Framework Directive adopted in 2000 introduced economic concepts into the environmental legislation by requiring Member States to produce economic analyses of water use from 2004 and to introduce the principle of full cost recovery from 2010. Thirdly, higher environmental standards have increased the cost of water services, and this is likely to continue as existing rules enter into force and standards are increased. Fourthly, infrastructure will require significant investments, particularly in the new Member States, which are likely to come largely from the private sector given the pressures on public expenditure.

From a competition point of view our attention has also been drawn to the water sector. First, an increasing number of antitrust, State aid and merger...
cases in the water sector have been brought to our attention. Secondly, horizontal issues such as Services of General Economic Interest (SGEIs) and public procurement rules, including on Public Private Partnerships (PPPs), have been widely discussed and have direct implications for the water sector. Thirdly, other organisations, such as the OECD, have taken an interest in the water sector.

DG Competition commissioned an independent study into competition in the water sector in the EU and the final report is available on DG Competition's website. Since then more information has been gathered via the Member States, operators and consumers. In 2003 the Commission Communication on Internal Market Strategy Priorities 2003-2006 announced that the Commission services would look into the water sector and could publish a Working Paper in 2004, and this was repeated in the White Paper on Services of General Interest of May 2004.

2. Structure of the water sector

From a competition point of view, the most important characteristics of the water sector are:

- water distribution (ie the local transport of water to the final customer) and waste water collection (ie the local collection of waste water from the final customer) are normally natural monopolies at least for domestic customers;
- the fixed costs linked to water distribution and waste water collection represent up to 70 percent of the total supply costs for domestic customers, and this is largely a sunk cost;
- water is difficult and expensive to transport, with transport costs per 100km representing about 50 percent of the wholesale cost of water (compared to 5 percent for electricity and 2.5 percent for gas);
- water and waste water operators are almost always vertically integrated, although there is a growing use of public private partnerships (PPPs) which might change this;
- given the health and environmental needs for high standards in the water sector, national, regional and local authorities have traditionally imposed public service obligations on water operators and granted them exclusive rights as compensation;
Competition and the Water Sector

- water is provided under the control of local authorities in almost all countries (the UK is an exception) which often only cover a relatively small area.

Two conclusions can be drawn immediately. First, liberalisation of the water sector would be unlikely to result in the same benefits as in other network industries because a large proportion of the cost of supply of residential customers is incurred by the distribution network (which would remain a monopoly) and there is little scope for supply from distant sources. Secondly, third party access (TPA) to the network — which was used to introduce competition in other network industries — raises concerns about quality standards and liability if these standards are not met. As the health and environmental consequences of unsafe water and waste water can be very serious, the adoption of general rules on TPA would be controversial. The issue of TPA should therefore be examined case by case. Nevertheless it will be interesting to follow market developments in England and Wales which have introduced compulsory TPA to the water networks for the supply of industrial customers following the adoption of the Water Act 2003.

3. Competition problems in the water sector in the EU

3.1 Wholesale markets, in particular supply to commercial consumers

Although water distribution and waste water collection for domestic purposes are generally considered to be natural monopolies, the supply of water and waste water services is not. For example, large water consumers could in theory be supplied (a) by the local operator; (b) by a neighbouring operator (either via specific pipeline for the site or via third party access to an existing pipeline); (c) through self-supply of water (eg water abstraction rights for raw water from a river or aquifer and possibly own treatment of this raw water); or (d) by a neighbouring water consumer carrying out its own water services (see c above) and with spare capacity.

The question is therefore whether there are legal obstacles to competition. The main threat to competition at the wholesale market, including supply to industrial and commercial consumers, seem to be anti-competitive state measures (ie state and local measures which cannot be justified by Article 86(2)). Examples include exclusive rights whose scope or duration is greater than justified; national legislation that permits water operators to share markets (eg Germany seems to allow agreements not to poach...
customers from each other); and a discriminatory allocation of water abstraction rights, often for indefinite periods.

In addition, vertical restrictions arising from exclusive long term supply dealings may be harmful. Examples could include long-term exclusive contracts between an independent treatment plant (possibly constructed under a PPP) and a water operator. Horizontal restrictions between operators may also be harmful and contrary to EC law even where national law allows them.

3.2 Market for the supply to households

Unlike the market for supply to industrial consumers where the quantities can be large enough to justify constructing new pipes, direct water to water competition in the household market would require third party access to the networks and so is unlikely to develop significantly in the near future. The main competitive pressure for domestic consumers therefore comes from competition for the market (ie competition to operate a local monopoly). The main barriers to competition in this market seem to be the lack of transparency when services are provided in-house by the owner of the network (normally the local authority) and problems with public tendering when the owner outsources the exclusive right to operate the network.

3.3 Water is subject to national and EC competition rules

The EC competition rules apply to all undertakings where there is an effect on trade between Member States. The ECJ has consistently held that the concept of undertaking covers any entity engaged in an economic activity, and any activity consisting of offering goods and services on a given market is an economic activity. On this basis it seems that the provision of water and waste water services would be considered to be an economic activity, except possibly for domestic consumers in Ireland where the local authorities pay for water through taxation. This is despite recital 1 of the Water Framework Directive which states ‘water is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such’, as this refers to water in nature rather than to the provision of water services.
There can be an effect on trade in the water sector (a) if the water consumer is sited close to a border and so could be supplied from a neighbouring Member State, (b) if the water consumer uses the water services as an input into goods that are then traded, (c) where the water operator is dominant on a substantial part of the European Community (e.g. supplies large cities or regions), (d) when there is a cumulative effect from a number of smaller networks, or (e) when a contract or concession is outsourced and an operator in another Member State might be interested in it. Normally if there is no effect on trade and the EC competition rules do not apply then the national competition rules will apply.

It is common for water operators to be entrusted by the relevant authority with public service obligations (e.g. universal service) and to receive in compensation exclusive rights, which remove them from the scope of the competition rules. But in accordance with Article 86(2), the exclusive rights must be proportionate to the service of general economic interest.

3.4 Application of the competition rules can help to address these problems

As noted above, liberalisation is probably not the best approach at this stage, but it is possible to encourage transparency and competition within the current structure of the market. This is in line with the views of the European Parliament which called in its resolution on the Green Paper on Services of General Interest for modernisation not liberalisation of the water sector. To encourage competition two important issues must be addressed.

The first is to limit the scope and duration of the exclusive rights granted to local monopolies to the minimum necessary to allow them to provide the public service obligations with which they are entrusted. The application of the competition rules, and in particular Article 86, is essential to achieve this. As public service obligations generally only cover domestic and not industrial purposes, the same should apply to the scope of any special or exclusive rights (see Corbeau (Case C-320/91)). So industrial users should be allowed to choose the most economically advantageous water and waste water services. Similarly, the exclusive right should not cover ancillary services (e.g. laying pipes or reading meters) which could be done by third parties without compromising the economic equilibrium of the provision of the service of general economic interest. When an
exclusive right is granted linked to a specific investment (e.g., the construction of a treatment plant) its duration should also be limited to the minimum necessary not to compromise the economic equilibrium of the project.

The second is to ensure that there is a competitive market whenever an authority decides to outsource water activities. The competition rules could have a role to play here but this is primarily a question of the application of the public procurement directives and the related rules coming directly from the EC Treaty (e.g., non-discrimination, equal treatment, transparency). There is also a need for greater clarity of the term ‘outsourcing’, and the ECJ is examining the line between outsourcing and in-house contracts in three pending cases. More transparency in the market (e.g., via benchmarking) could also help competition.

4. Conclusion

Even if ‘liberalisation’ does not seem to be appropriate in the water sector at this stage, there is scope to improve competition and transparency in the sector. The most important issues to address to improve competition in the sector are first to reduce the exclusive rights, which are widespread in the sector, to the minimum necessary and secondly to improve the functioning of the outsourcing market. Both issues will be addressed in the Working Paper foreseen in the Internal Market Strategy and the White Paper on Services of General Interest, and could also be addressed by competition or internal market cases if appropriate.

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F. Economic Pillars
I. Emerging varieties of capitalism in the EU new member countries of East Central Europe

By Ryszard Rapacki & Piotr Maszczyk

1. Introduction

As the mushrooming literature on comparative capitalism has clearly demonstrated, the historical evolution of market economies in the member countries of the European Union (or more broadly - in the Western world) gave rise to the development of different institutional architectures or the prevailing models (varieties) of capitalism. Depending on the set of criteria applied to distinguish between varying institutional infrastructures of the market economy in particular countries or their groups, two most widely used typologies can be singled out. The first such classification, best known in a version brought out by Amable, involves four different types of capitalist market economies coexisting within the framework of the EU Internal Market, i.e. (i) the Anglo-Saxon model, (ii) the Continental European model, (iii) the Nordic (or social-democratic) model, and (iv) the Mediterranean (or South European) model of capitalism. The second typology, developed by Hall and Soskice and based on the prevailing mode of coordination of economic agents’ actions, makes a distinction between: (i) liberal market economies (LME) and (ii) coordinated market economies (CME).

As shown by Hanson, the coexistence of different types of capitalism has been consistent with the process of European integration and - quite surpris-
ingly – has proceeded within the formal framework of *acquis communautaire*. In other words, it may be argued that unity (or the European integration) is compatible with and can be achieved through diversity. According to Hanson, the trend towards greater institutional heterogeneity has become even more pronounced with the most recent EU enlargement, i.e. accession of eleven new members from Central and Eastern Europe (CEE11) between 2004 and 2013.

Seen against this background, it may appear quite striking that – while departing from the command economy – the former socialist countries entered the road from plan to market without a clear *explicit* vision of the end point or the target type of capitalism they were aiming to build. Following a distinction made by Myant and Drahokoupil and similarly by Heiduk and Rapacki, it can be claimed that the overwhelming majority of these countries have undergone the process of ‘systemic transformation’, i.e. a process of change without a clear end result, rather than ‘transition’ or a movement toward a defined end result. Hence, it should come as no surprise that – after twenty plus years of systemic transformation – there emerged no single post-Communist type of capitalism in East-Central Europe and Central Asia. Simultaneously, despite undeniable progress in pushing through with structural reforms and building the institutional infrastructure of the market in these countries, it sounds like a plausible hypothesis that the results

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5 Ibid.


8 For details, see e.g. Rapacki, R., Z. Matkowski and M. Próchniak: *Transition Countries: Economic Policy and the Progress of Market Reforms*, Working Paper
achieved so far on the road from plan to market are very diverse in particular countries and quite different from the patterns established in advanced market economies.

The aim of the present paper is to show that – similar to advanced Western members of the European Union – there is no a single mode of a ‘post-Communist capitalism’ emerging in former socialist economies that recently joined the European Union. Simultaneously, we will strive to prove that the standard conceptual and methodological frameworks offered by the ‘varieties of capitalism’ (VoC) and the 'diversity of capitalism' (DoC) approaches respectively cannot be directly used so far for analytical and classification purposes in transition economies as it gives ambiguous and partly inconsistent results.9

To this end, in the section that follows we will apply - as the first approximation - the VoC approach to demonstrate the wide variety of institutional setups that developed in CEE11 economies to evolve into different forms of capitalism. Next, in section 3 we will discuss the most salient peculiarities of post-communist transition that make the standard conceptual and methodological framework, conventionally used to discriminate between various models of capitalism in advanced Western countries, only partly applicable for CEE11 economies. Finally, in section 4 we will suggest an alternative typology of the emerging varieties of post-Communist capitalism in CEE11 countries, relying on a different set of criteria than those applied by Hall and Soskice (2001) or Amable (2003) for developed capitalist states.

2. Varieties of ‘post-Communist’ capitalism – a standard approach

Based on the methodology and classification of the diversity of capitalism co-existing in advanced Western countries, a number of empirical studies have been undertaken targeting the former socialist economies and aimed at developing a similar typology for the latter group while at the same time

contrasting the results with the benchmark case or the former group of countries. The table below presents the findings of two such exercises, conducted by Knell and Srholec and Hanson, and updated and modified by the present authors.

Notes Table 1: pcGNI = per capita gross national income in international dollars at purchasing power parity, 2009, USA = 100. EoDB = country ranking on ‘Ease of doing business’, including 183 countries; measures for 2011. Gov = sum of governance scores (voice and accountability, political stability, effectiveness of government, regulatory quality, rule of law, control of corruption), converted into %% of maximum possible score; possible range from +100 to -100. Refers to 2010. 


11 Notes Table 1: pcGNI = per capita gross national income in international dollars at purchasing power parity, 2009, USA = 100. EoDB = country ranking on ‘Ease of doing business’, including 183 countries; measures for 2011. Gov = sum of governance scores (voice and accountability, political stability, effectiveness of government, regulatory quality, rule of law, control of corruption), converted into %% of maximum possible score; possible range from +100 to -100. Refers to 2010. 

Table 1. Development level and selected indicators of ‘institutional quality’, EU15 vs. CEE11 countries, 2005-2011

<table>
<thead>
<tr>
<th>Country</th>
<th>pcGNI</th>
<th>EoDB</th>
<th>Gov</th>
<th>CPI</th>
<th>Social cohesion</th>
<th>Labour market</th>
<th>Business regulation</th>
<th>Coordinatio index</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>EU15</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Greece</td>
<td>63.1</td>
<td>100</td>
<td>16.3</td>
<td>35</td>
<td>1.4</td>
<td>6.5</td>
<td>3.7</td>
<td>11.6</td>
</tr>
<tr>
<td>France</td>
<td>74.4</td>
<td>29</td>
<td>50.8</td>
<td>68</td>
<td>4.5</td>
<td>3.2</td>
<td>0.2</td>
<td>8.0</td>
</tr>
<tr>
<td>Portugal</td>
<td>52.8</td>
<td>30</td>
<td>38.2</td>
<td>60</td>
<td>1.1</td>
<td>4.4</td>
<td>1.0</td>
<td>6.5</td>
</tr>
<tr>
<td>Germany</td>
<td>80.7</td>
<td>19</td>
<td>57.5</td>
<td>79</td>
<td>2.4</td>
<td>3.3</td>
<td>-0.9</td>
<td>4.8</td>
</tr>
<tr>
<td>Spain</td>
<td>69.0</td>
<td>44</td>
<td>35.5</td>
<td>61</td>
<td>2.9</td>
<td>4.9</td>
<td>-3.1</td>
<td>4.7</td>
</tr>
<tr>
<td>Italy</td>
<td>69.8</td>
<td>87</td>
<td>20.7</td>
<td>39</td>
<td>2.5</td>
<td>1.7</td>
<td>0.3</td>
<td>4.5</td>
</tr>
<tr>
<td>Austria</td>
<td>84.2</td>
<td>32</td>
<td>62.4</td>
<td>79</td>
<td>4.1</td>
<td>0.7</td>
<td>-1.0</td>
<td>3.8</td>
</tr>
<tr>
<td>Netherlands</td>
<td>87.1</td>
<td>31</td>
<td>66.0</td>
<td>88</td>
<td>5.0</td>
<td>-0.2</td>
<td>-2.1</td>
<td>2.7</td>
</tr>
<tr>
<td>Sweden</td>
<td>83.4</td>
<td>14</td>
<td>70.8</td>
<td>92</td>
<td>5.6</td>
<td>0</td>
<td>-4.7</td>
<td>0.9</td>
</tr>
<tr>
<td>Denmark</td>
<td>85.0</td>
<td>5</td>
<td>72.7</td>
<td>91</td>
<td>1.6</td>
<td>-2.9</td>
<td>-0.3</td>
<td>-1.6</td>
</tr>
<tr>
<td>Belgium</td>
<td>80.2</td>
<td>28</td>
<td>48.7</td>
<td>71</td>
<td>3.9</td>
<td>-3.5</td>
<td>-3.9</td>
<td>-3.4</td>
</tr>
<tr>
<td>Ireland</td>
<td>72.4</td>
<td>10</td>
<td>58.2</td>
<td>80</td>
<td>-1.0</td>
<td>-0.9</td>
<td>-3.0</td>
<td>-4.8</td>
</tr>
<tr>
<td>Finland</td>
<td>77.3</td>
<td>11</td>
<td>74.1</td>
<td>92</td>
<td>1.6</td>
<td>0.2</td>
<td>-7.3</td>
<td>-5.4</td>
</tr>
<tr>
<td><strong>UK</strong></td>
<td>78.6</td>
<td>7</td>
<td>55.1</td>
<td>76</td>
<td>1.4</td>
<td>-2.9</td>
<td>-4.3</td>
<td>-5.8</td>
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<tr>
<td><strong>CEE11</strong></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Slovenia</td>
<td>58.0</td>
<td>37</td>
<td>36.5</td>
<td>64</td>
<td>3</td>
<td>2.1</td>
<td>1.3</td>
<td>6.3</td>
</tr>
<tr>
<td>Croatia</td>
<td>42.1</td>
<td>80</td>
<td>16.5</td>
<td>41</td>
<td>1.3</td>
<td>2.9</td>
<td>1.5</td>
<td>5.6</td>
</tr>
<tr>
<td>Czech Rep.</td>
<td>52.5</td>
<td>64</td>
<td>36.8</td>
<td>46</td>
<td>2.4</td>
<td>-2.0</td>
<td>4.0</td>
<td>4.4</td>
</tr>
<tr>
<td>Romania</td>
<td>31.8</td>
<td>72</td>
<td>7.5</td>
<td>37</td>
<td>-2.0</td>
<td>5.0</td>
<td>1.0</td>
<td>4.0</td>
</tr>
<tr>
<td>Latvia</td>
<td>38.6</td>
<td>21</td>
<td>26.6</td>
<td>43</td>
<td>-1.8</td>
<td>1.5</td>
<td>1.0</td>
<td>0.6</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>29.1</td>
<td>59</td>
<td>8.2</td>
<td>38</td>
<td>-1.8</td>
<td>-1.8</td>
<td>2.8</td>
<td>-0.8</td>
</tr>
<tr>
<td>Poland</td>
<td>40.0</td>
<td>62</td>
<td>32.3</td>
<td>53</td>
<td>-0.6</td>
<td>-1.1</td>
<td>0.0</td>
<td>-1.8</td>
</tr>
<tr>
<td>Slovakia</td>
<td>48.4</td>
<td>48</td>
<td>31.1</td>
<td>43</td>
<td>-0.4</td>
<td>-4.5</td>
<td>2.1</td>
<td>-2.8</td>
</tr>
<tr>
<td>Hungary</td>
<td>41.8</td>
<td>51</td>
<td>28.9</td>
<td>47</td>
<td>-1.8</td>
<td>0.0</td>
<td>-1.5</td>
<td>-3.3</td>
</tr>
<tr>
<td>Lithuania</td>
<td>37.9</td>
<td>27</td>
<td>30.9</td>
<td>50</td>
<td>-1.3</td>
<td>0.1</td>
<td>-2.5</td>
<td>-3.8</td>
</tr>
<tr>
<td>Estonia</td>
<td>41.9</td>
<td>24</td>
<td>43.3</td>
<td>65</td>
<td>-4.4</td>
<td>0.4</td>
<td>-1.7</td>
<td>-5.7</td>
</tr>
</tbody>
</table>
The index of strategic coordination, developed by Knell and Srholec, measures the prevailing type of coordination of economic agents’ actions. If positive, it indicates the institutional infrastructure in a given country that enhances a non-market strategic coordination (CME variety of capitalism) while negative scores suggest the prevalence of competitive markets as a coordination mechanism (LME variety of capitalism). The pertinent index is based on three sub-indices measuring (i) social cohesion or redistribution, (ii) labour market regulation (rigidity/flexibility), and (iii) business regulation. In the table, it has been supplemented by individual countries’ rankings on (a) Ease of Doing Business, (b) the quality of Governance, and (c) Corruption Perception Index, as well as by the data showing relative development levels of each country, as a percentage of the U.S. GNI per capita level.

As can be seen from the data in the last column of Table 1, CEE11 economies – similar to their benchmark or EU15 countries – display a wide spectrum of institutional characteristics that range between a ‘strong strategic coordination’ on the one extreme, and ‘strong market coordination’ on the other. Thus, at least on the surface, they seem to fit the description of the ‘varieties of capitalism’ typology. Within the entire group of CEE11 economies five countries (Slovenia, Croatia, the Czech Republic, Romania and Latvia) represent – to a greater or lesser extent – the CME category of capitalism while six new EU members (Bulgaria, Estonia, Hungary, Lithuania, Poland and Slovakia) exhibit institutional features compatible with the LME category. At the level of individual countries, Slovenia and Croatia lead the former category while among the most ‘liberal market economies’ Estonia and Lithuania are on the top of the list. It is also interesting to note that the Czech Republic and Slovakia – the two countries that split in 1991 from the former federal state of Czechoslovakia – are on the opposite ends of Knell-Srholec classification.

Among many factors that may explain such a wide dispersion of institutional characteristics and the resulting development of diverse forms of capitalism in CEE11 countries the following are particularly worth emphasizing:

- Varieties of socialism that evolved in different East-Central European and Central Asian countries between 1945 (or 1917 if applicable) and 1989, despite the ‘common core’ or the Soviet-imposed political and economic system and model of development. As a result, the command economy legacy that used to determine to a large extent the initial conditions for systemic transformation in each former socialist country varied from one transition economy to another.
• In more general terms, the institutional development trajectory in each transition economy seems to have followed a ‘path dependence’ pattern (see e.g. Stark and Bruszt 1998 and 2001), i.e. it used to be determined by historical traditions and institutional endowment inherited from the past.¹

• The choice of transformation strategy – e.g. between the ‘shock therapy’ and more gradualist approach. The choice in question tended to be determined to a large degree by the overall macroeconomic conditions of a country at the outset of systemic transformation (e.g. deep macro-economic disequilibria in Poland vs. stable and balanced economic situation in Czechoslovakia). This factor may explain why some countries, such as e.g. Poland, decided to embark on a radical reform package or ‘shock therapy’ and to stick to a liberal prescription provided by the ‘Washington consensus’. On the other hand, it also sheds some explanatory light on the reasons behind the choice made in 1989 by the Czech authorities to adopt a more gradualist transformation policy and to rely more heavily on strategic coordination rather than on market mechanism.

Given the findings established so far, a closer look at the data compiled in Table 1 reveals, however, a number of inconsistencies in the picture of institutional development in CEE11 countries and as a derivative – in the resulting typology of the emerging models of post-Communist capitalism. They are discussed in more detail in the next section.

3. Peculiar features of post-communist transition and the applicability of standard ‘varieties of capitalism’ approach.

The first inconsistency boils down to the heterogeneous nature of coordination indices for most of transition economies, shown in Table 1. Only in

¹ As a matter of illustration, the only European country that did not suffer hyperinflation after the First World War, in the early 1920s, was Czechoslovakia. Between 1948 and 1989, i.e. under the command economy, this country – unlike e.g. Poland or Hungary - pursued a very prudent and well-balanced economic policy. As a result, while departing from the central planning system in 1989, Czechoslovakia was again the only Central European former socialist country (apart of Romania but for different reasons) that entered the road towards a market-based system with no inflationary overhang, and no public and external debts, as a sound and balanced economy in macroeconomic terms. Hence – compared to its peers - the country was not doomed to embark on a ‘shock therapy’ and enjoyed a much wider room for manoeuvre in designing and implementing its systemic transformation strategy.
four out of eleven CEE11 countries (Croatia, Slovenia, Hungary and Poland) all three components of the overall index have the same sign as the latter. In the remaining countries the pertinent signs for one or two component indices are opposite to the derived aggregate coordination index.

The second problem is due to the fact that the supplementary data on ‘institutional quality’ of CEE11 economies, shown in the left-hand part of Table 1, exhibit no clear-cut pattern and seem to be only loosely correlated with coordination indices contained in the right-hand part of the table. This finding refers to both the Ease of Doing Business and Governance scores, and Corruption Perception index. On the other hand, however, it should be noted that some of the indicators of institutional development of CEE11 countries, in particular the Governance score and CPI, exhibit quite close correlation with the development level (GNI per capita) of these countries. Compared to other transition economies, not shown in the table, the link in question seems to be especially strong in the case of new EU member countries which may imply a significant role of “the external anchor” as an additional explanatory variable of the fast progress in structural reforms and relatively high quality of institutional environment in these countries.\(^2\) Even more heterogeneous picture of the emerging variants of post-communist capitalism can be found in another empirical study based on the ‘diversity of capitalism’ approach\(^3\), carried out by Mykhnenko.\(^4\) Although – compared to both Hanson (2006) and Knell and Srholec (2005) - the scope of his analysis is narrower as it covers only two sample transition countries – Poland and Ukraine, at the same time it is more comprehensive since it screens a number of other important dimensions of institutional infrastructure of the market that sharpen the picture of the nature of capitalism in former socialist countries. In particular, in his study Mykhnenko focuses on five areas or dimensions of institutional quality in each of the two countries: (i) product market regulation, (ii) the wage-labour nexus and labour market institutions, (iii) financial intermediation and corporate governance, (iv) the social protection sector, and (v) the education and knowledge sector.


\(^3\) Along the lines developed in Amable B., “The Diversity of Modern Capitalisms”, Oxford University Press, Oxford 2003.

As the most important finding, the results achieved by Mykhnenko imply that while in some respects either of the two countries seems to resemble one variant of capitalism, in some other respects they tend to converge to quite a different variant. More specifically, whereas in the case of Poland the mix of institutional characteristics in most areas (four out of five) point out to a similarity of the emerging variant of capitalism to the Mediterranean model, the dominant features of the fifth area, i.e. the social protection system are more akin to the Continental European model. In turn in Ukraine, while the nascent capitalism appears to resemble in many respects the Continental European model, the most salient properties if its social protection sector seem to exhibit much more similarity to the liberal Anglo-Saxon model of capitalism.\(^5\)

To wrap up this part of the discussion, the most plausible explanation of the possible reasons underlying the ‘institutional ambiguity’ (in Mykhnenko’s terminology) in Poland and Ukraine in particular, and in transition countries in general, may be synthesized in two points. First, this is the uncompleted process of building the ‘post-Communist capitalism’ in transition economies that makes their institutional infrastructure still a ‘work in progress’. The second reason is due to the fact that one of the key assumptions underlying the ‘varieties (diversity) of capitalism’ approach – i.e. institutional complementarities does not fully hold in former socialist countries. As a result, some parts of the institutional architectures prevailing in these countries are not compatible with other parts\(^6\), as is usually the case in advanced Western EU member countries representing different variants of capitalism.

In most general terms, it has to be highlighted that transition economies display a number of peculiar features that make a direct application of the


\(^6\) For example, In Poland the wage-labour nexus which is based on labour market flexibility is not complementary with the overall logic of regulated capitalism. The same holds true for Ukraine, in case of the underdeveloped welfare system vs. the general institutional logic of its post-communist capitalism. See Mykhnenko (2005).
standard methodological and conceptual framework embedded in the ‘varieties (diversity) of capitalism’ paradigm quite troublesome or at least difficult. In particular, the following problems deserve a special attention.\(^7\)

The first difficulty lies in the choice of an appropriate dependent variable while explaining the comparative economic performance of CEE11 and more generally - transition countries as a function of their “comparative institutional advantage”. Under the standard VoC approach\(^8\), the independent variable is the ability of a country to reach a leading position in the world in a particular branch of economic activity on the basis of radical innovation. As of today, no transition economy has gained such a position which may suggest that we need a more appropriate dependent variable for this group of countries, such as e.g. the more general form of integration with the international economy.

The second difficulty is linked with the choice of the right independent variable. Unlike in the EU15 countries where formal institutions or rules of the game tend to guide the behavior of economic agents, in CEE11 economies there has been quite a sizeable gap between formal and informal institutions with a strong bias towards the latter\(^9\). As a derivative, the proxy for independent variable or ‘comparative institutional advantage’ in former socialist countries should be defined differently compared to Western countries with established and reliable institutional environment.

The third problem is that institutions are not the only determinant of forms of international integration in transition economies – they are a necessary but not sufficient condition. Other important factors, including the inherited economic structures (in particular, the scope for new business expansion and the nature of welfare systems\(^10\)) and the command economy legacy, play a vital role as co-determinants of their international competitiveness.

The fourth difficulty in applying the VoC framework to transition economies is that it is built on the assumption of long-term continuity and stability of existing institutions. In contrast to developed market economies however, the process of systemic transformation entails a high degree of

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discontinuity and volatility. It is hard to predict therefore which institutional characteristics emerging in former socialist countries are permanent and are likely to have lasting consequences, and which are only of temporary nature.

Given the peculiarities of systemic transformation as an historically unprecedented process and the difficulties with a direct application of the standard ‘varieties (diversity) of capitalism’ framework to transition economies, outlined above, it seems advisable to adjust this framework with a view to better fit the specific conditions prevailing in former socialist countries. The section that follows sketches such a modified conceptual framework, including the transformation-specific set of criteria that enable a tentative classification of the varieties of ‘post-Communist capitalism’ emerging in transition countries.

4. Varieties of ‘post-Communist’ capitalism – a tentative classification.\textsuperscript{11}

The first step in adjusting the standard framework to the conditions of transition economies consists in distinguishing different forms of their integration with the international economy. The main criteria used for such a taxonomy include in particular the differences in the balance and structure of their current accounts, and the commodity composition of their exports.\textsuperscript{12}

Based on these criteria, six forms of international integration of former socialist countries can be singled out.\textsuperscript{13}

- \textit{Export-oriented FDI in complex sectors.} The main channel of international integration is through multinational companies (MNCs) and their subsidiaries in selected transition countries which export high-value manufactured products based on sophisticated technologies and inno-

\textsuperscript{11} The tentative typology of post-Communist capitalism put forward in this section is more comprehensive in scope compared to the focus of the earlier parts of the paper as it encompasses the whole group of 28 former socialist countries in Central and Eastern Europe and Central Asia. The rationale behind extending the classification framework involved is the fact that most (if not all) modes of integration with the international economy (the main classification criterion here) apply in varying proportions to CEE\textsuperscript{11} countries. See also footnote 5 beneath.


\textsuperscript{13} Needless to say, these forms are not exclusive that is more than one form can develop in a particular country at the same time (though one of them tends to be dominant while others play a supplementary role).
vation. This kind of activities requires a high level of government capacity and a developed environment for business. Most of these conditions have been met in Central Europe, the Baltic countries and – increasingly – in South-eastern Europe.

- **Export-oriented complex sectors without FDI.** This form of international integration can be seen as an exception rather than a rule compared to a more widespread pattern described under heading 1 which develops in the most economically advanced transition economies (Czech Republic, Slovenia). Marginally it can also occur in less developed countries of this group, as is the case with Russia (military equipment) or Belarus (exports of vehicles).

- **Simple manufacturing subcontracting to MNCs.** This form relies on exports of processed or semi-processed goods embodying medium- or medium-low technology with a relatively low value added (e.g. garments, footwear and simpler components). It was important in East Central Europe in the early 1990s and in the Baltics and South-eastern Europe in later years. It also spread to lower-income transition countries (Ukraine, Central Asia) but on a limited scale.

- **Commodity exports** proved to be the most important channel of integration with the world economy for the oil-exporting countries (Russia, Central Asia, Azerbaijan) and for Ukraine, a steel and chemicals exporter. Exporting raw materials and semi-manufactures requires a less sophisticated institutional environment, including state capacity, than in the case of categories 1-3.

- **Dependence on remittances and aid** (including borrowing from international financial institutions), as a means to compensate for large trade deficits, was the most common form of international integration for the lowest-income transition countries (e.g. Albania). Integration with the world economy took place through temporary or permanent emigration and work of country’s inhabitants to other countries and transferring their earnings back home.

- **Dependence on financialized growth** should be seen as mostly a supplementary form of international integration. The most basic indicator of this pattern of integration is the surplus on financial account of the balance of payment, excluding the contribution of FDI. At some stages of systemic transformation process a number of transition economies, including e.g. Hungary, Belarus, Ukraine, Georgia, Kazakhstan, and other Central Asian republics were representing this development pattern.
The foregoing classification provides a good starting point to work out a broader set of assessment criteria that are best adjusted to the specific conditions of transition countries and encompass – apart from external forms of integration – also internal factors. They will be subsequently used to distinguish the varieties of post-Communist capitalism emerging in transition countries. The criteria in question comprise the following:

- The mode of international integration.
- The nature of property rights,
- The role of the state.
- The nature of business-government relations.

As a function of the above criteria, five varieties of the ‘post-Communist capitalism’ in transition countries can be distinguished.\(^{14}\)

The first variety are FDI-based (second-rank) market economies. These are predominantly concentrated in Central and Eastern Europe. The most salient features of this variety include democratic political systems, integration with the European Union and export structures increasingly built around highly-processed manufactured goods produced by foreign-owned MNCs. Despite having complex export structures these economies have played only a secondary role in international production networks.\(^{15}\) Simultaneously they lack more sophisticated business infrastructure for high-tech innovations. Other characteristics comprise quite a wide diversity of labour market institutions and welfare systems that range between the conservative Continental model and liberal Anglo-Saxon variant of capitalism.

The second type of ‘post-Communist capitalism’ can be found in peripheral market economies, mostly in Southeastern Europe (SEECs) and the Baltic republics. Some of these countries, e.g. Estonia, may develop towards the first category; on the other hand, some other – less-advanced -transition economies may join this group in the future. Peripheral market economies rely on less sophisticated and thus less stable manufactured exports while at the same time displaying many features of the financialized growth pattern including a significant dependence on remittances.\(^{16}\) They

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15 For some authors, sticking to the standard ‘varieties of capitalism’ approach, this factor provides a sufficient rationale to introduce a third model of capitalism to this framework, i.e. a “dependent market economy” (DME). For details, see Nölke and Vliegenthart (2009).
16 This factor may be interpreted as an important explanatory variable for these countries’ (in particular the Baltic republics) high vulnerability to external shocks including the recent global financial and economic crisis.
have democratic political systems and ensure basic legal and institutional conditions for business. They also exhibit low level of welfare provision and large income disparities.

The third variety can be best described as *oligarchic (clientelistic) capitalism*. It is first of all represented in the CIS countries and in particular in Russia, Ukraine and Central Asian republics. This group shares the relatively authoritarian political systems and high incidence of rent seeking, due to close links between politics and the business world. Social and employment protection are generally underdeveloped, similar to institutional and regulatory framework for new business expansion. One of the underlying reasons for this lies in the fact that the institutions in question are irrelevant as determinants of the prevailing forms of these countries’ integration with the international economy.

The fourth variety of capitalism may be found in *order states* that is in those CIS countries (such as e.g. Belarus and some Central Asian republics) where the scope of market and institutional reforms was the most limited. The most essential institutional characteristics of this variety include authoritarian political systems, dominant role of the state in economic decision making, state support for commodity or manufactured exports as a channel for international integration, poor environment for private business and high level of welfare provision.

The fifth variant of ‘post-Communist’ capitalism is exemplified in *remittance- and aid-based economies*. This model applied and – to some extent – continues to apply to a number of low-income countries in the CIS and South-Eastern Europe. A remittance-based economy is compatible with a very low level of institutional development. It crucially depends on labour market conditions in another country and hence implies no internal institutional preconditions for international integration of the country concerned.

As a concluding remark, it is worth emphasizing that the above typology of the post-Communist varieties of capitalism is not engraved in stone. In some cases, there is some overlapping between two or more types of capitalism in particular transition countries. Moreover, the existing institutions are likely to evolve over time which may give rise to new complementarities and trigger changes in the prevailing institutional patterns in many countries. As a result, some transition economies may move from one variety of capitalism to another. Simultaneously, the very typology may also change

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Emerging varieties of capitalism in East Central Europe

– some forms of post-Communist capitalism would disappear while new varieties would emerge.

II. Economic Security - Key Challenge of the 21st Century

*By András Inotai*

From the beginning of the new century, the qualitative upgrading of economic security issues can be registered. It can partly be explained by the limited use of hard (military) power due to failed interventions in various parts of the world with negative consequences, as political destabilization, growing poverty, ethnic cleansing and massive migration. At the same time, rapidly growing economic interdependence, ongoing liberalization of production factors, such as commodities, services, capital and, to a lesser extent, labour have contributed to the growing importance of economic security. Also, the global financial and economic crisis and its management have certainly increased the awareness of policy-makers but also of societies on the necessity of addressing this issue. In some cases, existing international organizations are potentially able to face this challenge. However, the efficient management of several economic security problems requires new international approaches and crucial institutions such as the G-20, which includes the most influential countries of the global economy – to take new responsibilities.

This short essay highlights the main areas of concern related to economic security, to underline the importance of addressing these issues in future outstanding meetings and in the preparation of international policy decisions.

1. Security of access to markets and production factors

For several decades, and reinforced by the experience of crisis management, international trade has proved to be the engine of sustainable growth. Although multilateral negotiations in the framework of the WTO were stopped,
as an answer, we witness the rapid spread of bilateral and regional free trade agreements. It is not yet clear, whether, at a later stage, they can be integrated into a global trade liberalization framework or we have to live with a fragmented global trade regime. In addition, transnational companies with global and regional production chains, and generating at least half of the international trade, represent a key factor of liberalization of commodity flows but, increasingly, also of services. Therefore it would be recommended in the next years that international organizations, including the WTO and the G-20 should not only secure further trade liberalization but also a progressive opening up of national service markets taking into account basic interests of countries at different levels of socio-economic development.

2. Supply security

When talking about economic security, supply security, and even more, energy security ranks first. Despite the fact, as it will be argued in this paper, supply security is just one of economic security issues, and even within supply security energy is just one of the components. Beyond energy, supply security includes raw materials, food, industrial inputs and, as the strategically most important element, water.

Energy security is based on the physical availability of different energy carriers, the price at which they can be acquired, the disposable supply sources and the security of transit routes. At present, and in contrast to previous forecasts, neither physical availability nor the price level represent a security challenge (in some cases, just the opposite, lasting low energy prices may lead to socio-economic and political instability in oil and gas producing countries). However, the choice between geographic diversification of supply and transit routes may create a security challenge. For energy importing countries, diversification of supply (and less dependence on one or a few dominant suppliers) is expected to lead to lower security risk. However, if diversification of supply sources is connected with transit routes through several and partly unpredictable countries, additional risks may emerge.

Similar to energy, the international raw material market is characterized by twofold disequilibria. First, production and export of most raw materials (including metals and rare earths) are concentrated in a few countries. Second, a not less important market dominance of national
or international monopolies can be observed. Both the growing demand for raw materials in rapidly developing countries and the increasing importance of special materials (mainly rare earths) for high-tech sectors in many economies generate more competition.

3. Financial security

In this context, the global financial crisis can be considered as the watershed. It raised domestic and external financial security concerns and urgent tasks. In the domestic field, the management of budgetary and structural crisis as well as the role of internal savings deserve particular attention. External financial security includes the management of indebtedness in foreign exchange, growing financial imbalances between surplus and deficit countries, size, composition and use of foreign exchange reserves. A particular challenge consists in exchange rate security among key international players with different convertible currencies (USD, Euro, Yen, CHF, GBP). In January 2015, many investors have been affected by the lifting of the CHF-Euro exchange rate. Rapid or continuous appreciation or depreciation of national currencies increase the probability of "currency wars" with serious impact on global and regional trade and investment lows. However, and most importantly, a new international financial system has to be established. It should correctly reflect the already occurred shifts in the global economy, and take account of the growing role of emerging countries. The G-20 has key responsibility for developing a sustainable international financial framework.

4. Environmental Security

This issue has been the topic of many high-level international conferences. Still, as of today, no adequate solution could be reached. In fact, we do not know how much of the climate change is due to man-made pollution and how much can be attributed to long-term universal impacts (which, over millions of years, several times changed the earth's climate). However, even if a small part is caused by man-made pollution, we have to do our best to moderate the negative impacts. A co-ordinated international policy has to find a right bal-
András Inotai

ance between environmental, economic and social security by combining environmental requirements with those of sustainable socio-economic development and competitiveness. In addition, priorities of countries on different levels of development, as well as the "accumulated responsibility" for current pollution levels of industrialized countries have to be taken into account. In other words, any international agreement has to be based on combining universal values (our common future) and the fair treatment of countries on different levels of development.

5. Technological Security

In this context, three issues deserve special attention. First, the access to new technologies is limited and dependent on the regulation of technology producing and exporting countries. Since the development of new technologies and products (particularly in the pharmaceutical industry) require huge and risky investments, profits to be earned from new products have to be secured. Regulation of intellectual property rights has been one of the key issues of the WTO. Maybe, a new solution has to be found in the future, including the G-20 forum.

Second, the use of new technologies raises important questions. On the one hand, the international trade in "dual-use" technologies (including arms, nuclear, biological and chemical weapons) has to be regulated. On the other hand, technological security is closely linked to environmental and food security. In the first case, the security of nuclear energy-producing plants, in the second, the potential impact on human life of GMOs is on the agenda of international cooperation. Finally, as the most important challenge for our common future, the borderline between scientific achievements, business interests and ethical issues can be mentioned. There is no doubt that, already in the near future, we have to face this "choice" (and decision pressure), looking at the dramatic development of the biotechnology and gene technology.

Third, nobody seems to be prepared to offer a security network against cyberspace attacks. Since their consequences (including technology-driven misunderstanding among interdependent partners) may lead to incalculable reactions, we urgently need a global regulation, before it will be too late. Again, G-20 should take up this task and offer an adequate regulatory framework.
6. Social security

At first sight, social security seems to belong to the competence of nation-states. However, it has direct and indirect global security relevance as well. Directly, the demographic development (ageing vs. rapidly increasing young population, shrinking vs. growing labour force in different parts of the world, new challenges to worldwide healthcare) has to be dealt with. Indirectly, the pressure on national social welfare systems generates national, regional and partly also global security risks. In the developed countries, mainly in Europe, the reforming of the traditional (and for a long time stability-fostering) social welfare system is more and more unavoidable. In many rapidly developing countries the creation of an adequate social welfare system represents a not less important strategic task.

7. Value security

This is probably the most challenging issue for the sustainable development of mankind in the 21st century. Part of the topic, namely migration, is linked to social security. At present, about 3 per cent of the world population is permanently living in a non-native country - a huge contrast to practically complete capital liberalization and a high-level free circulation of commodities and increasing liberalization of the service sector. Even by very moderate calculations, in the next two decades, the share of people living in a non-native country will be doubled. Taking into account the growth of world population from 7 to 8 billion, it would affect about 480 million persons. Even if migration between/among neighboring developing countries will not be included into our forecast, three main magnets (USA, Australia, and Europe) have to be prepared to face massive migration flows. In this context, Europe has a double challenge. First, Africa's population is growing fastest and is expected to reach the level of India or China in less than 20 years (1.4 bn). Second, this young, mobile, poor and mostly less educated population has one developed region only in its immediate geographic neighborhood. At the moment, Europe is absolutely not prepared to face and manage this risk.

Another big challenge consists in how globalization, the influence of mass media, ever stronger interdependence not only in political and economic terms, but in people-to-people relations is changing our everyday life and our thinking about traditional values as well as our readiness for
and capacity to adjust ourselves to new values. In principle, multiculturalism is a big asset for all of us in the 21st century. However, at the same time, it can easily become the biggest security challenge in many parts of the world. Therefore, it is our common task and responsibility to benefit from the added values of different and interacting cultures and diminish/constrain the political, economic, social and psychological risks/costs. In the evolving global system based not only on political and economic, but, increasingly, also on cultural interdependence international institutions recognizing these opportunities and challenges correctly and at the right time are crucial. Therefore, the agenda of the G-20 should deserve utmost attention to this task. Moreover, we need a two-way approach: not only a top-down to be expected by international organizations, regional institutions and national governments, but also a bottom-up movement, the growing responsibility of citizens of the Earth for our common future.

8. Concluding remarks

Growing strategic importance of global economic security issues has emerged in parallel with the unfolding new international institutional structure represented by the G-20. It is imperative that the G-20 takes increasing responsibility for global economic security. First, even if part of the economic security topics has been or should have been permanently addressed by existing international organizations, the nature and scope of the problems need new approaches either leading to new tasks of the G-20 or upgrading the activities of available international fora (trade and environment). Second, new organizations in general, and the extended activities of the G-20, in particular, are required to embrace those economic security issues that have only partially been covered and managed by existing global or regional organizations (financial security and migration). Third, we have been facing with new challenges without any international organization responsible for efficiently management, such as global supply security, technological security and, probably most importantly, value security. Particularly in the latter, the G-20 has a unique opportunity and an unprecedented responsibility to develop a lasting and credible agenda for international debate and common actions.

At least for three reasons, China is expected to play a special role in the process of developing the global economic security framework. On the one hand, as the second largest economy, the leading player in international trade, a rapidly emerging global financial and gradually also technological...
actor and a crucial factor of sustainable supply security, China's interest in and responsibility for economic security has to be underlined. On the other hand, in 2016 China will take on the G-20 Presidency. This platform should be used to make substantial progress at least in some of the global economic security areas and strengthen the framework of international cooperation for the next and longer period. Finally, China's unparalleled experience with a history of 5000 years and its successful catching-up process to the developed world and its smooth inclusion into the international political, economic and institutional structures can definitely be considered as a highly-valued asset. In consequence, during its Presidency period, China can and should fully exhaust its potential role as an "honest broker" in key international economic security issues.

This is a slightly modified, reprinted article from the UNDP-CCIEE Report "Rebalancing Global Economic Governance - Opportunities for China and the G20 beyond 2015", 2016, p. 105-109.
III. Policies for coherence and structural change: the quest for cohesion

By Daniel Tarschys

The objective of economic and social cohesion appears in the Preamble of the 1957 Rome Treaty, but this was long a neglected formula. Its present prominence in the doctrine and political practice of the European Union can be traced back to a formative period in the 1980’s. When the Commission under Jacques Delors sought to re-launch the European integration process through the Single Act, the Internal Market and the European Monetary Union, a new impetus to the hitherto relatively modest Structural Policy was seen as an important ingredient in this offensive. The basic idea was to supplement the “liberal” or “market-oriented” elements of the programme with a “social” component and an explicit commitment to solidarity, thus appealing to both rightist and leftist currents of European public opinion. This alliance proved very tenacious and has since formed a strong basis for the continued push towards harmonisation and integration.

Delors and his collaborators considered several different labels for this policy, such as redistribution, solidarity, justice, social and regional development, and convergence. Finally, they settled for the thus far largely overlooked concept of “economic and social cohesion” from the 1957 Preamble. The other terms were also to be used in different contexts, but “cohesion” was chosen as the principal code-word for the social part of the programme launched by Delors. It caught on quickly and came to be attached a few years later to the particular new mechanism that was baptised the “Cohesion Fund”. Later, the notion of “territorial cohesion” was added to the formula.

The idea of promoting “cohesion” enjoys a wide appeal across the political spectrum. What is perhaps less obvious is the role that “convergence”

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might play in this pursuit. The underlying idea is probably that economic disparities undermine the sense of community that is desirable in the European Union and that disparities between regions and countries carry a particular weight compared to other disparities, such as the cleavages between rich and poor within any given geographical area. There are some good arguments in favour of this position which is also the basis for regional policy and a great many equalisation measures within Member States, but this idea of cohesion generated by territorial economic convergence is certainly not the only possible interpretation or derivation of the concept.

If we want to be serious about “cohesion” as an objective for EU policy and at the same time as a precondition for further progress in European integration, we should take a broader look at this goal. As a starting point, I will discuss the role of cohesion in the evolution of the Member States before examining the place of cohesion in the current Structural Policy and suggesting some suitable targets for a future cohesion policy at the European level.

1. Cohesion and the nation state

Cohesion is a general property in enduring organisms and organisations. To survive, all systems must stick together. The various forms of glue performing this integrative function are examined in many academic disciplines, as are also the disturbances and tensions leading to disintegration and systemic collapse.

Political scientists tend to distinguish several intertwined processes in the emergence of the modern state: the evolution of national and other territorial identities, the consolidation of political institutions and procedures, and the growth of legislation, protection mechanisms and public policy interventions. The Member States of the European Union are all products of such integrative sequences and chains of events. Some of them have a long history as sovereign nations while others are of more recent vintage. The unity attained is not always solid and irreversible. While all nation states have at some stage engaged in the suppression of local and regional autonomy, we presently see trends in the opposite direction in such countries as Belgium, Britain, France, Italy, Denmark and Spain. Yet by and large all these entities have by now attained sufficient cohesion and unity to be able to function as robust and stable political systems.
What creates, constitutes and maintains the unity of the nation state? It may be useful to distinguish between four different forms of cohesion: (1) economic, (2) social, (3) cultural and (4) political.

**Economic cohesion.** In the latter part of the 20th century, the world experienced an extended period of economic growth without precedent in any previous epoch of its history. In Europe, *les trente glorieuses* after the war were followed by some twenty years of slower expansion, but in the last decade of the century the growth process again recovered some of its momentum. All in all, this was a period of unparalleled increases in production and consumption, in trade and employment, in collective activities and transfers, in public welfare and private living standards.

When economic historians are asked to account for such peak periods in economic performance, they often point at such factors as innovations, institutions and investments. Scientific discoveries and technological inventions were clearly a key precondition for 20th century growth, with breakthroughs in such strategic fields as energy production and distribution, transportation, trade technologies, service delivery, media and the diffusion of information. At the same time, institutional consolidation and effective legal protection provided an environment of trust in which actors became more daring and enterprising. This opened up many opportunities for investments both in human capital and in material productive capacity.

In another perspective explored by economic theorists since the late 18th century, the increasing wealth of the nations grows out of a process of progressive functional differentiation and integration. While the autarchic household of the past was highly inefficient and thus condemned to poverty, the increasing division of labour and exchange of goods and services first in local communities, then within limited regions and finally through large-scale international trade led to continuous gains in productivity and quality of life. Though countries abandoning their old patterns of self-sufficiency for a partial reliance on international exchange are inevitably exposed to a variety of short-term fluctuations in the global market-place, in the long run they benefit from this strategy of economic integration and are richly rewarded by exploiting their comparative advantages.

The inherent vulnerability in any such exchange-based system for attaining and maintaining wealth is nevertheless an important determinant behind the need for economic cohesion. Eking out your livelihood in a self-sufficient household you are not so dependent on others. In a highly integrated economy, however, the situation is quite different as your continued well-being is contingent on the continuous supply of many inputs and the healthy functioning of a large number of separate mechanisms of production and...
distribution. The smooth interaction with all these mechanisms will be a cardinal requisite for economic efficiency. This is why social skills and communication talents are so crucial for agility and success in the market economy and why actors have to allocate an increasing share of their energy to maintaining contacts with others. Social capital acquires an increasing importance in addition to physical assets and productive competence.

An important ground for stability in the developed exchange economy is furthermore the extended time-horizon in the calculus of most actors. Where costs and benefits are assessed in a short-term perspective only, there is always a greater propensity for violent, aggressive and criminal behaviour. The drug addict in frantic search of money for immediate purchases is an extreme example of an economic actor with a short and proximate time-horizon; ulterior consequences carry no weight in his decisions. His antidote is the socially well-integrated person whose action is guided and restricted by a whole set of considerations about sequels, reactions and other after-effects. With stakeholders constituting the vast majority of the population in wealthy societies, there are strong forces favouring economic stability.

This has implications both for international relations and for social relations within individual societies. When the Vikings changed their economic behaviour from raid and robbery to continuous trade, they began to develop stable relations with particular cities, and their successors were eventually integrated into the Hanseatic League. Much more recently, the “scramble for Africa” and the pursuit of quick profits in certain parts of that continent presupposed a different style of economic behaviour than that of long-term exchange. Though significant security arrangements and the recourse to violence survive in some parts of global commerce, we can also observe a secular tendency towards more peaceful trade patterns.

The same holds true for domestic relations. Where earlier theories of capitalism frequently emphasised the inevitability of class strife and conflict of interests between different strata, later observers are often struck with the considerable measure of social peace in developed market economies. In spite of continuing disparities in wealth, acute conflicts are infrequent except in periods of particular economic turbulence. One reason for this is certainly the high degree of mutual economic interdependence prevailing in market-based societies. If broad strata consider disruptions and disturbances to be harmful to their future wellbeing and believe that more is lost than gained through militant manoeuvres, they are not likely to engage in an energetic pursuit of short-term political and economic interests. Social cohesion. A further reason for the relative harmony in developed market systems is the wide range of measures that have been taken to narrow economic gaps.
and disparities. The industrial revolution from its very inception was accompanied by a variety of concerns which the 19th century often referred to as “the social question”. These elicited a variety of policy responses stretching from educational reforms, poor laws, alcohol legislation, urban and housing programmes to social insurance schemes intended to alleviate the high degree of economic insecurity induced by conjuncture-sensitive employment conditions and other work-related contingencies. With the Bismarck social insurance initiatives in late 19th century Germany, the Beveridge reforms in post-war Britain and various enterprise-based services and benefit schemes in the Communist 60 countries providing inspiration for different models of social protection, 20th century industrialism was always connected with a whole panoply of accompanying measures to mitigate frictions and satisfy needs not spontaneously addressed by the market.

As analysed by Esping-Andersen, Flora, Kuhnle and others, welfare capitalism has assumed many different faces. The role assigned to families in the provision of care has differed a great deal not only over time but also across nations, with northern Europe more prone to organise institutional services for the elderly and the Mediterranean countries more inclined to preserve multigenerational households. When it comes to financial arrangements, another cleavage goes between the corporatist arrangements of the social insurance system in continental Europe and the largely state-funded systems in the Nordic countries. Albert sees a principal distinction between the Anglo-Saxon model and the Rhine model, the former informed by stringent economic liberalism and the latter more inclined to build on étatisme combined with interest-group accommodation.

The models chosen have significant implications for gender relations in the different societies, as family care is often synonymous with women remaining at home and labour markets correspondingly dominated by men. With women particularly active in the formation and maintenance of informal networks, the forms of welfare provision have also left their mark on the patterns of social interaction. Important increases in GDP and in the balance between the formal and the informal economies in the post-war period are linked to growing female participation in the labour force.

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The parallel expansion of market economies and welfare state arrangements signals a complex causal texture in the relationship between the private and the public sectors. While a long line of economic theorists extending from early 19th century Manchester liberals to late 20th century libertarians and neoliberals have emphasised the harmful effects of the public interventions and the fiscal burden associated with big government and while some currents in the social democratic tradition may well have overadvertised the economic benefits of welfare arrangements, there is clearly a mutual dependence between economic growth and the increasing provision of certain collective goods and services. Capitalist expansion would not have been possible without a certain range of public activities and arrangements, but it is also the necessary base for their funding. Though particular fiscal measures and ill-conceived public interventions can certainly harm economic growth, the principal nexus between the two processes is one of mutual support.

A different vision of this relationship is presented in the train of thought represented by Michel Foucault where central ingredients in the evolution of government are the invention and refinement of mechanisms for the exercise of control, discipline and domestication. Seen in this light, welfare institutions and support schemes serve the function of reducing heterogeneity and maintaining public order. Of particular importance is the suppression of deviant behaviour and thought patterns. Education, health care and a host of accompanying policy programmes contribute to the steady supply of competent and orderly labour. Other public bodies are there to handle the marginalised people and keep them out of the way. In this perspective, too, there is a clear linkage between economic growth and the evolution of the state, though its nature is far more sombre. This type of nexus is further explored in a growing body of Foucault-inspired studies on the “governmentality” of modern societies.\(^5\)

Social cohesion is highly dependent on perceptions of distributive justice. This affords a particular role to taxation as a means of keeping imbalances in wealth and living standards within the bounds of the tolerable, but also to other forms of redistributive policy such as development assistance and emergency aid to suffering groups and areas. Regional policy as practised in many modern states can be seen as a systematisation of such efforts, made possible through the increasingly efficient articulation and aggregation of the interests concerned. Yet what is explicitly labelled regional pol-

\(^5\) Smandych 1999.
Policies for coherence and structural change: the quest for cohesion

Policy is only a small part of the many different measures affecting the geographical distribution of wealth and living standards, whether they be regulatory, fiscal, or related to public expenditure.

Cultural cohesion. A third feature linked to the emergence of advanced industrial societies is the increasing intensity of communication and the simultaneous extension of common cultural frameworks. This evolution is reflected in the formation of larger language areas and the repression of parochial diversity in favour of national and global homogeneity.

Again, the connection with economic growth is quite intricate. Literacy and numeracy have old links with both commerce and public administration. The oldest preserved written texts from the civilisations of the Eastern Mediterranean are extracts of bureaucratic reports and accounts. While primitive agricultural societies had relatively little need for sending or receiving messages, communication skills and technologies became increasingly crucial with an expanding economic exchange. In trade transcending the immediate vicinity, there was a need also for a common lingua franca and for diffusion of economic information. The consolidation of dialects into a limited number of languages was a development linked to the development of long-distance trade and to the aggregation of smaller political units into larger nations.

Nation-building and state-building were often interconnected processes. Either of them could precede the other: in some cases we have seen “a nation in search of a state” and in others “a state in search of a nation”. According to the typology suggested by Hroch, the national awakening often went through three stages: an early “intellectual” phase in which artists and scholars sought to extract national symbols and traditions from historical and ethnographic inquiries, a “political” phase in which these themes came to serve as vehicles for movements and parties, and finally an “étatiste” phase in which they were integrated into official national doctrines and forcefully propagated through schools and other means of mass communication. An impressive literature covers the complex relationship between state-building and nation-building.

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The consolidation of national identities is linked both to seminal events, often traumatic, and to the evolution of communicative agencies cultivating and propagating the memory of such events. The formative stages in the history of a nation are, as Ringmar has put it, “periods of symbolic hyper-inflation” when a large number of emblems, flags, dress codes, fêtes and rituals are invented. But to make a lasting impact such traditions must also be maintained and conveyed through a system of mass communication. Within the nation state, the common frame of reference supplied by the mass media, the school system, national heroes in sports and the performing arts and a massive amount of common experiences contained in the sphere of consumption and every-day life have conspired to reinforce the sense of national allegiance.

All this has contributed to the strengthening of national identities which served many functions in the 20th century. To begin with, they greatly facilitated the mass mobilisation required to wage World War I. Second, they played an important role in the acceptance of general suffrage which enhanced the legitimacy of government. The democratic institutions in combination with the heightened sense of national solidarity in turn paved the way for the welfare state and a dramatic extension of the public sector. If at the outset of the 20th century some 5–10 per cent of GDP passed through the public coffers, the level of taxation and public spending at the end of this century had attained between a third and a half of GDP in all industrialised countries, and even more in Scandinavia. The growing cultural cohesion within the nation states was an important prerequisite for this expansion. Yet cultural cohesion did not develop within the confines of national cultures and national borders alone. With the increasing ease of communications in the 20th century, many new fashions and contraptions also obtained a world-wide impact. Films, music and other forms of popular culture created trans-national generational cohorts bound together by shared experiences. With the educated classes in particular serving as transmitters of elements of a nascent global culture, stronger links were forged between the many civilisations and national traditions in different corners of the world. Through the revolution in international communications, a new shared idiom has been established above the national languages, an idiom constituted and held together by universally well-known symbols, icons and logos. This

evolution constitutes one of the predominant trends in the much-discussed process of "globalisation".

**Political cohesion.** A significant feature in the political development of the last few centuries is the streamlining and systematisation of norms and institutions. Specific and improvised approaches have been co-ordinated, homogenised and crystallised into stable patterns. Ad hoc solutions have given way to consistent methodologies, and exceptions have been pressed back in favour of neatly arranged rules. Legislation has become organised in hierarchical layers with clear principles of precedence. Where ancient sovereigns made a host of disjointed decisions, one after the other, modern governments are more prone to apply systems and standards. The modern political mind has transformed the nature-grown English gardens of traditional governance into orderly French parks.

The growth in political consistency can be observed at many different levels. Looking at the institutional structure of European societies a few centuries back, we find a motley assortment of arrangements. Many towns still had their particular "freedoms" derived from ancient royal patents or concessions, and among the regions there were all kinds of counties, cantons, bishoprics, feudal fiefs and mini-republics. Rights and duties varied widely on the basis of guild membership and hereditary status. Tradition and privilege concurred in sustaining highly fractured political systems.

Launching the ideas of equality before the law, the single citizenship and the civil service career open to all talents, the French Revolution challenged this fragmentation. Many subsequent reforms laid the ground for enhanced national consistency. In legislation, *Code Napoléon* and *Bürgerliches Gesetzbuch* ushered in an era of significant harmonisation. The administrative reforms in Prussia and the emergence of the modern Civil Service in Britain paved the way for modern government. This was the era of the state, sometimes said to be the creation of a few dozen German professors in public law. What the 18th century had started through the invention of the "carmel sciences" and the "police" (a "policed society" in that age was an orderly, disciplined community), the 19th century continued through the homogenisation of administrative standards in a range of policy areas, including that of local self-government.

An element enhancing national political cohesion was the acceptance of more rigorous chronological frameworks. National elections became increasingly frequent and regular. An accelerating recourse to time-limits introduced more discipline into the administrative institutions. Publications began to appear at regular intervals. With the postal system and the arrival of early telecommunications followed not only a quicker heartbeat of the
political system, but also a greater penetration of previously isolated areas. The periphery moved closer to the centre and entered into the same theatre of events.

The introduction of compulsory schooling was an immensely important step in the enhancement of national cohesion. As a communicator of a common national frame of reference and other political messages, the schoolmaster at his desk proved vastly more efficient than his predecessor, the priest in his pulpit. The gradual development of secondary schools, colleges and other forms of higher education were further contributions to the formation of common perspectives.9

Another 19th century innovation working in the same direction was the emergence of clubs, societies, and associations. While most such activities were local, the new means of communication facilitated the diffusion of ideas and associative forms across geographical and linguistic barriers. From the latter part of the 19th century in particular, Europe saw an unprecedented growth in religious, political and civic movements, including trade unions, professional associations and a huge number of clubs based on common leisure interests. If enhanced political cohesion was the express purpose of some such organisations, it was also an unintended by-product of many others. Of particular importance was the emergence of national political parties.

The continuing revolution in communication technologies has added further momentum to this process, facilitating information flows both inside the state machinery and in the wider democratic infrastructure in which it is embedded. In measuring the extent of political cohesion in present-day European societies, both of these spheres are highly relevant. We can identify, firstly, a certain number of objective elements linked to the institutional and legislative uniformity of the modern state and to the wide range of policies purporting to inject a tangible substance into the concept of citizenship. But another relevant sphere is that of subjective allegiances and perceptions of community and solidarity. The linkage between these two sides of political cohesion is quite strong: without a measure of “systematised equality” there would not be a sufficient sense of common identity within the political system, but the latter is in turn a precondition for the sustainability of the modern welfare state, which rests both on extensive demands for compliance

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with legal obligations and on far-reaching redistribution based on the extraction of substantial resources through the fiscal system.

In conclusion. While it is possible to keep these four forms of cohesion analytically distinct from each other, it is also obvious that they are bound together by a thousand threads. To mention but a few of the most obvious connections:

- The growth and differentiation processes that produce economic cohesion also generate frictions that require active measures to attain social cohesion;
- A measure of social cohesion and a measure of cultural cohesion are preconditions for political cohesion and fiscal mobilisation, which in turn enable governments to implement social and cultural policies.
- Economic development is contingent on a combination of trust and mutual understanding which comes about only within certain cultural frameworks.

This list could easily be continued. Causes and effects, independent and dependent variables link up to each other in complex patterns. Though it is clear that the modern state and the modern society have evolved through parallel developments in all these four fields and an intense interaction between them, the direction of causality and the sequencing of events in this process are not easy to disentangle and not necessarily identical in different societies.

2. Cohesion and the European Union

If the European nation states have come far in consolidating their cohesion, the European Union is a clear laggard in this respect. While economic integration is proceeding at a brisk pace, the sense of community in the Community remains notoriously weak. The Union is still a political entity in the making, often referred to as an organisation sui generis, an integrated organism in statu nascendi or, in the words of Delors, an “unidentified political object”. It is more than an international organisation but less than a state, combining inter-governmental, confederalational and federational ingredients in its operational make-up. In cultural terms, there are old and new links binding us together through the shared heritage and the many common references diffused through global mass communications, but under this the layer of common codes, the continent also persists as a mosaic of dialects and languages, of customs and traditions.
What is the role of *cohesion* in the development of the European Union? And what forms of cohesion are particularly important? Let us first consider one similarity and one contrast.

- In the building of Europe just as in the building of the nation state, there is a complex dialectic and reflexive relationship between cohesion and the process of integration. Cohesion is both a precondition for European unification and one of its effects. In one scenario, increasing contacts and a growing sense of solidarity contribute to a greater sense of community among Europeans which in turns facilitates the elaboration of common policies and the acceptance of common standards. In the reverse scenario, the continued short-sighted defence of national and parochial interests may block further progress towards European cooperation and unity.

- Comparing the efforts undertaken to promote cohesion at the national and the European levels, one is however struck by the difference in breadth and focus. Whereas the long-term policies to consolidate the nation state have included sustained efforts in all of the four fields mentioned above, European cohesion policy has thus far been very much lop-sided towards one particular angle and one particular set of interventions. In current EU usage, the very term “cohesion” has taken on a highly specific meaning. Often preceded by the attributes “economic and social”, it refers either to EU Structural Policy in general or to the particular form of transfers channelled through the Cohesion Fund. Not only is the cohesion policy of the EU limited to the economic and social fields, but it is also concentrated to some rather narrow segments of these two areas, those of structural development and territorial equalisation.

What nexus is there then between “convergence” and “cohesion”? By which routes would a reduction in the disparities between production levels and living standards in different parts of the continent lead to enhanced integration and a strengthened sense of togetherness? One might imagine both concrete and symbolic elements in such a causal process.

Many pains of poverty stem out of the awareness that life could be different. It is easy to foresee that a certain degree of opulence and conspicuous consumption in the wealthier parts of the European Union might generate a sense of injustice and relative deprivation in areas lagging behind. Countries and regions with limited resources might also find it difficult to live up to the common standards agreed at the European level. A process of catching up and a reduction of the material disparities could conversely lead to a greater sense of community and shared destiny.
The cohesion impact of policies promoting convergence need not be limited to the lagging areas alone. Under favourable circumstances, there can also be positive vibrations for the net contributors. Well-organised solidarity efforts give satisfaction to both donors and recipients. With so much in our life guided by self-interest and the fulfilment of personal needs, we all need sound doses of altruism to arrive at a healthy psychic balance. If the family or “the small world” around it are the most immediate and most important scenes for our caring instincts and our empathy with others, there are also further circles beyond them for such actions and emotions. Voluntary work, redistributive policies and social interventions have an important role to play in this context at the local and national levels, as has development assistance and other forms of international cooperation beyond our borders. In measuring the impact of such efforts, it is crucial not to forget the whole spectrum of benefits accruing to the donors, ranging from the emotional returns of altruism to the extension of the self-image and the widening of identity horizons.

Closely related to this aspect is the need not to belittle small contributions because of their marginal scope or effects. Gifts may have a symbolic value far exceeding their material value, and the same can well be true of well-managed assistance programmes. Limited flows of support can also have great strategic importance if they involve a transfer of know-how, technical expertise and extended perspectives. It should therefore not be excluded that initiatives in favour of convergence might make a sizeable contribution to the pursuit of cohesion in the European Union. But it is hardly a foregone conclusion that such efforts are really the best or the most efficient way of furthering this goal, or that the particular forms of intervention that have emerged within the field of Structural Policy are ideally suited to serve this purpose, or even that the privileged arena for the promotion of cohesion should be the economic and social sphere. As can be seen from the checkered history of this policy many political bargaining processes have left their marks on the design of EU Structural Policy, and it is not at all self-evident that its present shape corresponds to present priorities.

In returning to the four types of cohesion distinguished in the previous section, we might usefully look at them through the prism of subsidiarity. There is broad agreement that all four forms of cohesion discussed here — economic, social, cultural and political — are essential and indispensable features in the “European model”, or the special type of society characteristic of modern Europe with its combination of free markets and social protection, of freedom and equality, of Rechtstaat and Sozialstaat, and of respect for human rights. What is less obvious is the optimal distribution of
responsibility for these different desiderata between the various levels of government. Recognising a specific form of cohesion as vitally important does not necessarily imply that it is a suitable task for the higher echelons of European governance.

- Looking first at economic cohesion, it seems evident that the European Union has already played a major part in furthering integration and interaction between the various economies and will retain a crucial place in this process. The elimination of customs barriers, the extension of access to previously closed market segments and the co-ordination of many rules of the game are key factors in recent European economic development. While Structural Policy interventions may have given some impetus to this growth process and may perhaps make a particularly useful contribution to the adaptation of the new Member States to the common standards, the main force within the EU propelling integration is certainly to be found in the regulatory frameworks for trade and mobility and in the monetary union. Historically, the main role of Structural Policy in this context has been more oblique than direct: by neutralising apprehensions and lubricating the transition process in economically distressed areas, it has given a push to the process of economic integration.

Within the concept of social cohesion we find a whole batch of different concerns that are crucial to the European project: One is the issue of equality and distributive justice. Clearly, the key subnational government. Income maintenance systems and targeted support of individuals outside the labour market require massive transfers based on the mobilisation of judicious mixes of self-interest and solidarity. The European Union with its present minuscule budget is not in a position to engage in the purely redistributive side of this undertaking.

The contribution it has made through Structural Policy is located in the adjacent field of “help for self-help”, supporting efforts by the weaker areas to pull themselves up by their own boot-straps. Even here, its assistance has been a largely symbolic supplement to national efforts, though often marketed as a highly strategic boost to the autonomous productive and expansive forces within poor and vulnerable regions. The problem with this approach, however, is very much the same as with national attempts to promote growth in targeted areas. Picking the winners is excruciatingly difficult, and the historical record of public authorities in this respect is none too encouraging. There is little solid knowledge on which to base the selection of interventions, which is why policies tend to be scattered and often veer from one fad to the other.
A third social policy concern refers to relations in the labour market. By bringing the social partners into key deliberations on European affairs and giving them a voice through the Economic and Social Committee, the European Union has played a constructive role in building consensus between employers and employees.

A final aspect refers to the setting and enforcement of certain common standards in the social field and to the social facets of labour mobility. Though most arrangements are likely to remain national, a measure of harmonisation is also required. In art. 13 of the draft constitutional treaty proposed by the Convention, social policy is designated as an area of shared responsibility.

As far as social matters are concerned, a further analysis of the division of responsibilities between different levels of government seems very much called for. Though European contributions for social cohesion should by no means be ruled out, it seems important not to burden such policies with unattainable, perhaps even unapproachable objectives. Neither is it advisable to reduce cohesion policy to the narrow aspect of growth promotion in economically weak countries and regions.

With “economic and social cohesion” perpetually invoked as a mantra, far too little attention is paid to the need for cultural cohesion in the European Union. Comparing the past cohesion efforts that contributed to the consolidation of the European nation states to those presently going on in the European Union, one is struck by the lack of a cognitive, spiritual, and value-oriented dimension in EU cohesion policy. The adoption of the Charter of Fundamental Rights might signal a mind-turn as far as common values are concerned, but there is as yet little action to back up this shift in emphasis. As far as Structural Policy is concerned, it is still very much hooked on the original material goals of the Rome Treaty and has not been adapted to later efforts to broaden the political canvas and give room for a much wider set of objectives.

Not that cultural goals have been entirely excluded from the EU agenda. Besides the small budget available to the Commissioner for Education and Culture, a certain number of cultural activities are also co-financed through the Structural Funds, masquerading as measures to promote economic development or infuse vitality into distressed areas. But the main often repeated tenet is that cultural policy is a domain of the Member States into which the Union should be wary of intruding. The same goes for education. Though some slice of this sector may qualify for support if it can be defined as an instrument for the restructuring of the economy, the main EU principle
has always been to respect the national and in some cases subnational hegemony in the sphere of education.

Without calling in question this fundamental division of labour, rooted in our linguistic diversity and the continuing strength of our national traditions, there are nevertheless significant areas in cultural policy and education where more European co-operation and even some measure of harmonisation would be desirable. The many joint activities developed within the Council of Europe under the wide umbrella of the European Cultural Convention illustrate the leverage potential of even small infusions of resources. Cultural exchange, joint projects between libraries and archives, translation of literature, European film production, protection of the cultural and natural heritage, support for museums and exhibitions, synergies in the audiovisual field, theatre and live music are some areas where EU contributions could generate a genuine European value added of high symbolic value.

In education, the main task might be to promote the common European dimension in school curricula. In the last few decades, European studies have emerged as an important field of teaching and research at university level, and there are already dozens of centres offering undergraduate and graduate instruction in such topics. But the European element in the teaching of civics in our primary and secondary schools is still deficient and uneven. Much more can be done to develop mobility programmes so that they reach not only the brightest and most upwardly mobile students, leaving aside the vast majority of adolescents and young people. The moot issue of foreign language learning is from time to time touched upon by European leaders and ambitious goals are pronounced ("two foreign languages for every student!"), but little is done to translate such ideas into action. If we really aim to bring a solid European component into our school systems at various levels, there is an obvious scope for a multiplication of the common efforts in this field.

Teacher training may be singled as a particularly strategic task. To bring more European substance into our schools we need educators with a broad European perspective. Some measure of joint education at European teachers’ colleges would be useful in this context.

The link between Europeans and the European Union remains weak. This is variably specified as a low visibility of the European Union, a feeble European identity, a flagging interest in European affairs, low trust in European institutions and widespread ignorance of the supplementary European citizenship introduced through the Maastricht Treaty. All of these circumstances conspire to the persistence of a stubborn “democratic deficit”.

https://doi.org/10.5771/97838452886723
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Again, the lessons from nation-building and state-building are perfectly clear. If an entity wants to function as a coherent, effective and legitimate political body, it cannot refrain from making serious investments in political cohesion. Constitutional development is crucial to enhance responsiveness and accountability. The recently concluded Convention has made a number of suggestions along these lines. But there is also a need to embed the formal institutions in a democratic infrastructure, allowing them to operate in touch with civil society and with independent media.

The key problem in the European setting is that this infrastructure is still largely self-contained within each Member State, or language area. There are as yet only contours of a common European “public space”. Yet to attain political cohesion there is need for a whole range of supportive measures to break down these barriers. Of crucial importance is the sphere of mass communications. EU contributions to the widening of this public space could usefully be channelled to conquering the language barriers by different forms of trans-frontier media. Common ventures in European television have made their modest beginnings with Euro-News which could usefully be expanded to cover further languages. A cultural channel (a “Euro-Arte”) has been proposed by Lionel Jospin, and a European political channel (a “Euro-Phoenix” or a “Euro-C Span”) would seem to be equally useful. With the plenary discussions in the European Parliament already interpreted into all the official languages of the Union, it would be quite inexpensive to broadcast them throughout the continent.

Summing up this argument, there are good reasons to question the present concentration of Structural Policy interventions to certain limited segments of social and economic policy. If the objective of cohesion is taken seriously and targets are sought out that would give maximum impact for the resources invested, more attention would be due to its cultural and political dimensions. The challenge of forging cohesion in the emerging European polity cannot be reduced to the shrinking of regional imbalances and the equalisation of living standards between different areas.

This is a reprinted text adapted from “Reinventing cohesion: the future of European structural policy”. Stockholm: Swedish Institute for European Policy Studies 2003.