



DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

Constitutional Affairs

Justice, Freedom and Security

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Petitions

**CHALLENGES IN CONSTITUTIONAL
AFFAIRS IN THE NEW TERM: TAKING
STOCK AND LOOKING FORWARD**

**THURSDAY, 6 NOVEMBER 2014
ASP 1G3**

Workshop for the AFCO Committee

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2014





DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

CONSTITUTIONAL AFFAIRS

**Challenges in constitutional affairs in the
new term:
taking stock and looking forward**

Thursday, 6 November 2014
ASP 1G3

Workshop for the AFCO Committee

This workshop was requested by the European Parliament's Committee on Constitutional Affairs.

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Workshop for Committee on Constitutional Affairs

CHALLENGES IN CONSTITUTIONAL AFFAIRS IN THE NEW TERM: TAKING STOCK AND LOOKING FORWARD

European Parliament, Altiero Spinelli 1G3,
6 November 2014, 9.00-12.30 & 16.00- 18.30

PROGRAMME

9.00-9.15 Introduction by the chair of the Committee on Constitutional Affairs

INTER-INSTITUTIONAL RELATIONS

9.15-10.15 Assessing the EU inter-institutional dynamics after the elections
The Juncker Commission and new institutional and political set-up, *Yves Bertoincini (Notre-Europe - Jacques Delors Institute)*
European Council and the Council: perspectives on new dynamics in EU Governance, *Uwe Puetter (Central European University)*
Which challenges are there for the European Parliament: legislation, organisation and scrutiny, *Olivier Costa (College of Europe)*

10.15-10.45 *Debate*

CONSTITUTIONAL EVOLUTION OF THE EU

10.45-11.45 Differentiation of the governance in the European Union and challenges of democratic legitimacy, *Wolfgang Wessels (University of Cologne)*
National constitutional orders and deepening of the European integration, *Monica Claes (Maastricht University)*
Trends in differentiation of the EU Law and lessons for the future, *Steve Peers (University of Essex)*
Looking ahead: pathways of future constitutional evolution of the EU
Carlos Closa Montero (European University Institute)

11.45-12.30 *Debate*

***** BREAK**

16.00-16.05	Introduction of the afternoon panels
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EUROPEAN DEMOCRACY

16.05-16.50	<p>The structure of the Europarty system after the 2014 elections, <i>Luciano Bardi (European University Institute)</i></p> <p>European Parliament Political Groups and European Political Parties: between cooperation and competition, <i>Enrico Calossi (European University Institute)</i></p> <p>European Citizens' Initiative - assessment of first lessons, <i>Marta Ballesteros (Milieu)</i></p>
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16.50-17.40 Debate

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TRANSPARENCY REGISTER

17.40-18.00	<p>Transparency Register - Institutional and Constitutional Aspects</p> <p>Constitutional and institutional aspects of lobbying, <i>David Coen (University College London)</i></p>
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18.00-18.20 Debate

18.20	Concluding remarks
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LIST OF ABBREVIATIONS

AECR	Alliance of European Conservatives and Reformists
AEN	Alliance for Europe of the Nations
AENM	Alliance of European National Movements
AFSJ	Area of Freedom, Security and Justice
AGRI	Agriculture and Rural Development Committee
AIDE	Alliance of Independent Democrats in Europe
ALDE	Alliance of Liberals and Democrats for Europe
BVerG	Bundesverfassungsgericht (German Constitutional Court)
CJEU	Court of Justice of the European Union
COSAC	Conférence des Organes Spécialisés dans les Affaires Communitaires
EAf	European Alliance for Freedom
EC	European Community
ECG	European Green Coordination
ECPM	European Christian Political Movement
ECR	European Conservatives and Reformists
ECSC	European Coal and Steel Community
ED	European Democrats
EDP	European Democratic Party
EFA	Alliance Free Europe
EFA	Alliance Free Europe
EFD	European of Freedom and Democracy
EFD2	European of Freedom and Direct Democracy

EFDD	European of Freedom and Democracy
EFGP	European Federation of Green Parties
EGP	European Green Party
EL	Party of the European Left
ELDR	European Liberal Democrats and Reformists
ELDR	European Liberal Democrats and Reformists
EMU	European Monetary Union
EMU	Economic and Monetary Union
EP	European Parliament
EP	European Parliament
EPP	European People's Party
EPP	European People's Party
ESM	European Stability Mechanism
EU	European Union
EU	European Union
EUD	Alliance for a Europe of Democracies
G-EFA	Greens-European Free Alliance Group
GUE/NGL	Confederal Group of the European United Left/Nordic Green Left
JHA	Justice and Home Affairs
MELD	Movement for a Europe of Liberties and Democracy
MEP	Member of the European Parliament
MS	Member States
PES	Party of European Socialists
PFEL	Political foundation at European Level

PoG	Party on the Ground
PPEL	Political party at European Level
S&D	Group of the Progressive Alliance of Socialists and Democrats
TESM	Treaty on the European Stability Mechanism
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TR	Transparency Register
TSCG	Treaty for Stability, Coordination and Governance
TSCG	Treaty on Stability, Cooperation and Governance (Fiscal Compact)

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Panel I - Inter-Institutional relations

Assessing the EU inter-institutional dynamics after the EP elections

Yves Bertoncini

The Juncker Commission and new institutional and political set-up

Uwe Puetter

European Council and the Council: perspectives on new dynamics in EU Governance

Olivier Costa

Which challenges are there for the European Parliament: legislation, organisation and scrutiny / Quels sont les défis pour le Parlement européen ? Législation, contrôle et organisation

Panel I - Inter-Institutional relations

The Juncker Commission and new institutional and political set-up

Yves Bertoncini

The Juncker Commission has been formed within a new legal, institutional and political context, which has a direct impact on the way its legitimacy will be perceived in the next few months and years. It is essential to analyse the underlying political factors structuring this legitimacy and to analyse the impact of the changes already visible as regards the Barroso Commission as well as of some other evolutions which could take place in the course of the new legislature.

In this perspective, it is worth underlining that the Commission's legitimacy will go on depending on the double confidence of both the European Council and the European Parliament, and that it can be assessed in connection with three main sets of issues:

1. The composition of the Juncker Commission: a twofold legitimacy test quite successful
2. The organisation and functioning of the Juncker Commission: a welcome change to be confirmed
3. The Juncker Commission's actions and output: a key issue for its legitimacy

1. The composition of the Juncker Commission: a twofold legitimacy test quite successful

As the Commission members are not directly elected, the legitimacy of the Commission comes from the Member states as well as from the European parliament; this twofold legitimacy corresponds to the dual nature of the EU (a Union of citizens and a Union of states). The “representativeness” of the Juncker Commission then lies on the fact that its members come from all the Member states (one commissioner each). It also derives from its link with the European Parliament elections, as its members have been collectively endorsed by the European Parliament (which can also censure the College). In this framework, the Juncker Commission appointment appears to have matched quite successfully the main political criteria to be met as regards the legitimacy of the composition of this institution, be they national, political or personal.

1.1. The distribution of tasks between the members of the Juncker Commission

It is worth noting that a desire for balance has emerged during the designation of the Juncker Commission and the distribution of tasks among its 28 members, which appears to cater for considerations at once demographic (size of their countries of origin), geopolitical (location of their countries of origin) and historical (length of membership of their countries of origin).

The Juncker Commission also complies with a non-written rule applied since the launch of the EMU and the creation of the so called “Schengen area”: the president of the Commission and the Commissioner in charge of these issues all come from member states which belong to these two major achievements of the European construction. This was also key for their legitimacy given the intensity of the political debates generated around these two Areas, especially during the so called “euro area crisis”.

Having said this, it has to be recalled that some member states could still express concerns about the way the Juncker Commission is composed: the bigger member states could feel that being on an equal footing (1 commissioner designate by each country) does not reflect the respective power of the countries (the bigger member states had two commissioners instead of one until the Treaty of Nice); the euro area member states could feel uneasy with decisions taken by a Commission in which 10 members out of 28 (more than 1/3) come from non-euro area countries.

1.2. The party affiliation of the members of the Juncker Commission

The adoption of the “Spitzenkandidat” procedure has strengthened the party aspect in terms of the choice of the president of the Commission: JC Juncker was indeed nominated in his capacity as lead candidate in the party (the EPP) that garnered the highest number of votes in the May 2014 European elections.

The party affiliations of the Juncker Commission's members, on the other hand, have played a less clear role in their appointment, both on the European Council and in the European Parliament. Almost every single member state nominated its candidates to the Commission from parties belonging to whatever national coalition is in office in their country, but Bulgaria and Luxembourg, which are governed respectively by a member of the ESP and of the ADLE, opted for commissioners affiliated to the EPP; while four member states nominated candidates who were not members of the government leader's party: two commissioners affiliated to the ADLE were nominated by governments led by Social Democrats, in Denmark and in the Czech Republic; a commissioner affiliated to the EPP was nominated by the Austrian Government, also headed up by a Social Democrat; and a commissioner affiliated to the S&D was nominated by the Netherlands Government, which is led by a member of the EPP.

As a result, the Juncker Commission's makeup reflects a quite stable balance of forces among the parties, despite the electoral rebalancing that has taken place since 2009. The Commission chaired by José Manuel Barroso comprised 21 members from right-wing and centre-right parties, as opposed to 7 from left-wing and centre-left parties; the Juncker Commission comprises 19 members from right-wing and centre-right parties, as opposed to 9 from left-wing and centre-left parties. The only noteworthy changes concern the smaller number of commissioners affiliated to the ADLE (5 instead of 8 in the Barroso Commission) and the arrival of a commissioner affiliated to the CRE group (Britain's Jonathan Hill), while the commissioners affiliated to the EPP and to ESP number 14 and 8 (instead of 13 and 7) respectively.

This virtually unchanged status quo in party terms is at odds with the party rebalancing that has taken place since 2009: on the one hand, in the European Parliament, where the EPP's relative superiority over the S&D group has diminished considerably (29% of seats rather than the previous figure of 36%, as against 25% for the ESP both before and after May 2014); and on the other, in the European Council, which currently has sixteen government leaders from the right or the centre-right, as against twelve from the left or centre-left. A purely party-based interpretation is, of course, insufficient to explain the political rationales at work within the Commission – rationales which also owe a great deal to its members' national origins and personal profiles. But if the Juncker Commission adopts a more collegial and political style in its work, as its president has promised, it will be in a position to vote on the basis of a balance of forces assigning twice as much clout to commissioners affiliated to right-wing and centre-right parties, who will have, on their own, the simple majority required to adopt its decisions.

So it is on a more quality-related register that we could perceive a kind of party-based rebalancing, symbolised in particular by Social Democrat Frans Timmermans' appointment to the post of first vice-president of the Commission, by the presence of an equal number of EPP and S&D vice-presidents (three each), and by Pierre Moscovici's appointment to the post of commissioner for economic and monetary affairs. The real impact of these more qualitative balances on the decisions of the Commission should be monitored carefully, as it will also have an impact on the Commission's legitimacy.

In any case, it will be up to the Juncker Commission to use its powers not only on the basis of its internal party balances, but also to be able to reach variable geometry majorities in the European Parliament and at the European Council, while taking the at once party-based and diplomatic rationales into account when it uses its right of initiative and implements the political guidelines laid down by its president.

1.3 The personal profile of the members of the Commission

It could seem a sign of naivety to recall that the legitimacy and effectiveness of the Juncker Commission will also rely on the profiles of its members, whose selection was in member states hands, under the control of the EP -the objective being to select the right commissioners at the right place.

The European Parliament's hearings interviewing the commissioners nominated gave rise, as in the past, to occasionally lively exchanges, and at times even to outright questioning of the candidates' expertise or profile. As in 2004 and in 2009, they led to the replacement of at least one commissioner-designate (liberal Slovenian candidate Alenka Bratusek) as well as to a little minor tinkering with the portfolios entrusted to other commissioners – the Slovak commissioner, in particular, being assigned the post of vice-president with responsibility for the "energy union" and the new Slovenian commissioner being given the transport portfolio.

These hearings were marked by the occasionally implied invocation of a "pact of non-aggression" between the S&D, EPP and even ADLE groups, which appeared to assign priority to the defence of candidates from the same party over an assessment of their real merits, as provided for in Article 17.3 in the Treaty on the European Union (in connection with their expertise, commitment and independence). These hearing have sometimes led to the confirmation of Commissioners whose profile and national origins have been seen as contradictory with the portfolio they had been designated for. It is by no means a given that such conduct adds lustre to the

legitimacy of commissioners thus appointed: it will be up to them to confirm that they can act properly and strengthen their credibility on the basis of concrete actions.

2. The organisation and functioning of the Juncker Commission: a welcome change to be confirmed

The reduction of the size of the Commission provided for in the Lisbon Treaty not having been implemented, the Juncker Commission's legitimacy will also be reinforced if its organisation and functioning evolve in the direction announced by his president, on the basis of both political and legal changes.

2.1. Organisation aspects: a more vertical Commission based on clusters

A Commission of 28 members needs to work on a more vertical internal basis, giving a key role to the vice-presidents, as announced by JC Juncker: it was not desirable to go on having 27 technical portfolios devoted to commissioners having the same status for the implementation of their tasks.

The internal hierarchy put in place within the Juncker Commission is then not rely only on the president power to structure and allocate responsibilities among its members, but also on a new use of the status of the "Vice-presidents": on the basis of the article 248 TFEU, the president chose these vice-presidents according to their political weight and origin, and not to compensate the narrowness of their portfolio; he has even created overarching portfolios (on Energy Union, Euro and social dialogue, etc.). The president and vice presidents of the Commission will be seconded by the other commissioners, whose portfolio will be connected to their respective spheres of competence, on the basis of a "cluster system" and "project teams". This more collective functioning to reach the overall political objectives of the Commission and the EU should be guaranteed on a daily basis by the college itself and, last but not least, its president.

In this perspective, the "internal rules of procedure" of the Commission should be revised to ease the implementation of the clusters system, for example by giving some specific rights to the vice presidents such as setting the agenda of the Clusters meeting and of the commissioners acting in their respective field of competence. A new use of "empowerment procedures" and "delegation procedures" should in particular be promoted. These rewriting of the rules of procedure should be made on the basis of the provisions of the article 18 of the TEU dealing with the vice-president/high representative for foreign affairs and security policy, drawing lessons (political, human, functional, etc.) on the way they were implemented (or not).

2.2. Functioning aspects: a more collegial Commission

There is a vital need to apply fully and properly the collegiality principle within the Juncker Commission, so as to take advantage of the added value of all the Commissioners, whose experience and contribution on all the issues at stake are key: it will guarantee that the Commission's decisions and initiatives have been approved after an open political discussion, and the Commission's meeting aim is not to produce a formal endorsement of the technical proposals prepared by the DG's (see §-3). A genuine collegiality will also be crucial to strengthen the feeling of ownership of all Commissioners and to ease their mobilisation in the public debate of their countries of origin and beyond.

The president or vice-presidents of the Commission should then meet on a regular basis with the commissioners acting within their respective sphere of competence (sector based collegiality within Clusters meetings); the president of the Commission and his/her vice-presidents should meet on a periodic basis so to promote a better political coordination of the institution; all these meeting should take place with the support and presence of the Secretariat general of the Commission.

The overall collegiality of the Commission will be reinforced by weekly meetings based on the inputs from the Clusters meetings and Coordination meetings mentioned above; it will also be reinforced by open discussions of the college concluded by more systematic votes, based on the principle that its president is a “primus inter pares”, not a prime minister. The fact that all the commissioners are able to participate in the vote of the college on an equal footing is not a real problem: the simple majority rule is indeed a functional advantage for the Commission, whose decision can be made much more easily than at the Council (qualified majority or unanimity) and even more easily than at the EP (where a majority of its component members or a 2/3 majority are sometimes required).

3. The Juncker Commission’s actions and output: a key issue for its legitimacy

The Commission’s legitimacy and effectiveness are partly linked to the inter-institutional and political context. In times of “crisis management” (recent period), the European council is more legitimate as “firefighter” than the Commission (the same applies to the ECB); the European council is also very legitimate as an “architect” to build solutions based on EU or non EU treaties; the Commission nevertheless plays a key role as “mason” (drafting of the new legislation in particular). In more “normal” times, the Juncker Commission should become more influent if it’s well managed, with a new college benefiting from a new legitimacy. But the Juncker Commission’s legitimacy will also be linked to its political output, i.e. the way it exercises its powers – it will have to face four main challenges in this perspective.

3.1. The strategic agenda setting challenge: from “Spitzenkandidaten” to “Koalitionsverhandlungen”

The circumstances surrounding the Juncker Commission's inauguration would have benefited from being governed by more institutional procedures as regards the definition of the EU agenda. The "Spitzenkandidaten" is a useful innovation, but its natural complement, the “Koalitionsverhandlungen” should also be adopted and adapted to the EU inter-institutional specificity.

While it is the very nature of Juncker's election to spawn a [new agenda](#) for the legislative term of 2014 to 2019, nevertheless a certain vagueness still surrounds it in this sphere. The European Council has identified ["five overarching priorities"](#) which it would like the Commission to adopt; in an extension of their election campaigns, the political groups in the European Parliament have all put forward their proposals during the hearing for the new Commission president and the hearing of the members of its team; and JC Juncker, for his part, has identified ["ten areas"](#), specifying that he plans to submit a detailed programme only after putting his team together.

A reading of these documents reveals areas of fairly strong convergence, particularly in connection with a better balance between stringency and growth and a stronger profile for the EU on the international stage. Yet no visible inter-institutional negotiations have been made to formally produce a fully-fledged "contract for the legislative term", as happens for instance in the budgetary sphere: why should there be an agreement on the EU's means yet not on its objectives? In light of this, the prospect of tensions arising cannot be ruled out, which may well blur the exact scope and importance of the link forged between the European elections and the EU's action plan.

The political directions of the EU should then be subject to deeper discussion between the Juncker Commission, members of the European Council and the majority political groups of the European Parliament. Such a “trialogue” would be all the more useful if it led to the adoption of an inter-institutional agreement formalising a “contract for the parliamentary term” that would provide the EU and its citizens with the internal and international direction they need more than ever between now and 2019, both at the EU28 and at the euro area levels.

In broader terms, it would be preferable to conclude a basic tripartite framework agreement to replace the current model of agreements that appears to be fragmented and unbalanced. The distinction between political programming and procedural engagements and the very different scope of them can be acknowledged. Nevertheless the need for enhanced dialogue and shared planning would be preferable to the set of partial agreements that might be contradictory and do not contribute to the clarity of the political purposes of the EU as a whole and the Juncker Commission in particular.

3.2. The subsidiarity challenge: imparting greater legitimacy to the exercise of the EU's competences

The EU has appeared to be rather intrusive these past few years, particularly in the "countries under programmes" but also because it adopts norms that are very detailed, badly explained and often met with a hostile reception by citizens. While the Troika has already left Ireland and Portugal, there is no doubt that it is necessary to send the same political signals concerning the level of detail of EU rules and interventions between now and 2019, by retaining a limited number of priority actions, even if this does not mean that the EU should do less in all fields.

This is mainly because EU action would be better embodied if it were clearer in the future. Embodied by great projects such as the promotion of balanced economic, social and environmental development or the assertion of the interests and values of Europeans within globalisation; embodied by symbolic projects to be promoted in all their dimensions, such as "banking union" or the "Energy Union". But it is also necessary to proceed with adjustments relating to the conditions governing the exercise of the EU's competences, which are often the target of complaints focusing on the way the Community produces laws. It is with this in mind that the Juncker Commission should act in three directions:

- On the one hand to dispel the "legend that 80%" of laws are of Community origin: it is necessary to put forward a clear and substantiated argument on the basis of the converging figures now available, which demonstrate that the proportion of laws of Community origin is closer to 20% than to 80%, with major differences from one sector to the next; in the longer term it would be necessary to change the treaties' misleading phrasing, which suggests that "education", "industry" and "social policy" are fully part of the EU's competences.
- On the other hand to improve the distinction between that which pertains to the "legislative" sphere in the narrowest sense of the term and that which pertains to the "regulatory" sphere: this presupposes a clearer distinction between "legislative acts", "delegated acts" and "implementing acts" on the basis of their political or technical scope, and a clearer distinction in the use of the terms directives/implementing regulations; the effect of these adjustments would be to highlight the fact that the EU intervenes more on technical issues for the purposes of standardisation than it does in defining the laws that govern its citizens' lives. For this new hierarchical order to be clear in political and civic terms, it is necessary at this juncture for the Commission to ensure that the texts submitted to the law-makers are restricted to containing only measures of a genuinely legislative nature, while the implementing acts and delegated acts must be confined to non-legislative measures.
- Finally, it is also urgent to establish the extent to which the reforms of the EMU's governance have or have not reinforced the power of the Juncker Commission and narrowed the field of national sovereignty and democracy. This clarification is crucial both in order to get recent developments into proper perspective and to make it possible to implement on a healthy basis all those adjustments that the euro area's governance still requires. An analysis of the nature of the various competences exercised by the EU and the Commission in the context of the EMU's new governance by comparison with the competences exercised in international organisations would be useful, so as to underline that the relations between the EU and its member states reflect four different political regimes which have an extremely variable political impact (see Appendix 1).

3.3. Less intrusive Community laws: the cost of “too much Europe” challenge

The pedagogical clarifications recommended above may not necessarily be sufficient to seal the debate on the impact of the EU at the national level, thus it demands more specific political action from the Commission.

It is necessary, therefore, for the Commission on the one hand to focus its initiatives on a limited number of properly-targeted political priorities; and on the other, to monitor the strict application of the principles of subsidiarity and of proportionality under the watchful eye of national parliaments and of the Court of Justice. On this basis, it is incumbent upon the Commission to strictly limit the "bureaucratic" output of Community laws in certain sectors, or to allay the impact of some of the Community laws currently in force, in order to send out a clear signal to the citizens and to the member states.

- This "legal signal" will be a balanced signal if it simultaneously identifies the sectors in which European laws could be less numerous or less intrusive, and those in which more European legislation could be considered useful, for instance in the fiscal or energy spheres. This, because it is crucial to properly decipher the highly contradictory demands that have emerged from the European elections in May 2014 and in the various national political arenas throughout the year. The Juncker Commission must rapidly draft this dual inventory in order to set the debate in motion over the coming months. But in any event, it is not a matter of withdrawing or of rewriting laws which a majority of public opinion are eager to see remaining in force.
- The "legal signal" that the Juncker Commission address to the EU's member states and citizens will also be balanced if it clearly sets out the terms of the debate in terms of effectiveness, but also of legitimacy. Thus it is crucial to admit that the political cost of some of these laws is higher than their economic or social benefit on account of the way in which they are perceived. The key issue here is not to restrict action to simply adopting a technocratic approach, rightly pointing to the "cost of non-Europe" in numerous spheres, but to associate action with a political analysis including the "cost of too much Europe" in those spheres where it might seem that the presence of European laws leads de facto to incomprehension or even to outright rejection. It must be clear, therefore, that it is possible to forego the adoption of new Community laws, for political and even symbolic reasons, even if doing so would damage the European citizens' purchasing power or protect their health to a lesser degree. The crucial thing is that this choice be made explicitly and publicly (rather than implicitly, as is so often the case) in such a way that its benefits and disadvantages can clearly be perceived by the citizens and by all of the players involved. The European institutions have special responsibility with regard to this choice between cost and benefits, and the Juncker Commission is in the front rank in this connection because it holds a monopoly on legislative initiative. In particular, it is crucial for the college of commissioners to play their role to the full in this area in order to steer the activities of the Commission's services in the right direction.
- And lastly, the "legal signal" that the Juncker Commission send out will be more clearly received if it concerns laws which have cornered the public debate at either the European or the national level and which are therefore of symbolic significance. It should be relatively easy for the Commission to identify such laws, through its offices in the member states or on the basis of public opinion surveys (whether already available or specially commissioned). By way of an example, based purely on a "gut feeling", we shall confine ourselves here to identifying at least two categories of law that should be made less intrusive in order to trigger a beneficial "legislative shock", namely the health, phytosanitary and environmental safeguard laws on the one hand, the European competition rules, particularly those relating to state aid, on the other hand.

3.4. The right of legislative initiative challenge: a dynamic and open monopoly

The exercise of the monopoly over legislative initiative assigned to the Commission is strictly regulated: in this sphere the Brussels Commission takes its inspiration from the conclusions of the European Council on the one hand and from the guidelines of the European Parliament on the other, in the context of its annual working agenda. But this monopoly also allows it to play an irreplaceable role when the time comes to draft the content of proposals for directives and regulations, after consulting with all of the interested parties and making every effort to serve the general European interest. Calling into question this monopoly over legislative initiative, by assigning it to the European Parliament for instance, could well undermine the Commission's position within the institutional triangle, within which its role as an intermediary has already been impacted to a major degree by the substantial increase in the number of first-reading agreements between the European Parliament and Council.

Introduced by the Treaty of Lisbon, the "right of citizens' initiative", in other words the opportunity offered to a representative group of EU citizens to call on the Commission to propose a legislative initiative, offers more promising potential for development because it breathes substance into the notion of participatory democracy at the European level. This new right has already been exercised by over twenty groups of citizens from at least seven EU member states, but only some of the initiatives launched have succeeded in attracting over one million signatures; many of them have thus triggered a fully-fledged Europe-wide debate on which the Commission has had to react. Such reactions should mobilise all due political and communication resources in the future, especially when they are negative, given the negative feelings to be expressed by their initiators among all the people they had mobilised in their campaign.

Numerous citizens' mobilisations have encountered difficulties of a technical, legal or political nature which have hampered their development and revealed the need to simplify the circumstances governing the exercise of this right of initiative, particularly in relation to conditions governing the collection of signatures (a system should be set up for on-line signature gathering) and the 12-month time limit set for their collection, which appears to be too short for players in associations devoid of sufficient means to enable them to act at the pan-European level (a 24-month delay would be better). It is up to the European Commission to propose that simplification on the basis of the initial reviews drafted after the right of citizens' initiative has been exercised for a few years.

All these substantial human, organizational and legal changes could be completed by others, especially as regards the nature and number of the inter-institutional agreements concluded by the Commission and the other institutions. The balance of powers between the institutions, and then the legitimacy and efficiency of the Commission, will also go on depending on the evolution of the political context (crisis period or not). But even if they are not revolutionary as regards the nature of the EU treaties and political game, these changes are likely to give the Commission all the strength it needs to contribute to address the challenges Europe is facing.

The way competences are exercised in the EMU

Purpose	Tools	Keyword	European actors	Comparable actors
Bailout	Memorandum of Understanding MOU	Condition	Commission / ECB European Council	IMF
Preventing/correcting fiscal excesses and macro-economic imbalances	Stability Pact TSCG	Sanction	Commission Council	UN
Monitoring economic and social policies	Europe 2020 Euro + Pact TSCG	Incitation (political)	Commission Council	OECD
Promoting structural reforms	Reform financial aid	Incitation (financial)	Commission Council	World Bank

Source: Yves Bertoncini and Antonio Vitorino, *Reforming European Governance, NE-JDI, September 2014.*

Biography

Yves Bertoncini is an administrator at the European Commission, where he has worked at the Directorates-General "Education, Training, Youth" and "Regional Policy". He has worked in the office of the French prime minister with responsibility for research on Europe at the Centre d'Analyse Stratégique (2006-09), and as adviser to the secretary-general of European affairs (2010-2011). He has also worked for the French minister of foreign and European affairs, on the organization of the "national dialogue for Europe" (1995-1997) and at the French embassy in Algiers (1992-93). He was responsible for international affairs at the Fédération Française des Sociétés d'Assurance (2002-05). He teaches or has taught European issues at the Corps des Mines (Mines Paris Tech), at the Institut d'Études Politiques (IEP) in Paris (2001-11) and at the École Nationale d'Administration (2007-09). He is the author of numerous books, articles and policy papers on European questions. Yves Bertoncini holds degrees from the Institut d'Études Politiques in Grenoble and the College of Europe in Bruges. He has also studied at the IEP Paris and at the University of California in Berkeley.

Panel I - Inter-institutional relations

European Council and the Council: perspectives on new dynamics in EU Governance

Uwe Puetter

The European Council and the Council play a central role in policy-making within those new areas of EU activity within which intergovernmental policy coordination prevails over legislative decision-making such economic governance and foreign affairs. The emphasis on decentralised governance implies important changes to institutional design and the practice of inter-institutional relations.

1. NEW INTERGOVERNMENTALISM: GOVERNANCE METHOD RATHER THAN TEMPORAL EXPERIMENT

KEY FINDINGS

- Post-Maastricht **integration paradox** informs contemporary institutional choice.
- Development of **new areas of EU activity** most important trigger for institutional change.
- The **Lisbon Treaty** has confirmed the post-Maastricht institutional order.

The **Maastricht Treaty** marked an important step in European integration as it substantially **expanded the scope of EU policy activity**. Yet, it did so by stipulating that a number of new EU activities would be governed differently than this was the case with established fields of single market integration. Though the Maastricht Treaty endorsed earlier political moves to base community method decision-making increasingly on qualified majority voting in the Council and started the transformation of the European Parliament (EP) into an effective co-legislator, it **favoured intergovernmental policy coordination over legislative decision-making as the key governance mode** when it came to the **new areas of EU activity**.

These new policy domains included **economic governance** under Economic and Monetary Union, **foreign, security and defence policy**, as well as **justice and home affairs** matters. The approach to enlarge the scope of EU activity by identifying new policy domains which were to be made subject to a common coordination regime was continued by the Amsterdam Treaty, which added **employment policy**, and with the Nice Treaty, which added **social inclusion**.

The **Lisbon Treaty** has endorsed this approach once again. It also highlighted the **distinctive character of policy coordination as opposed to legislative decision-making** under the classic community method. The Treaty has **explicitly denied the possibility of legislative action** in the case for the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP) (Article 24.1, TEU Lisbon) and has ruled out that the Court of Justice would have jurisdiction over these policy domains.

Moreover, the Lisbon Treaty confirmed the decentralised governance set-up within the domain of economic governance which relies only on a **very limited number of binding rules**, which however cannot be enforced unilaterally by either the Commission or the Court of Justice. Legislative action in this domain is restricted to **regulate the process of policy coordination and surveillance**. Yet, it cannot be used to transfer ultimate decision-making competences to either the Commission or the Court. The Lisbon Treaty also acknowledges the political salience and inter-relatedness of the new coordination domains (see for example Article 5, TFEU Lisbon).

In short, European integration after the Maastricht Treaty is marked by an **integration paradox**. Member states **pursue further integration** and have repeatedly agreed to an expansion of the scope of EU activities. However, they almost categorically **reject major new transfers of ultimate decision-making powers** following the model of the classic community method to supranational actors such as the Commission and the Court.

2. CONSEQUENCES FOR INSTITUTIONAL DESIGN AND INTER-INSTITUTIONAL RELATIONS

KEY FINDINGS

- Permanent **consensus generation among member state governments and the Commission** becomes an imminent task.
- **Policy initiation and implementation** are based on collective member state action as there is no central enforcement mechanism.
- **Intergovernmental bodies gain in importance** and enjoy procedural prerogatives and a greater public role within the new areas of EU activity.
- **Institutional engineering** is detectable at all levels of European Council and Council decision-making and **inter-institutional relations are reconfigured.**

The rejection of new major competence transfers to traditional supranational actors has so far not resulted in a lack of ambition to pursue further integration. However, within the new areas of EU activity **collective action is reliant on the permanent mobilisation of consensus and self-commitment among member state governments.**

The **Commission cannot drive policy initiative or supervise policy implementation unilaterally.** For example, within the CFSP framework the Commission commands important resources, as much as member states do. It is a **partner in the coordination process** rather than a steering institution. In economic governance the Commission commands considerable surveillance powers and can address far-reaching policy recommendations to individual member states. Yet, it relies on political endorsement from the Eurogroup and the European Council to make its voice heard. The prospect of quicker sanctions which was raised by the **six-pack and two-pack reform packages have not reduced this dependency on member state consensus** but rather increased it as the consequences for domestic politics are potentially far higher than before.

As **demand for the EU's main intergovernmental decision-making forums – the European Council and the Council – to deliver policy consensus increases** they gain in importance in terms of **procedural prerogatives and public attention.** The quest for consensus is not a new phenomenon in EU politics. As regards the new areas of EU activity, however, this quest is not restricted to particular moments in the legislative cycle but a permanent feature of policy-making which can hardly be circumvented, for example through the threat of qualified majority decision-making.

The quest for deliberation and consensus is detectable as a process of **institutional engineering which is aimed at improving the consensus generation capacity** of the relevant forums for intergovernmental decision-making. **Working methods** are reformed and **political dialogue intensifies substantially** among the most senior representatives of member state governments. **Inter-institutional relations are reconfigured** so as to reflect the dependency on high-level political consensus in EU decision-making.

3. THE LEAD ROLE OF THE EUROPEAN COUNCIL

KEY FINDINGS

- Policy coordination issues have **far-reaching repercussions for domestic politics** and trigger **intervention at the highest political level**.
- The salience of the **new areas of EU activity** is reflected in the **composition of the European Council agenda**.
- There is a **considerable increase in the frequency** of meetings.
- The **European Council 'tasks' other institutional actors**.

The **European Council assumes a central role in the governance of the new areas of EU activity**. This is not only manifest in the relevant Treaty provisions but is also confirmed by the practice of European Council decision-making ever since the second half of the 1990s. The main reason for the centrality of the European Council is **sensitivity of most of the policy dossiers** as regards their implications for domestic politics and policies. Moreover, many policy issues are associated with concerns over sovereignty.

It is reported that the personal administrations of the heads of state and government aim for supervising more and more dossiers related to the new areas of EU activity. At the same time political consensus within the European Council is very often the **requirement for successful policy implementation at the domestic level**. Ministers and senior government officials in the Council often lack the political authority to enforce collective agreements domestically on their own.

The pivotal role of the European Council in governing the new areas of EU activity is reflected in the composition of the forum's agenda. Despite the fact that the European Council was engaged in complicated institutional decisions – including enlargement and repeated processes of Treaty reform – the **bulk of European Council agenda items is related to the new areas of EU activity**. Nearly two-thirds of all European Council agenda items during the period of 1992-2013 were related to the new areas of EU activity. **Economic governance and foreign affairs** have been the only two agenda items to **feature on almost all European Council meetings so far**. The latter two policy domains are also those on which the heads spend most of their time during the summit meetings.

The shift of attention towards the new areas of EU activity is also reflected in an **increased frequency of European Council meetings**. Whereas the standard was to have three meetings per year in the early 1990s, this figure increased with the roll-out of the new policy coordination activities steadily. Since 2008 the number of formal and informal gatherings of the heads has always been at seven or higher.

The lead role of the European Council can also be traced at the level of inter-institutional relations. It has become an established practice that the **heads 'task' the relevant Council formations, the Eurogroup and the Commission** to prepare and implement policy decisions. This may also lead to a de facto modification of the Commission's right of initiative.

4. THE REFORM OF WORKING METHODS

KEY FINDINGS

- European Council proceedings **give priority to confidential face-to-face debate** among the heads.
- Agenda-setting practices reflect the ambition to both establish **regularity** and allow for **ad-hoc discussions**.
- The **full-time president** acts as the **chief institutional engineer** and focuses on the internal functioning of the European Council and on **inter-institutional relations**.

The European Council's focus on policy coordination dossiers has implications for institutional design. Though the rationale behind the creation of this high-level body has always been to foster direct debate between the heads of state and government, the growing **dominance of the new areas of EU activity for the European Council agenda makes it more pressing to reach concrete agreement**.

An early indicator for this development is the gradual **exclusion of foreign ministers** from European Council meetings during the late 1990s and the early 2000s. Today, long-term institutional decisions and general EU affairs only account for a small proportion of the overall work of the body. Informal agreement among the heads on key policy moves within the new areas of EU activity and the common analysis of policy challenges such as in the context of crisis situations is the main objective of European Council meetings.

The **focus on confidential face-to-face debate** among the heads speaks to this point. Key issues are typically discussed in the second part of European Council meetings. The so-called 'dinner' takes place at the 80th floor of the Justus Lipsius building and excludes any access to the discussion by diplomats or senior officials.

Agenda-setting practices too reveal the effort to facilitate consensus generation in relation to key policy issues and enable a common interpretation of policy challenges. While there is an effort to represent the full spectrum of coordination issues through **scheduling debates in regular intervals** (e.g. on the analysis of the economic situation or strategic foreign policy issues), the European Council also has developed **crisis management routines and is convened frequently on an ad-hoc basis**.

The office of the **full-time president** provides another **crucial step in the reform of European Council working methods**. Contrary to expectations which saw the European Council president mainly as an external spokesperson for the EU, the evidence of the two terms of the presidency of Herman Van Rompuy suggests that he acted as a **chief institutional engineer**. The president plays a key role in facilitating agreement among the heads through **bilateral discussion** and by using his **agenda-setting powers**. Rather than pursuing an own political agenda, Van Rompuy has sought to structure and foster debates with the aim of facilitating agreement on collective policy action.

5. THE COUNCIL AS A COORDINATOR

KEY FINDINGS

- The key focus of Council activity within the new areas of EU activity is **to coordinate and not to legislate**.
- This **requires revised working methods** which are different than those chiefly used within the context legislative decision-making.
- The creation of the **Eurogroup as an informal forum** for euro area coordination, the **informal ECOFIN breakfast** and the role of the **High Representative as chair of the Foreign Affairs Council** reflect this dynamic.
- **Dedicated high-level policy coordination committees** underpin the activities of the European Council and the Council.

The Council as a forum for the representation of member state governments always has exercised multiple roles simultaneously. Yet, in the post-Maastricht period and with the launch of new major areas of EU activity, which are based on policy coordination rather the legislative decision-making, the **internal functioning of the Council has been subject to a series of institutional adjustments**.

This is most obvious with regard to **three of the most frequently convened forums for collective policy debate among EU ministers and the relevant member of the Commission**: the Eurogroup, the Economic and Financial Affairs Council (ECOFIN) and the Foreign Affairs Council.

The decision in 1997 to constitute the **Eurogroup** as an **informal coordination forum** for the euro area marked an important departure from the standard working method of the Council. The Eurogroup is based on the minister-plus-one approach and excludes delegations. It has played a **crucial role in political management of the euro area** though it is formally not a configuration of the Council.

The Eurogroup was the first group of ministers to introduce the office of an **elected president**. The role of the Eurogroup chair is highly similar to the one of the European Council president. The Eurogroup model is equally geared towards **confidential face-to-face debate and direct agreement** among ministers and the participating commissioner. **ECOFIN** too has enhanced its institutional capacity to foster EU-wide policy coordination. Its **informal breakfast meeting** has become a key venue for policy dialogue.

The **Foreign Affairs Council** has been developed into the **main coordination forum for CFSP and CSDP matters**. It equally applies the **new presidency regime**. The separation of these dossiers from general EU affairs further confirms the institutional **trend to create dedicated forums for policy coordination** at the level of ministers.

The growing institutional separation of policy coordination and legislative affairs is also clearly visible in the **proliferation of senior expert committees which are primarily focused on the main coordination dossiers**. The Economic and Financial Committee, the Eurogroup Working Group and the Political and Security Committee are the most prominent examples.

6. CONSEQUENCES FOR DEMOCRATIC CONTROL

KEY FINDINGS

- The **salience of intergovernmental executive bodies** in EU decision-making raises new questions about democratic control.
- The **EP** plays an important role in providing **public scrutiny but cannot exercise its major procedural prerogatives** which it enjoys within the EU legislative process.
- **National parliaments** have so far **only partially appreciated the increased importance of the European Council** and the Council in non-legislative EU decision-making.

The salience of intergovernmental bodies in governing the new areas of EU activity raises new questions about democratic control. As member state governments increase coordination at the EU-level, decisions by the European Council, the Eurogroup and the Council relating to the new areas of EU activity have **often immediate repercussions for domestic politics**.

Though it has gained substantial co-decision-making powers related to the EU legislative process, the **EP cannot rely on its major procedural prerogatives** when it attempts to control the work of the EU's most prominent forums for intergovernmental policy coordination.

However, the **EP has stepped up its efforts to provide public scrutiny** for decision-making **within the new areas of EU activity substantially**. The activities of its Economic and Monetary Affairs Committee as well as its public role in debates over the EU's foreign and security policy speak to this point.

The **record of national parliaments in adjusting their internal procedures** to the increased importance of the European Council and informal forums for policy dialogue among ministers **is mixed and so far limited**. Some parliaments enjoy the prerogative to mandate their relevant head of government prior to European Council meetings, others have introduced the practice of hearings ahead and after of European Council gatherings. Yet, many national parliaments cannot rely on special scrutiny procedures.

It is **unlikely that enhanced democratic control within the context of the new areas of EU activity can solely be provided either at the EU or national level alone**. Whereas the EP can scrutinize decision-making output and seek influence via its own president in relation to particular European Council dossiers, its **ability to hold the relevant presidents of the different intergovernmental bodies personally accountable is highly limited**. This is especially because the presidencies of the European Council and the Eurogroup are geared towards facilitating the internal functioning of the relevant body rather than the representation of a particular political agenda.

National parliaments in turn may find it **difficult to react to the inter-institutional dynamics at the EU level**, which undoubtedly play into European Council and Council decision-making, when scrutinizing their own executives. Yet, **national parliaments may have more leverage in correcting or preventing particular decisions**, in case they consider this necessary

Biography

Uwe Puetter Uwe Puetter is Professor in Public Policy and Director of the Center for European Union Research at the Central European University, Budapest. He also holds the Jean Monnet Chair in European Public Policy and Governance and is a member of the Executive Board of the FP7 research consortium 'bEUcitizen'. His most recent research has concentrated on the transformation of intergovernmental relations in the European Union after the Maastricht Treaty and how the European Council and the Council as key forums for collective decision-making have been affected by these changes. Uwe Puetter's new book 'The European Council and the Council. New intergovernmentalism and institutional change' appeared with Oxford University Press in 2014.

Panel I - Inter-institutional relations

Quels sont les défis pour le Parlement européen ? Législation, contrôle et organisation

Olivier Costa

Cette note a pour ambition de souligner quelques-uns des défis que le PE devra affronter durant la prochaine législature. En matière législative, les trilogues, l'initiative législative et le passage en revue des propositions pendantes doivent retenir l'attention des députés. Pour ce qui concerne le contrôle, c'est la stratégie globale du PE vis-à-vis de la Commission (soutien ou indépendance) qui est en jeu ; la législation déléguée et la comitologie méritent également quelque attention. Enfin, l'organisation interne du PE doit être envisagée sous l'angle de l'image de l'institution, qu'il s'agisse de l'impact du travail de « rationalisation » entrepris dans les années 1980 ou de la manière dont les clivages politiques sont donnés à voir ou occultés. Plus spécifiquement, la question de la place des études d'impact devra être posée.

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1. INTRODUCTION

Une réflexion sur les défis que devra affronter le Parlement européen (PE) pendant la nouvelle législature nécessite d'opérer trois clarifications préalables.

1.1 Analyser les institutions de l'Union

La présente réflexion se situe dans une perspective néo-institutionnaliste historique : il importe, selon nous, de considérer les processus institutionnels dans le temps long, d'admettre que les choix opérés dans le passé ont un impact sur les stratégies institutionnelles (*path dependency*), et de tenir pour acquis que les institutions sont porteuses de visions du monde stables. Les configurations d'acteurs internes aux institutions, leurs règles de fonctionnement, leurs routines, font que ces visions, et les stratégies qui en découlent, sont peu susceptibles de changer radicalement. Dans ces circonstances, toute réflexion sur la stratégie du PE et des autres institutions doit prendre en compte leurs stratégies antérieures, et partir du principe que des inflexions majeures seront difficiles à mettre en œuvre, ou à la source de conflits.

Il faut aussi souligner la complexité des « préférences des acteurs du PE ». Non seulement celles-ci sont très diverses, compte tenu de la composition et de la structuration du PE, mais elles sont construites et défendues à différents niveaux : au niveau individuel (députés, fonctionnaires...), à celui des composantes du PE (groupes politiques, commissions parlementaires, organes hiérarchiques, Directions générales...) et à celui du PE. Il convient donc d'éviter de réifier à l'excès « la stratégie » du PE, et rappeler que ce dernier n'est pas une institution monolithique et unanime, mais un ensemble d'acteurs aux stratégies diverses et mouvantes.

1.2 Comprendre la stratégie du PE

Pour bien analyser la manière dont la stratégie du PE se définit, il faut aussi souligner le fait qu'elle doit concilier différents ordres d'exigences, pas nécessairement compatibles :

- *la représentativité* : les députés ont été élus pour porter des idées, qu'il s'agisse de celles de leurs électeurs, de leur parti ou des leurs. La stratégie du PE doit refléter l'état des forces en présence au sein de l'assemblée, et des idées – très diverses – dont elles sont porteuses.
- *la capacité institutionnelle* : le PE ne peut avoir de l'influence que s'il a une action cohérente, notamment pour satisfaire aux exigences de majorité et de délais prévues par les traités. Depuis l'Acte unique européen, une majorité de députés a fait le choix d'une rationalisation sans cesse plus poussée de l'organisation interne du PE, en ce inclus les modalités de la délibération en commission et en plénière. Progressivement, les droits individuels des députés ont été restreints, au profit des groupes politiques, et dans une moindre mesure, des commissions ou d'un certain nombre d'élus (40 désormais). Le règlement intérieur a été modifié à de nombreuses reprises pour discipliner les comportements des élus en plénière, empêcher les prises de parole intempestives et limiter drastiquement les manœuvres dilatoires. Les organes hiérarchiques du PE (Présidence, Bureau, Conférence des présidents...) ont été dotés de pouvoirs croissants. Ces dernières années, la montée en puissance des activités législatives, l'inflation du nombre de députés et de partis politiques représentés, et l'arrivée de députés fortement eurosceptiques ont favorisé la poursuite de cette stratégie.
- *l'exigence démocratique* : la stratégie de « rationalisation » du fonctionnement du PE a toujours fait l'objet de contestations. Deux conceptions divergentes de l'impératif démocratique s'affrontent à cet égard. Certains élus considèrent qu'il faut maximiser l'influence du PE dans le triangle décisionnel, au prix de la rationalisation de son fonctionnement et d'une moindre liberté individuelle des députés : c'est la *démocratie par le PE*. D'autres estiment qu'il faut veiller au respect de la démocratie au sein même de l'assemblée, en garantissant la liberté d'expression et d'action des élus et la spontanéité des échanges : c'est la *démocratie au PE*. L'enjeu est de trouver un point d'équilibre entre ces deux logiques, sachant que la première est globalement soutenue par les hiérarques de l'assemblée, les responsables

des grands groupes et le Secrétariat général, et la seconde par les députés du rang, ceux des 'petits' groupes et les non-inscrits.

- *le bon fonctionnement de l'Union* : le PE a toujours fait valoir sa capacité de veto (en matière législative, budgétaire, conventionnelle ou d'investiture de la Commission) pour faire entendre ses exigences dans le dialogue interinstitutionnel. Il a toutefois souvent fait machine arrière, au nom du bon fonctionnement de l'Union. C'est également au nom de l'efficacité du système politique de l'Union que le PE s'est engagé dans la voie des trilogues et des accords précoces en matière législative.
- *la redevabilité du PE* : les députés doivent rendre des comptes (*accountability*) aux citoyens et aux organisations qui les représentent (organisations de la société civile, partis politiques, médias...). Le mandat électoral dont disposent les députés ne les dispense pas d'obligations vis-à-vis de leurs électeurs. Il leur importe donc de prendre en compte la manière dont l'action du PE est perçue dans le monde extérieur, et de prêter notamment attention aux impératifs de transparence et de lisibilité dans la définition de sa stratégie et de son propre mode de fonctionnement.

1.3 La nouvelle architecture institutionnelle de l'Union

L'histoire du régime de l'Union peut être résumée par la notion de « parlementarisation », entendue comme un processus tendant à le rapprocher sans cesse davantage des régimes nationaux. Même si la « méthode communautaire » n'a jamais été remise en cause de manière frontale, de multiples réformes et évolutions sont venues faire de l'Union un Etat de droit, au sein duquel l'assemblée élue jouit de larges pouvoirs, et dont les institutions interagissent sur un mode de plus en plus partisan.

La campagne électorale des européennes de 2014 et l'investiture de la Commission Juncker ont montré que le processus se poursuivait. On peut désormais décrire l'Union comme un régime composé de cinq institutions majeures : la Cour, qui est tout à la fois un tribunal arbitral, administratif et constitutionnel ; un exécutif bicéphale, composé du Conseil européen, sorte de chef d'Etat collectif exerçant le leadership, et de la Commission, en charge de mettre en œuvre la politique ainsi définie ; un parlement bicaméral, formé du PE – chambre basse représentant les citoyens – et du Conseil – chambre haute représentant les Etats.

On note que les relations entre pouvoirs exécutif et législatif sont de plus en plus politisées. Si la grande coalition PPE-S&D qui a été à la manœuvre pour imposer J.C. Juncker à la tête de la Commission se stabilise (avec ou sans l'ADLE), notamment pour faire face aux eurosceptiques, le fonctionnement du PE pourrait changer, de même que la logique décisionnelle dans l'Union. A l'avenir, la Commission pourrait notamment chercher à s'entendre en amont avec les grands groupes avant de proposer une nouvelle norme.

On examinera successivement les défis de la nouvelle législature en matière législative, de contrôle et d'organisation interne.

2. LES DEFIS EN MATIERE LEGISLATIVE

Les questions législatives occupent une place centrale sur l'agenda et dans les activités du PE. Le traité de Lisbonne a généralisé l'application de la procédure législative ordinaire à des matières très importantes. Il existe toutefois des marges de progression pour l'influence du PE. Trois problématiques doivent retenir particulièrement l'attention.

2.1 Les trilogues

Les trilogues sont apparus dans les années 2000, en conséquence de la réforme de la procédure de codécision (Amsterdam) et du désir d'éviter les blocages institutionnels après l'élargissement de 2004. D'importantes réformes ont déjà permis de mieux encadrer cette pratique au sein du PE : la procédure est désormais plus transparente ; la commission parlementaire donne un mandat clair à l'équipe de négociation ; une partie significative des cas sont soumis à la plénière (1/3) ; la négociation est menée par un groupe de députés, et non plus par le seul rapporteur.

Néanmoins, des progrès peuvent encore être réalisés :

- il faut mieux évaluer les gains potentiels d'une participation aux trilogues : le PE ne semble pas être l'institution qui a le plus à gagner aux trilogues, et doit adapter sa position à celle de la Présidence du Conseil ;
- il faut distinguer les dossiers « importants » des autres : il n'existe, à l'heure actuelle, pas de critère clair et universel en la matière. Chaque institution à sa propre conception des choses, et même au sein du PE, les avis divergent. Or, il est crucial que les dossiers les plus importants fassent l'objet d'un examen approfondi en commission puis en plénière, et donnent lieu à deux lectures si nécessaire. En l'absence de critère universellement valide (un nouveau texte n'est pas forcément plus important que la réforme d'un ancien ; un texte court peut être aussi crucial qu'un long ; un texte présenté par la Commission comme étant de l'ordre de la « refonte » ou de la « codification » peut être très politique...), il faut un dispositif d'examen au cas par cas ;
- il faut prendre en compte l'impact des trilogues sur les équilibres internes au PE : la généralisation de cette procédure a conduit à une réallocation du pouvoir. Les trilogues ont davantage profité aux 'grands' groupes (et en leur sein aux membres les plus influents) et aux hiérarques de l'assemblée (présidents de commissions, vice-présidents de l'assemblée en charge de la codécision). A contrario, les députés du rang, les membres des 'petits' groupes et les non-inscrits ont le sentiment que la décision leur échappe. Ici encore, deux visions de la démocratie (*par le PE et au PE*) s'affrontent.

2.2 L'initiative législative

Très tôt, le PE s'est arrogé un droit « d'initiative de l'initiative » sur la base de son droit d'adopter des résolutions déclaratives. Le traité de Maastricht a formalisé ce droit :

Article 225 TFUE (ex-article 192, second alinéa, TCE) : Le Parlement européen peut, à la majorité des membres qui le composent, demander à la Commission de soumettre toute proposition appropriée sur les questions qui lui paraissent nécessiter l'élaboration d'un acte de l'Union pour la mise en œuvre des traités. Si la Commission ne soumet pas de proposition, elle en communique les raisons au Parlement européen.

Ce pouvoir est aujourd'hui partagé, dans certaines conditions, avec le Conseil, les Etats-membres, la Cour, la BCE et les citoyens européens, via l'Initiative citoyenne européenne (ICE) instituée par le traité de Lisbonne. Dans les faits, le Conseil contourne les procédures existantes en empruntant la voie du Conseil européen, qui est désormais à l'origine de 50% des initiatives législatives de la Commission.

Pour l'heure, le PE ne s'est pas réellement mobilisé autour de cette possibilité, et semble s'en remettre davantage à l'engagement de la Commission à exercer « *son droit d'initiative de manière constructive en vue de rapprocher les positions du Parlement européen et du Conseil* » (déclaration commune sur les modalités de la codécision, 2007). Des progrès ont été réalisés dans le recours à l'article 225 TFUE, mais les résultats restent décevants pour les promoteurs des initiatives, en raison de l'attitude de la Commission.

Le PE devrait exiger de la Commission qu'elle traite ses initiatives à l'égale des ICE, qui font l'objet – à tout le moins – d'une communication officielle. Le Vice-Président Timmermans a laissé entendre que c'était envisageable, lors de son audition. Compte tenu du succès de la procédure d'ICE, il conviendrait que le PE use davantage de la procédure de l'article 225 TFUE, notamment pour apparaître comme un relais des demandes qui s'expriment dans la société civile.

Afin d'éviter que les progrès de la démocratie représentative ne fassent les frais de ceux de la démocratie directe, il importe que le PE apparaisse comme un interlocuteur pour les acteurs de la société civile porteurs de projets législatifs, et fasse en sorte que ceux-ci n'envisagent l'ICE que comme une solution de dernier ressort.

2.3 Le passage en revue des propositions pendantes

La Commission européenne a, formellement, le droit de retirer ses propositions législatives tant qu'elles ne sont pas adoptées en première lecture. La Commission Barroso I avait abondamment usé de ce droit, créant la polémique avec le PE : la Commission jugeait que c'était là une mesure « technique », alors que certains députés y voyaient un geste par essence politique.

La Commission Juncker va probablement faire de même, mais dans une approche plus politique encore. Dans les lettres de cadrage envoyées aux candidats commissaires, le Président a en effet indiqué « *I will ask you to discuss, within the first three months of the mandate, with the European Parliament and the Council, the list of pending legislative proposals and to determine whether to pursue them or not, in accordance with the principle of 'political discontinuity'* » (lettre à Frans Timmermans, 10 septembre 2014). La référence au principe de « discontinuité politique » laisse entendre que la Commission Juncker ne s'estimera pas tenue par les propositions faites par la Commission Barroso II, et qu'elle pourrait faire un usage massif de son droit de retrait. Ce principe, inspiré de la vie politique allemande, n'était pour l'heure d'application qu'au PE.

Le retrait de propositions pendantes n'est pas neutre politiquement : il peut être un moyen de poursuivre des objectifs politiques, et doit donc retenir toute l'attention du PE. L'enjeu est d'autant plus crucial que J.C. Juncker a décidé, comme son prédécesseur, de moins légiférer. Rappelons que la Commission Barroso II a proposé 40% de textes législatif en moins que la précédente. Enfin, cette perspective pose un problème de calendrier : si la Commission retire un grand nombre de propositions, celles-ci ne seront proposées à nouveau qu'en 2016 ou 2017, compte tenu de la lourdeur de la procédure d'élaboration. Dans ces conditions, le PE va être confronté à un afflux de normes en fin de mandat, et contraint – comme il l'a été lors de la précédente législature – d'accepter la logique des accords en première lecture.

Le PE doit donc prêter toute l'attention requise à cet enjeu pour éviter d'être mis devant le fait accompli par la Commission. Si le retrait de certaines propositions peut être politiquement souhaitable, et répondre à des attentes qui s'expriment au PE et dans l'opinion, une approche au cas par cas est indispensable.

Un autre dossier, connexe et tout aussi brûlant, et celui de l'éventuelle abrogation de normes existantes. Il renvoie, encore une fois, à la problématique de ce qui est politique et de ce qui ne l'est pas.

3. LE ENJEUX DU CONTROLE POLITIQUE

En matière de contrôle, les enjeux sont multiples et étroitement liés à la nouvelle configuration institutionnelle qui émerge à l'issue du traité de Lisbonne et de l'investiture de la nouvelle Commission.

3.1. Le contrôle de la Commission

Le PE est doté de tous les moyens dont disposent les chambres modernes pour contrôler la Commission, et les députés en font un usage extensif, en toute indépendance.

Le réel enjeu concerne désormais la capacité du PE à entretenir le dialogue politique noué à l'occasion de l'investiture de la Commission, et à faire progresser l'idée que les commissaires doivent lui rendre des comptes. Cela passe notamment par le maintien des contacts entre les commissions parlementaires et le ou les commissaires auditionnés.

La nouvelle structure de la Commission, avec ses sept vice-présidents chargés de superviser le travail d'un certain nombre d'autres commissaires, pose aussi des problèmes pratiques. Dans quelle commission parlementaire vont-ils être reçus ? Dialoguer avec les autres commissaires a-t-il encore un sens, si les vice-présidents concentrent le pouvoir d'initiative législative ?

Pour ce qui concerne l'approche globale des rapports avec la Commission, il n'appartient pas à l'auteur de ces lignes de prendre position. Les députés européens vont devoir opérer un choix entre deux attitudes, qui renvoient à deux logiques :

- une logique d'indépendance institutionnelle entre PE et Commission, dans la continuité des législatures précédentes ;
- une logique de majorité parlementaire, impliquant un soutien de principe à l'action de la Commission par les groupes qui ont voté son investiture.

3.2. Les rapports avec le Conseil européen et son Président

Le Conseil européen est aujourd'hui le centre d'impulsion de l'Union. Il a clairement pris en charge la fonction de leadership initialement dévolue à la Commission. Il importe donc que le PE développe un dialogue avec cette institution, et notamment avec son Président.

Le PE a déjà réussi à établir des contacts fructueux avec Herman Van Rompuy, qui a régulièrement rendu compte de son action devant les députés. Le PE devrait tirer profit de l'arrivée d'un nouveau Président pour essayer de faire évoluer les choses et faire valoir que l'irresponsabilité politique du Président du Conseil européen n'exclut pas qu'il rende des comptes aux députés.

Les rapports du PE avec le Conseil européen et son Président seront nécessairement conditionnés par les choix opérés vis-à-vis de la Commission – indépendance ou soutien.

3.3. Les enjeux de la législation déléguée et de la comitologie

C'est là une dimension plus technique de la fonction du contrôle du PE, mais pas moins importante. Après avoir longtemps bataillé, le PE jouit aujourd'hui d'une information substantielle sur une partie importante des activités de comitologie. Il est aussi pleinement associé à la procédure de délégation législative à la Commission introduite par le traité de Lisbonne. Toutefois, assurer le suivi de ces dossiers est un travail complexe et ingrat ; peu de députés acceptent d'y consacrer une partie significative de leur travail parlementaire.

Il est indispensable de mieux sensibiliser les députés aux enjeux de la législation secondaire, qui conditionne fortement l'impact des politiques européennes. Il faut également accroître les moyens administratifs dévolus à cette tâche, et clarifier les responsabilités en la matière. Il semble que les acteurs des commissions

parlementaires (députés et fonctionnaires), qui ont suivi l'élaboration des actes, sont plus à même que les agents des services transversaux du PE de saisir les enjeux de la négociation sur la législation secondaire.

Par ailleurs, il faut que le PE réclame des améliorations en la matière. Plusieurs difficultés méritent d'être évoquées :

- la coexistence durable de procédures antérieures et postérieures au traité de Lisbonne, et le désir de certains acteurs de maintenir les premières (PRAC). Cette tendance est notamment le résultat des excès commis par la Commission lors des premières mises en œuvre de la procédure de législation déléguée, et des réactions du Conseil à cela ;
- la nature *ad hoc* des procédures, qui comportent de nombreuses exceptions, dérogations, cas particuliers qui confèrent à la législation secondaire une complexité juridique inédite ;
- cette complexité limite la capacité des acteurs politiques (députés européens, ministres) et des représentants de la société civile à saisir les enjeux réels de la législation déléguée. Elle aboutit à confier l'élaboration de la législation secondaire à des fonctionnaires, alors même que le Président de la Commission entend accroître la dimension politique du fonctionnement de l'Union ;
- la législation secondaire souffre plus aussi d'un manque de transparence et d'un accès problématique aux documents relatifs à la délégation législative, à la comitologie et même aux trilogues ;
- les négociations en trilogue achoppent très fréquemment sur la question de la ventilation entre actes délégués et actes d'exécution, au grand dam des représentants du PE qui aimeraient se concentrer sur d'autres enjeux.

Un futur accord interinstitutionnel devrait clarifier la situation, mais il importe que le PE aborde la négociation avec des objectifs clairs et des demandes fortes. Trois points pourraient retenir l'attention :

- les interprétations abusives des procédures d'exécution (par exemple, la clause *no opinion-no adoption* de l'article 143.3) ;
- le risque de voir les mesures d'exécution aboutir, paradoxalement, à alourdir la législation primaire et à freiner sa mise en application ;
- la nécessité de former à une large échelle les acteurs des institutions et les représentants de la société civile aux subtilités de la législation déléguée.

Le PE a vocation à se faire l'écho des préoccupations qui s'expriment en la matière dans la société civile et chez les destinataires des politiques européennes. Une première étape pourrait être l'organisation d'une audition publique au PE, associant des représentants des trois institutions, des experts, des praticiens et des représentants des médias. Cela mettrait le PE en position de force pour négocier l'accord interinstitutionnel.

III. LA PROBLEMATIQUE DE L'ORGANISATION INTERNE DU PE

Les perspectives pour l'organisation interne du PE dépendront largement des priorités définies en matière de législation et de contrôle. Quelques points méritent toutefois d'être examinés, quoi qu'il en soit.

3.1. Les enjeux de la « rationalisation » de la délibération

Comme on l'a indiqué en introduction, le PE est une chambre où les comportements sont très normés et où les organes hiérarchiques et les ('grands') groupes jouent un rôle prépondérant. Cette option est une garantie 'd'efficacité' pour le PE (entendue comme la capacité à respecter les délais et les agendas, et à réunir les majorités nécessaires pour faire entendre sa voix dans le dialogue institutionnel), mais elle a des conséquences en termes d'allocation du pouvoir au sein de l'institution.

Elle suscite aussi des réactions négatives de la part de certains élus et groupes politiques, voire de certaines délégations nationales, attachées à un fonctionnement parlementaire moins normé.

3.2. L'image publique du PE et la mise en lumière du travail en commission

La « rationalisation » de l'activité du PE pose aussi le problème de l'image de l'institution – sa délibération étant difficilement compréhensible et offrant peu de moment d'interaction libre entre les élus. Les choix stratégiques à opérer dans les rapports du PE avec la Commission (indépendance ou soutien) auront également des conséquences importantes pour l'image de l'assemblée.

Deux tendances contradictoires émergent aujourd'hui :

- le PE apparaît comme une assemblée où la diversité idéologique est croissante : la présence de nombreux élus eurosceptiques prouve que le PE n'est pas une institution bureaucratique et unanime, mais une assemblée représentative de toutes les opinions qui s'expriment dans la société, ouverte à la controverse politique ;
- le large soutien des groupes S&D, PPE et ALDR à la Commission Juncker, et la possibilité d'une logique de « cogestion » du PE par ces trois groupes, donne au contraire l'image d'une assemblée consensuelle, où le clivage gauche-droite s'efface, et qui marginalise les élus des autres groupes.

La plénière donne une image un peu caricaturale de ces deux tendances. A l'inverse, les commissions parlementaires montrent que les accords « au centre » ne sont pas systématiques, mais construits aux termes de négociations difficiles, et que les élus des autres groupes ont pleinement voix au chapitre. Des efforts de communication mériteraient certainement d'être faits dans cette direction.

3.4. Les études d'impact

Dans le cadre de la *Better regulation strategy*, la Commission a systématisé la réalisation d'études d'impact *ex-ante* lors de la préparation de nouvelles propositions législatives. Le Vice-Président F. Timmermans semble très attaché à cette pratique.

Les députés se sont souvent plaints de la qualité et de la partialité des études menées par la Commission. Ils ont ainsi adopté en juin 2011 un rapport « garantir l'indépendance des études d'impact » et se sont dotés d'une structure dédiée : l'unité « évaluation d'impact *ex-ante* », qui analyse les études de la Commission et réalise les siennes sur les amendements des députés. Cette unité ne dispose toutefois que de 5 agents, et a donc d'une capacité d'action très limitée par comparaison avec la Commission. En outre, son action ne fait pas l'unanimité : certains députés craignent que l'unité ne réduise leur liberté dans la rédaction des amendements et ne ralentisse le processus législatif – l'évaluation des amendements prenant du temps. Une systématisation des études d'impact *ex-ante* au sein du PE est, il est vrai, de nature à accroître encore la logique de « rationalisation » de son fonctionnement. Cette option est un choix politique, qui doit être traité comme tel, et non comme une évidence.

La réalisation d'études d'impact *ex-post* ne présenterait pas le même défaut : elle permettrait aux députés de mieux saisir les enjeux d'un dossier, de prendre des initiatives, sans contraindre leur action et sans accroître le caractère « bureaucratique » de la délibération.

4. CONCLUSION

Le PE est à nouveau à un moment-charnière de son histoire, qui lui donne l'occasion de redéfinir ses rapports avec les autres institutions, et d'établir de nouveaux rapports de force.

L'approche du fonctionnement et de la stratégie de l'assemblée en termes « d'efficacité » mérite de faire l'objet d'un débat ouvert, compte tenu de son impact sur les dynamiques internes de l'assemblée, le rapport entre expertise et politique, et l'image du PE.

À l'échelle interinstitutionnelle, le processus de « parlementarisation » se poursuit. La prochaine étape est logiquement l'inscription dans les traités de la vocation du PE à choisir le Président de la Commission à l'issue des élections (voire la totalité du Collège) et à disposer d'un véritable pouvoir d'initiative législative, conjointement avec la Commission et le Conseil.

Biography

Olivier Costa is Director of the Department of Political and Administrative Studies of the College of Europe (Bruges) and Research Professor at the Centre national de la recherche scientifique (University of Bordeaux). He is co-Director of the Jean Monnet Center of Excellence of Aquitaine. He has been teaching EU studies in many Universities in Europe, USA and Japan. He has published numerous books, articles and editorial contributions dealing with European institutions – mainly the European Parliament – and policy-making, and with parliaments and MPs. He is member of the editorial board of the Journal of European Integration, the Journal of Legislative Studies and the RISP: Italian Political Science Review.



Panel II - Constitutional evolution of the EU

Wolfgang Wessels

Differentiation of the governance in the European Union and challenges of democratic legitimacy

Monica Claes

National constitutional orders and deepening of the European integration

Steve Peers

Trends in differentiation of the EU Law and lessons for the future

Carlos Closa Montero

Looking ahead: pathways of future constitutional evolution of the EU

Panel II - Constitutional evolution of the EU

Differentiation of the governance in the European Union and challenges of democratic legitimacy

Wolfgang Wessels

1. THE ANALYSIS: THE EVER INCREASING COMPLEXITY OF MULTI-TIER AND MULTI-SPEED DIFFERENTIATION

1.1. GROWTH AND VARIETIES OF DIFFERENTIATED INTEGRATION

1.2. UNCERTAIN CHALLENGES IN THE NEXT TERM

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4. CONCLUSION: NEED FOR FLEXIBILITY

REFERENCES

1. THE ANALYSIS: THE EVER INCREASING COMPLEXITY OF MULTI-TIER AND MULTI-SPEED DIFFERENTIATION

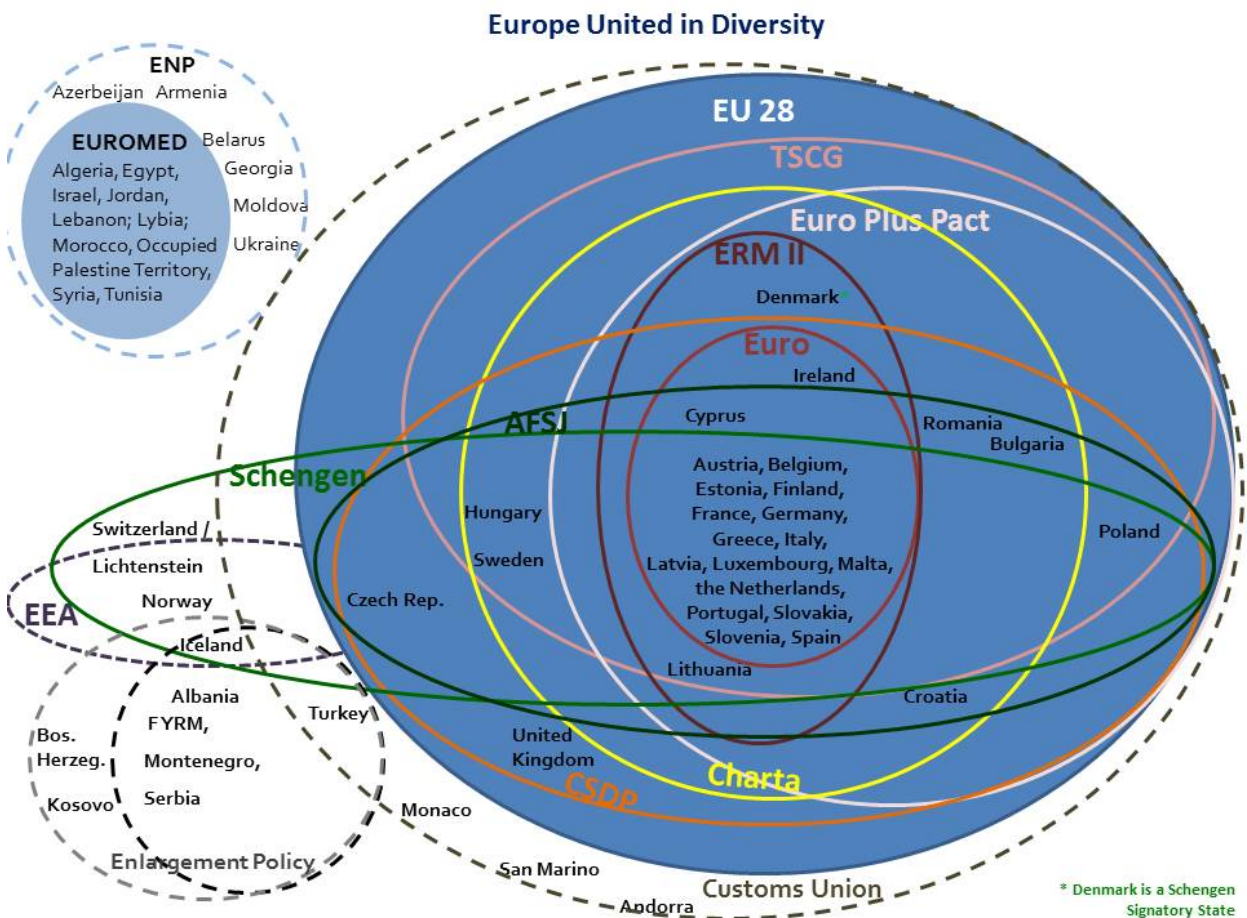
1.1. Growth and Varieties of Differentiated Integration

Constitutional and de facto patterns of multi-tier and multi-speed integration, in which not all member states have the same rights and obligations, have considerably increased in forms and variation of member state participation (see Figure 1) and in overall numbers (Figure 2). We observe varieties of multi-tier governance in several of the Union's exclusive, shared and supporting competences. In consequence, academic contributions and political proposals have developed a differentiated set of respective terms and categories like 'multi-speed', 'l'avant-garde', 'Europe pioneer' 'core Europe', 'variable geometry', 'l'Europe à la carte', 'directorate'. This cacophony tells us that there is neither one single form of differentiation nor one master guiding concept.

The Lisbon Treaty has again added further legal opportunities (see permanent structured cooperation in Art. 46 TEU).

Since 2009 we also observe an additional feature: Reacting to the crisis years the European Council or the Euro Summit adopted new treaties outside the EU framework (the ESM and TSCG) which have again increased the relevance and the complexity of differentiated modes of EU governance.

Figure 1: Europe United (?) in Diversity



Source: Tekin, Funda (2014). *Note: Circles are based on specific EU Treaties and Protocols. Enhanced cooperation is therefore not included. Norway, Iceland, Liechtenstein and Switzerland are marked as Schengen associated, but they also participate in some AFSJ policies as the Dublin Regulation. Further forms of differentiation, especially in view of external action like 'eastern partnership' are not included.*

One major explanation for the creation and the evolution of these forms of differentiation was and is that member governments have in several constellations preferred to pursue imperfect and incomplete forms of solving problems together than to wait in vain for a perfect constitutional and institutional set-up via Treaty revisions in line with the Community method. Many 'solutions' were found ad hoc. In most cases the 'Masters of the Treaties' (BVerG 2009: para. 150) did not care whether and how the EP or/and national parliaments could get involved in the respective policy-making. The issue of democratic input legitimacy was never high on the agenda.

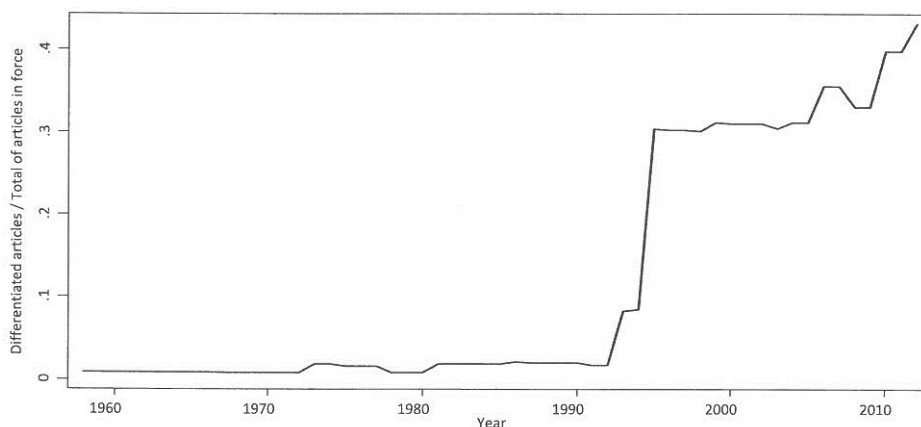
Overall, we observe considerable variations of parliamentary involvement in these forms of differentiation, but in general, the role of EP and national parliaments stays weak in procedures of the differentiated integration.

1.2. Uncertain challenges in the next term

As for the future use of forms of differentiated integration in the next legislative period we can only make educated guesses.

The trends (see figure 2) seem to point towards an increase of differentiation.

Figure 2: Development of differentiated Integration



Source: Winzen, Thomas and Frank Schimmelfennig (2014).

Such an analysis supports the view that, with a growing number of member states, pressures of Euro-sceptic forces and constraining dissent of EU citizens, centrifugal trends inside the EU are dominating. However, we should not underestimate centripetal forces: more member states aim to become members of the Euro and nearly all member states signed the TSCG. For governments it seems to be costly not to sit at the table and not being able to raise their voice in decisive sessions.

Analysing the political dynamics which have promoted forms of differentiated integration the Franco-German tandem has been the major factor and force. In 2014 this engine does not seem to be able and/or willing to mobilize further steps towards some kind of a core Europe.

In view of the form and type of differentiation one past feature is that existing treaty provisions were not perceived and taken as a major gate for differentiation: Those on 'enhanced cooperation' were only used twice due to the legal and procedural constraints of the treaty text. Also the Lisbon TEU's offer to establish a 'permanent structural cooperation' in CSDP matters was not taken up given political divergences among

leading member states. Looking ahead for the next five years there seem to be few dynamic forces and constellations which would lead to a higher frequency of using these articles.

In 2014 major issues on the possible agenda for more forms of differentiation are additional provisions for the Euro zone for reinforcing the Monetary Union (e.g. an own budget) and specific arrangements for the UK. But this list might turn out to be not exhaustive.

For the term starting in 2014 we could not expect any treaty revisions which would enable more general and innovative forms of differentiation, e.g. an associated status (see e.g. Spinelli Group/Bertelsmann Stiftung).

For discussing options for the coming years experiences (which are not necessary a valid predictor for the future) let us expect that in case of crises and urgency additional and unusual forms of differentiations will be formed.

The EP has thus to be prepared for unorthodox forms of differentiation with 'dirty' features of communitarization.

2. ASSESSMENT: CHALLENGES AND DISPUTES ON THE DEMOCRATIC LEGITIMACY

For the EP (like for national parliaments) the complexity of multi-tier governance has considerably increased the difficulties to play an adequate role vis-à-vis the strong multi-level players of the executive branch of government. A specific challenge is to counterbalance the power of national leaders in the European Council. Of particular importance are the scope and form of the EP's participation in the EMU.

Such a task is not just a question of institutional self-defence of the EP but is a critical issue of how the EU polity is being shaped in an open, legitimate and efficient way.

One significant item is the debate and the dispute on the EP's role and its way of participation. This issue concerns the democratic representativeness and thus legitimacy of the EP. We find an asymmetry between the countries involved in executive decision making on one hand and parliamentary control by the plenary of EP on the other. Heads of States or Government (e.g. the Euro Summit), Ministers (in the Eurogroup) and civil servants (in the Eurogroup working group) form exclusive circles without attendance of representatives of the opt-out countries. In the procedure of 'enhanced cooperation' the non-participant members can at least take part in the deliberations without voting (see Art. 330 TFEU). However, in the EP all members vote – e.g. for enabling forms of enhanced cooperation through the consent procedure.

The central question is: how can and should the EP deal with EU policy sectors in which not all member states participate? Should EP members from opt - out countries have equal rights?

The EP's line of arguments (see especially EP 2013) stresses that it is 'the parliamentary body of the EMU and that its appropriate involvement is essential for ensuring the democratic legitimacy and functioning of the EMU' (point 26 of the resolution). In analogy the EP should be empowered to use all its rights and functions in all varieties of differentiation.

As to the internal unity of the EP its position is unambiguous: 'any formal differentiation of parliamentary rights with regard to the origin of Members of the European Parliament represents discrimination on ground of nationality' (point 29). In cases of measures of (formal differentiation) '(...) the asymmetry deriving from the involvement, on the one hand of the representatives of (...) participating countries and, on the other hand, the European Parliament and the Commission as representing all the Union's citizens and promoting the general

interest, (...) does not reduce but, on the contrary, enhances the legitimacy of those measures.’(point 30 of the resolution).

In addition, the EP stresses that the internal rules of the European Parliaments offer a sufficient margin of manoeuvre to organize specific forms of differentiation’ (point 31 of the resolution).

Alternative views should not be underestimated in the public debate of member states. The claim by the EP is disputed by politicians who stress the fundamental legitimacy of Member States represented either by the Heads of State or Government or national parliaments, at least in areas, in which EU institutions decide about national competences. The former French President Nicolas Sarkozy claimed that ‘[o]nly the Heads of State or Government (could) take up responsibilities because at the end they (were) the only ones to dispose of the democratic legitimacy to decide in the crisis’ (Sarkozy 2011).

Also the ruling of the German Federal Court on the Lisbon Treaty in 2009 underlined the need for democratic legitimation through national parliaments and governments (BVerfG 2009, para. 262).

In view of representative legitimacy but also in terms of the Union’s efficiency national voices stress that giving voting rights to MEPs whose voters in their national circumscriptions are not affected might lead to blockages of decisions needed by the member countries participating in a multi-tier construction. Of high significance will be reactions in the media if - in an extreme case - MEPs from Non Euro countries would contribute to an EP decision in which the donor countries are obliged to give considerable credits and debtor countries are obliged to take drastic measures of fiscal austerity. The fundamental democratic principle of ‘no tax without representation’ would be turned around to ‘no representation without tax’.

Following such an assessment one option aims at reinforcing the powers of national parliaments of those member states which are part of the differentiated integration. Especially with regard to the crisis of the euro zone several politicians argue for including those national parliaments, which hold the budgetary power in the decision-making process (see Fischer 2011). Some national ministers even call for splitting the European Parliament to create a separate eurozone parliament of the 18 countries in the Eurozone (Schäuble 2014). Legitimacy should finally be based on the European Council and/or on a chamber of members of national parliaments (Schäuble 2014). Also the idea of a mixed parliament (with MEPs and NPs) is launched (Roth 2011). Such a model claims a legitimacy bonus as national parliaments are seen as the best representative of their citizens – being closer to their constituencies than MEPs in Brussels/Strasbourg or the Head of Government in a possibly distant national capital.

As to increasing the role of national parliaments there are major concerns: Parliamentary debates might exclusively focus on national perceptions and interests leading to parochial, narrow positions which are not helpful for the efficiency of EU decision making. If national parliaments simply formulate and support national preferences, involvement of these legislatures will lead to unproductive blockages in the relevant institutions on the EU level.

Another related option is the creation of a ‘second (parliamentary) chamber’ integrated in some way into the EU’s architecture. Functions and forms of such a new institution for multi-tier constructions are unclear and disputed. A first major issue is the scope of activities: Does each form of differentiated integration need one of those chambers with then varying numbers of participants? Or will there be only one chamber of national MP for all areas of the EU – thus including also parliamentarians from opt-out countries, which would imply major questions of representativeness?

There is also a significant issue of democratic legitimacy. It concerns the representative legitimation of few delegated members of national parliaments. Parliaments of Member States are hesitant or not even empowered (see BVerfG, 2 BvE 8/11, 28/2/2012) to delegate the exercise of their competences to a small group of their members (such as the case of COSAC).

Overall with more parliamentarians involved transparency would be even more reduced: For all, not at least for the Union's citizens, the complexity of who takes which decisions when in several different forms of differentiated integration would increase even more than now and the accountability of political decisions would be even further reduced.

3. ADVICE: A DIFFERENTIATED SET OF STRATEGIES

In view of possible, but not necessarily probable challenges of future forms of differentiation the EP should pursue a set of differentiated strategies. In view of past experiences one major principle for actions will be to expect the unexpected.

3.1. Monitoring efforts for more differentiation

Given the need to expect unexpected and unusual forms of differentiation one major task will be to establish or reinforce an early warning system and to monitor the efforts of member governments to frame and shape forms of multi-tier differentiations. One issue concerns the powers which the Lisbon treaty has allocated to the EP: If the EP has no shared power in legislative or treaty making functions, then the issue needs to be treated differently as if the actions of member governments would weaken the established rights of the EP.

A major item for the EP strategy is thus related to the Union's division and allocation of competences. If multi-tier constructions do not only concern areas and categories of exclusive or shared competences (see Art. 2-6 TFEU), the claim for an exclusive parliamentary representation by the EP will meet strong opposition from national parliaments reinforced partly by Constitutional Courts.

3.2. Forms of internal differentiation

A way to reduce concerns of lacking legitimacy (see above) of the EP-acts might be to prepare parliamentary decisions by committees in which only MEP from the concerned member states are active, e.g. by a sub-committee on the EURO; MEPs from other countries could of course participate. In these special working groups or sub-committees only MEPs from participating countries would then take part in the vote which then might even – in an informal arrangement – determine the final vote of the EP-plenary, if this is acceptable at all. Another suggestion is that the chairpersons of relevant committees need to come from member states inside the differentiated form of integration.

In view of the critical voices it is however doubtful, if these arrangements will look convincing for the European citizens and national media. Some might just look cosmetic.

3.3 Cooperation with national parliaments

One issue will return in many variations of differentiations. Given legal and political obstacles the EP as well as national parliaments will need to discuss how they should extend and deepen forms of inter-parliamentary cooperation in cases of multi-tier and multi-speed governance.

In a coordinated division of labour, parliaments of both levels could jointly exercise a comprehensive participation in the ex-ante preparation and an ex-post scrutiny and control. This model is based on a strategy of a multi-level alliance or coalition of parliaments vis-à-vis power seeking governmental heads in the European Council. To establish regular dialogues among the relevant committees of several levels can be organized in

flexible procedures - adequate for each respective set-ups of differentiated integration. No treaty revisions are needed as long as no real powers are given to these bodies.

At first such an option of a mixed multi-level parliamentary control of differentiated forms of integration looks as reasonable as pragmatic and flexible. However, experiences with COSAC and with the joint committee of Art. 13 of the TSCG indicate major problems: These set-ups have only weak rights in the Union's institutional architecture. Perhaps even more significant is the lack of legitimacy attributed by their home or mother parliaments: 'Contributions from the conference shall not bind national parliaments and shall not prejudice their positions' (Art. 10, Protocol). Neither the EP nor national parliaments are keen to intensify their cooperation beyond forms of informal dialogues. They do not intend to delegate their powers to a small group of their members. National constitutions are also restricting forms of parliamentary delegation (see BVerfG, 2 BvE 8/11, 28/2/2012). Also the EP views the 'creation of a new mixed parliamentary body [...] both ineffective and illegitimate on a democratic and constitutional point of view' (Draft Opinion of the Committee on Constitutional affairs 2012: 8)

Taking a closer look, these forms will be of only a limited relevance for the decision making processes in multi-tier constructions. From empirical evidence we need to conclude that parliamentarians from both levels do not have incentives to engage themselves. In spite of many declarations parliamentarians draw no real benefits from these forms of dialogue as they produce no binding results.

CONCLUSION: NEED FOR FLEXIBILITY

Analysis, assessment and advice show that there is no simple and straightforward strategy of the EP to deal with yet uncertain forms of differentiation. We do not know which forms of differentiation member governments might be tempted to pursue in the next years. Thus no one size fits it all option can be developed. To plan for a yet to be defined form of associated membership (in particular for the UK) will imply other solutions than steps to reinforce the Eurozone. One major recommendation is thus to expect the unexpected and to prepare for eventualities.

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Biography

Prof. Dr. Wolfgang Wessels is chairholder of the Jean Monnet Chair for Political Science at the University of Cologne since 1994. In 2007 he was awarded the Jean Monnet Award in gold and in 2011 with the UACES Award for Lifetime Achievement in Contemporary European Studies. His priorities in teaching and research include the political system of the European Union, the role of the EU in the international system, the deepening and widening of the EU, modes of governance and theories and strategies of European integration. Prof. Wessels is co-editor of the "Jahrbuch der Europäischen Union" (33rd Edition) and the "Europa von A-Z, Taschenbuch der europäischen Integration" (13th Edition) and has published widely in leading Journals and edited volumes. Prof. Wessels is currently publishing a book on the European Council. He is chairman of the executive board of the Institut für Europäische Politik (IEP, Berlin) and of the Trans European Political Studies Association (TEPSA, Brussels). Since 2009 he is vice-president of the German consortium of the Turkish-German University. Since 1981 he is Visiting Professor at the College of Europe, Brugge and Natolin. Prof. Wessels has coordinated several research projects funded by the Deutsche Forschungsgemeinschaft, the Thyssen and Volkswagen Foundations as well as by the European Commission.

Panel II - Constitutional evolution of the EU

National constitutional orders and deepening of the European integration

Monica Claes

Constitutional evolution in the EU takes place in several spheres simultaneously, EU, national and international. Constitutional change in the EU is conditioned by national constitutions, and due regard must be had to the conditions national constitutions impose when considering constitutional change at the EU level. Reversely, participation in EU integration imposes conditions on the constitutional orders of the member states, in terms of respect for the fundamental values of constitutionalism.

1. INTRODUCTION

2. NATIONAL CONSTITUTIONAL OBSTACLES TO EU INTEGRATION

2.1. BACKGROUND

2.2. CONSTITUTIONAL CONDITIONS TO EU INTEGRATION UNDER THE TREATIES AS THEY STAND

2.3. CONSTITUTIONAL CONDITIONS TO TREATY AMENDMENT

3. EU REQUIREMENTS TO NATIONAL CONSTITUTIONAL ORDERS

EXECUTIVE SUMMARY

Background

The EU's constitutional evolution takes place in several spheres simultaneously. National constitutions perform several functions in the broader European constitutional evolution in the EU is also a function of developments in national constitutional orders. National constitutions *facilitate* and *legitimate* European integration, and at the same time, *channel*, *condition* and *limit* further integration. These functions that national Constitutions perform in the context of European integration are most visible at times of Treaty amendment. Yet, also in the day-to-day functioning of the Union and gradual evolution under the Treaties as they stand, national constitutions may impose obstacles and limits to further EU integration. So, what are the current trends in this field and what are the challenges ahead? How should the EU and the EU institutions respond to these national constitutional obstacles?

Constitutional obstacles to EU acts under the current Treaties

National constitutional obstacles to EU law adopted under the Treaties as they stand manifest themselves in three main areas:

- fundamental rights protection
- *ultra vires* review and
- identity review

National constitutional and highest courts in several member states have announced that they may review whether EU acts comply with national fundamental rights requirements; are adopted within the limits of EU competences as interpreted by them and/or do not infringe the national constitutional identity. If they should find such a breach, they may hold EU law inapplicable in their member state.

Such unilateral decision to hold EU law inapplicable would violate the authority and primacy of EU law, and should be avoided. The EU institutions can contribute to avoiding such situation by being sensitive to and responsive to national concerns in these fields.

Constitutional obstacles to Treaty amendment

More and more national Constitutions have been amended so as to include reference to the fundamental principles and values that are considered to impose conditions to participation in European integration. These conditions are usually set out in the Europe provision, which often also contains a procedural requirement for approval of Treaty amendments that impact on the Constitution, either in the form of a special majority in Parliament, or a referendum. Sometimes, Treaty amendments may require constitutional amendment, which may not be possible in those member states where the constitutional core is considered unalterable. In those member states, the limits of European integration would be reached under the prevailing Constitution. Further integration would then require the adoption of an entirely new Constitution.

EU requirements for national constitutional orders

National constitutions impose conditions and limits on European integration, but reversely, participation in EU integration also poses conditions on the constitutional orders of the member states. Member states have to comply with the **basic Union values set out in Article 2 TEU**. Nevertheless, it has become apparent over the past years, that the EU lacks an efficient framework to tackle challenges to the **rule of law** and the **fundamental values of the Union** in purely domestic situations, i.e. situations which do not have a direct link with EU law otherwise than through Article 2 TEU.

There is a need for a more concrete set of norms and obligations imposed on the member states, and standards that can be used in the assessment of the situation in the member states. These standards can be found for example in the Checklist as formulated by the Venice Commission.¹ These standards could either be included in the text of the TEU, or in a separate Charter to which the TEU would refer (as in the case of the EU Charter on Fundamental Rights).

¹ CDL-AD(2011)003rev-e□Report on the rule of law - Adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011).

1. INTRODUCTION

Constitutional evolution in the EU takes place in several spheres simultaneously, at the level of EU law, as well as at the national level, and international treaties and agreements which are relevant for the EU and its member states, most conspicuously, the ECHR. Indeed, the EU's 'constitution' in its broadest sense, is best viewed as a compound, combining elements of EU law (the EU Treaties, the Charter, general principles of EU law), **national constitutional law** and law deriving from other relevant sources, such as the ECHR.

Accordingly, constitutional change in the EU is also conditioned by national constitutions, and due regard must be had to the conditions and limits that national constitutions impose when considering constitutional change at the EU level. **So, what are the conditions and obstacles that national Constitutions impose on EU integration and how should the EU institutions respond? This is discussed in Section 2.**

Reversely, participation in EU integration imposes conditions on the constitutional orders of the member states. While to a large extent member states retain autonomy to shape their constitutional order, these orders must comply with fundamental values of constitutionalism, which the EU and its member states share: rule of law, democracy and fundamental rights protection. How can the EU ensure that member states comply with these fundamental values? **This is the subject of Section 3.**

2. NATIONAL CONSTITUTIONAL OBSTACLES TO EU INTEGRATION

2.1 Background

National constitutions perform several functions in the broader European constitution. On the one hand, they **facilitate** and **legitimate** European integration, and on the other hand, they **channel, condition and limit** further integration.

The **facilitating and legitimating** function of constitutions is illustrated by those constitutional provisions which allow for a 'limitation of sovereignty' or a 'transfer of to the EU. Many member states' Constitutions include a '**Europe provision**'. The force of these provisions varies from merely allowing for participation, to directing the State organs to contribute to the aim of a united Europe. This is evident for instance from the '*Lisbon decision*' of the German Constitutional Court when it held that

'[t]he constitutional mandate to realize a united Europe, which follows from Article 23.1 of the Basic Law and its Preamble means in particular for the German constitutional bodies that it is not left to their political discretion whether or not they participate in European integration'.¹

However, national constitutions not only enable, but also **set limits** to further EU integration. Sometimes the constitutional conditions on participation in EU integration can be found in the same Europe clause that enables it. Yet, they may also derive from concepts and norms contained in or underlying the Constitution, and from general conceptualizations of the relationship between the State and the EU. **The main constitutional obstacles to further EU integration are therefore implicit in the constitution.** They may derive from a specific understanding of concepts such as 'sovereignty', 'democracy' (linked to 'the Nation' or 'the People'), 'statehood', 'essential state functions' as well as 'constitution' itself. This may also include obstacles that are today referred to as '**the core of the constitution**' or the '**constitutional identity**'. Thus, in order to evaluate limits that are implicit in constitutions one needs to look beyond the text of the constitutions, by also studying

¹ German *Bundesverfassungsgericht*, decision of 30 June 2009 (*Lisbon*), 2 BvE 2/08

http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html, at nr. 225.

relevant case law of the constitutional and supreme courts of the Member States, constitutional practice, as well as the academic and public debate.

These functions that national Constitutions perform in the context of European integration are most visible at times of Treaty amendment, as is witnessed by the referendums and decisions of (constitutional) courts in the process of ratification of Treaty amendments. Yet, also in the day-to-day functioning of the Union and gradual evolution under the Treaties as they stand, national constitutions may impose obstacles and limits to further EU integration. In order to structure the debate, a distinction is made between further integration taking place under the Treaties as they stand, and further integration in the form of Treaty amendment. So, what are the current trends in this field and what are the challenges ahead? And how should the EU and the EU institutions respond to these national constitutional obstacles?

2.2 Constitutional conditions to EU integration under the Treaties as they stand

There is a clear trend of national Constitutions and constitutional actors to emphasize the limiting function of national Constitutions *vis-à-vis* European integration. Constitutions are seen as **bulwarks against further European integration**, and the constitutional courts interpreting these Constitutions as **guardians of the national constitutional order**. When we first look at the functioning of the EU under the Treaties as they stand (absent Treaty amendment), the limiting or protective function of constitutions manifests itself in three main areas in the context of European integration: **fundamental rights protection, *ultra vires* review and identity review**. These will be considered in turn.

Fundamental rights protection

The insistence of national constitutional courts on the importance of fundamental rights protection also in the context of EU integration (known as the *Solange* case law) has contributed to the development of EU fundamental rights - first in the form of general principles of EU law in the case law of the ECJ, and later culminating in the adoption of the form of the EU Charter of Fundamental Rights which is now binding. In part, this development has eased the concerns of constitutional courts, and today they generally refrain from imposing national constitutional rights standards on the EU. Nevertheless, several courts and national judges have indicated that they may not always agree with the standard of protection offered at EU level, or with the particular balance struck in concrete cases, e.g. on moral grounds, or on the basis of deep-seated local value choices.

This development should also be seen against the background of the increasing critique of the Strasbourg Court in several member states. Most actors involved, including judges, politicians, academics and the public at large will still agree that there is a need for the ECtHR and for a subsidiary safety-net at the European level to ensure that domestic protection mechanisms are sufficient and do not fall below the European common minimum standard. Yet, there is a growing sense of '**mission creep**' on the part of the ECtHR, which allegedly interferes too much in domestic issues and overreaches into areas that no longer concern the protection of fundamental rights as originally intended in the ECHR. This **critique** may also spill over to the EU and the ECJ, as is evidenced for instance from the reactions in academia and national courts to the ECJ judgments in *Melloni* and *Åkerberg Fransson*, in which the ECJ opted for an extensive interpretation of the scope of the Charter and rejected the view that national constitutional rights should take precedence over EU rights where they offer more protection.

Challenge: for the EU institutions, this development calls for awareness of the sensitivities of particular fundamental value choices and balances struck in the member states in the context of fundamental rights, and responsiveness to these sensitivities. EU law provides for a host of mechanisms and

techniques to accommodate for national preferences which comply with the European common standard, e.g. by allowing national discretion or providing exceptions in specific cases.

Ultra vires review

Ultra vires review (i.e. review of the limits of the exercise of competences by the EU) was introduced by the *Bundesverfassungsgericht* in its Maastricht decision. It has since been taken over by several constitutional courts, and the emphasis on the limits of the competences of the EU has also found its way into the constitutional texts of several member states. The basic idea is that since the member states are the original holders of all power and **Kompetenz Kompetenz** remains with them, they should also retain jurisdiction to ensure that the EU does not unilaterally extend its powers beyond what was agreed in the Treaties. EU decisions taken or acts done outside the scope of the competences conferred on the EU in the Treaties are inapplicable in these member states. The German Federal Constitutional Court, for instance, examines whether the legislative instruments of European institutions and agencies have transgressed the boundaries of their powers in a manner specifically violating the principle of conferral, in other words, that there is (1) a sufficiently qualified breach of powers and (2) that the impugned act amounts to a structural shift in the balance of competences between the member states and the Union. Prior to such finding, the *Bundesverfassungsgericht* will make a reference to the ECJ. Yet, if the European Court should hold an act valid, while the German Federal Constitutional Court would arrive at the conclusion that a particular EU act is *ultra vires*, the act will be declared **inapplicable** in Germany and the German constitutional organs, authorities and courts are prohibited from taking part in putting them into effect.

Other courts, such as the *Danish*, *Polish* and *Czech* courts have followed suit, and challenge the exclusive jurisdiction of the ECJ to review the validity of EU acts under EU law and reserve for themselves the ultimate review of the exercise of these competences. The *Czech* Constitutional Court is the only one which has so far actually held EU action (a regulation and the interpretation and application thereof by the ECJ) *ultra vires* and therefore inapplicable, but that decision can best be seen as the reflection of a conflict between the Czech Supreme Administrative Court and the Government on the one hand, and the Czech Constitutional Court on the other hand, rather than as a direct confrontation between a member state court and the EU.

The most concrete and acute example of a real challenge is the **OMT reference** of the *Bundesverfassungsgericht*, which is currently pending before the Court of Justice.¹ A group of German politicians and individuals challenged actions of an EU institution, the ECB, before the German Federal Constitutional Court which assumes jurisdiction to review whether or not the relevant actions are or are not within the limits of competences of the EU. The German Federal Constitutional Court sided with the plaintiffs in the case and announced that it considered the action to be *ultra vires* and therefore inconsistent with EU law, but it made a reference to the ECJ, to ask whether there could be an interpretation that would make the action valid under EU law.

Challenge: The crucial difficulty with this type of review is that national courts claim jurisdiction to review the legality of EU law unilaterally, with formal and direct effects only for the territory of the relevant member state, but with consequences for the entire Union. The issue of the limits of EU competences is a crucial one to ensure the legitimacy of the EU, but it should be patrolled for all member states alike at the EU level. It is problematic that one member state can unilaterally decide EU acts inapplicable, while they would remain valid for the rest of the EU. To prevent such a situation, the EU

¹ German *Bundesverfassungsgericht*, decision of 14 January 2014, 2 BvR 2728/13 (OMT); Case C-62/14 *Peter Gauweiler and others v German Bundestag*.

institutions should be careful not to transgress the limits of their competences, and be seen to be so careful by giving due account of the exercise of their competences.

Constitutional identity

In its *Lisbon* decision, the German Federal Constitutional Court introduced a third element to its *répertoire* of constitutional review of EU law: constitutional identity review. The Court will review whether EU acts affect 'the area of constitutional identity' or the core of the Basic Law which cannot be transferred (Art. 79 sec. 3 in conjunction with Art. 1 and Art. 20 GG). If the EU should infringe on the constitutional identity of Germany, the German constitutional organs, authorities and courts are prohibited from taking part in putting them into effect.

Again, other courts have followed suit and have announced that they would review whether EU law affects the national identity or constitutional identity of the member state in some way or other, such as the Polish *Trybunał Konstytucyjny*, and the Latvian *Satversmes tiesa*, while the French *Conseil constitutionnel* had developed its own national identity approach even before the German Federal Constitutional Court, and the Italian *Corte costituzionale* has emphasized that EU law should not infringe upon the '*principi inviolabili*' of the Italian Constitution since the 1970s.

Challenge: The German Federal Constitutional Court has made it clear that its constitutional identity review cannot be replaced by national identity review conducted by the European Court of Justice. Nevertheless, an awareness of and responsiveness of the EU institutions to concerns for national identity and constitutional identity of the member states and their courts is crucial to avoid clashes with national actors. This is true for the EU institutions in the decision-making phase and for the Court of Justice when deciding on challenges brought against the EU.

Conclusion

It should be noted that the three obstacles mentioned above –fundamental rights, ultra vires review and identity review- do not exist in all Member States, or at least, they have not always been made explicit in the same way. There is, accordingly, a great variety between the Member States.

- Several Member States have no -or at least no clearly articulated substantive obstacles for further integration under secondary EU law. This is the case for instance in *Estonia*, the *Netherlands*, the *United Kingdom*, *Croatia* and *Slovenia*. In *Ireland* and *Cyprus*, the Constitution even explicitly grants constitutional immunity to EU law and national laws, acts and measures necessitated by membership.
- In other Member States only one of the obstacles is developed explicitly, such as in *France* (constitutional identity) and *Denmark* (*ultra vires* review).
- The *Czech* constitutional court has defined the obstacles of ultra vires and fundamental rights review, and has hinted at constitutional identity review as an obstacle, but has explicitly refused to further define it and has left it open for further development on a case by case basis.
- In *Germany* and *Sweden*, all three obstacles have been defined.
- In *Bulgaria*, *Malta* and *Poland*, the entire Constitution has to be respected.

The bottom line is, that these instances of unilateral review of the constitutionality of EU action leave considerable leeway to the (constitutional) courts to decide where the limits of EU integration are under the current Treaties. To be sure, such unilateral decisions that EU law would be inapplicable within one member state would violate the authority and primacy of EU law, but they are considered legitimate under the national Constitution of the relevant member states.

2.3. Constitutional obstacles to Treaty amendments

More and more national Constitutions have been amended so as to include reference to the fundamental principles and values that are considered to impose conditions to participation in European integration. These conditions are usually set out in the Europe provision, which often also contains a procedural requirement for approval of Treaty amendments that impact on the Constitution, either in the form of a special majority in Parliament, or a referendum.

A distinction can be made between **substantive** obstacles and **procedural** hurdles.

There is a broad variety among Member States as to the **substantive** obstacles which constitutions impose on further integration by treaties. One set of obstacles concerns the **sheer volume of powers** transferred, which is then considered to threaten fundamental principles of the constitution, such as statehood, national democracy or sovereignty.¹ Again, the best known example is Germany, where the *Bundesverfassungsgericht* has suggested on several occasions that there may be a tilting point at which the sheer volume of powers transferred is so high that it harms German democracy and hence also the German citizens' fundamental right to vote, or that German statehood itself, considered to be a constitutional prerequisite, would be threatened, so that the Treaty amendment would be unconstitutional. In the *Lisbon* decision, the *Bundesverfassungsgericht* has attempted to list the essential state functions or sovereign powers, which need to remain in the hands of the State in order for Germany to retain its sovereign statehood. In essence, five areas of state activity must remain for the democratic will-formation and decision making within Germany.² The *Polish* Constitutional Tribunal has stated that neither Article 90 nor Article 91 of the Constitution could be used as a legal basis for the delegation of competences to the EU to such an extent that this would signify the inability of Poland to continue functioning as a sovereign State and where an international organisation would in fact become the sovereign.³ The *Czech* Constitutional Court has indicated that such limits do exist in the Constitution, but it has refrained from formulating a list, leaving the decision to a case-by-case approach.

The underlying concern in all these cases is similar: the constitutions (are interpreted to) protect the **statehood or sovereignty** of the State and its existence as an **independent and sovereign State**. Accordingly, the State cannot by way of the EU Treaties lose its statehood, sovereignty and independence entirely. In other words, the procedure for the transfer of competences cannot be used to absorb the State in a federal Union which would mark the end of sovereign statehood.

More often, however, the substantive limits concern less the extent of the competences conferred or the precise powers to be transferred, but rather the way in which they are to be exercised, and the **values and principles** they must respect. Specific characteristics of the State or specific value choices expressed in the constitution must remain unaffected and free from interference. Again, there is a broad variety in the constitutional sensitivities that are expressed in the constitutional texts and constitutional doctrine and case law. In some cases, particular **sensitivities** are singled out. These range from issues of neutrality and defence

¹ The Danish *Højesteret*, Decision 6 April 1998 (Maastricht Treaty) par. 9.8 has held that under Article 20 *Grundlov* transfers of competences may not be so extensive that Denmark cannot any longer be considered to be an independent state. According to the Spanish Constitutional Tribunal, transfers of the exercise of competences under Article 93 of the Spanish Constitution have 'material limits' and may not affect the sovereignty of the Spanish State, the Spanish basic constitutional structures and the Spanish system of fundamental principles and values set forth in the Constitution, Spanish *Tribunal Constitucional*, Opinion 1/2004 of 12 December 2004 (re Constitutional Treaty), par. II, 2.

² (1) substantive and formal criminal law, (2) the police monopoly on the use of force towards the interior and the military monopoly on the use of force towards the exterior, (3) fundamental fiscal decisions on public revenue and public expenditure, with the latter exclusion being particularly motivated, inter alia, by social-policy considerations, (4) decisions on the shaping of circumstances of life in a social state, and (5) decisions which are of particular importance culturally, for instance as regards family law, the school and education system and dealing with religious communities, German *Bundesverfassungsgericht*, decision of 30 June 2009 (*Lisbon*), para 252, further elaborated in para 253-260.

³ Polish *Trybunał Konstytucyjny*, decision K 18/04, para 8.

(Ireland and Austria), to specific national conceptions of particular fundamental rights and how they should be protected (abortion in Ireland, *laïcité* in France, abortion and family values in Poland), or to specificities of the form of government of the country (such as republicanism in France and Italy).

Often, the constitutional sensitivities find expression in the form of conditions which membership of the EU must comply with. They are then not restricted to a particular fundamental right or constitutional value, or to one specific element of the form of government, but they relate rather to the **core values of constitutionalism** themselves. It is not always clear, but often implied, that it is the particular *national* expression of these (universal or at least shared European) constitutional values that is protected. Thus, several constitutions (are interpreted to) express the idea that the State can only ratify treaties and participate in the EU or international organisations in so far as these comply with the core values of the constitution. They thus project their basic constitutional principles on the Union, and require the Union to comply with essentially the same principles.

With respect to **procedural hurdles for further integration by way of amending EU Treaties or adopting new ones**, it could be said that, as a general rule, the more a treaty impinges on a national constitution and the more it approaches its core values, or is considered to do so, the more difficult it becomes to ratify such a treaty, and the higher the procedural hurdles that need to be overcome. These hurdles concern both the **approval of the relevant treaty**, and, should this be necessary, **amendment of the constitution**. Constitutional requirements on approval of EU Treaties vary from simple majority in parliament, to special majority for some EU Treaties, to special majority for all EU Treaties, to constitutional amendment by referendum (in Ireland).

If a **Treaty submitted for approval is found to actually infringe the constitution**, the procedural requirements become more stringent, and ratification will usually have to be preceded by a **constitutional amendment**. The procedural requirements for constitutional amendment vary to a large extent. In some countries certain constitutional principles are considered so crucial that they are protected by **constitutional provisions which are declared unamendable**. If a proposed treaty reaches those constitutional limitations, approval can only be secured through other means and avenues. This is especially the case in Germany, where an infringement of the German constitutional identity can only be overcome by the adoption of a new Constitution.

Challenge: With so many national substantive and procedural obstacles, Treaty amendment becomes very difficult and ratification almost unfeasible.

3. EU REQUIREMENTS TO NATIONAL CONSTITUTIONAL ORDERS

National constitutions impose conditions and limits on European integration, but reversely, participation in EU integration also poses conditions on the constitutional orders of the member states. This is very clear in accession processes, when candidate states must comply with the Copenhagen criteria. Only states complying with the values of constitutionalism, rule of law, democracy and the protection of fundamental rights can join the EU. Where necessary, candidate states have amended their constitutional order so as to comply with the conditionality requirements.

Yet, also after accession, member states have to continue to comply with the **basic Union values set out in Article 2 TEU**. Nevertheless, it has become apparent over the past years, that the EU lacks an efficient framework to tackle challenges to the **rule of law** and the fundamental values of the Union in purely domestic situations, i.e. situations which do not have a direct link with EU law otherwise than through Article 2 TEU. This problem has been debated mostly in the context of the developments in Hungary, but also in the context of the situation of the Roma in France or freedom of the media in Italy.

In order to fill the **'enforcement gap'** between infringement procedure under Article 258 TFEU, which requires an infringement of a specific legal obligation under EU law and Article 7 TEU which requires 'a serious and persistent breach', and is considered a 'nuclear option', the Commission has recently formulated the **'EU Framework to strengthen the Rule of Law'**. The new framework establishes an 'early warning tool' allowing the Commission to enter into a dialogue with the Member State concerned to prevent the escalation of systemic threats to the rule of law. The new framework does not constitute or claim new competencies for the Commission but makes transparent how the Commission will exercise its role under the Treaties. The process has three stages: (1) Commission assessment - the Commission assess whether there are clear indications of a systemic threat to the rule of law; (2) **Commission recommendation** - unless the matter has already been satisfactorily resolved, the Commission will issue a 'rule of law recommendation' addressed to the Member State; and (3) **Follow-up to the Commission Recommendation** - the Commission will monitor the follow-up given by the Member State to the recommendation. If there is no satisfactory follow-up within the time limit set, the Commission can resort to one of the mechanisms set out in **Article 7 TEU**.

While this may be a step in the direction of a more effective enforcement of the rule of law in the EU member states, a number of questions remain open. The most important one is that of **standards: by what standards should the EU/ the Commission assess the situation in the member states? What are the precise obligations imposed on the member states in this context?**

A concrete set of standards is still lacking at the EU level. To be sure, the Commission Communication contains an Annex referring to general principles of law stemming from the constitutional traditions common to the Member States that are linked to the rule of law, which have been developed in the case law of the Court of Justice. But this is not a full list. Moreover, it relates only to the rule of law, and not to other fundamental values mentioned in Article 2 TEU.

Challenge: There is a need for a more concrete set of norms and obligations imposed on the member states, clear and reliable standards and criteria to be used in when assessing the situation in the member states. These standards can be found for example in the Checklist as formulated by the Venice Commission.¹ These standards could either be included in the text of the TEU, or in a separate Charter to which the TEU would refer (as in the case of the EU Charter on Fundamental Rights).

¹ CDL-AD(2011)003rev-e Report on the rule of law - Adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011).

In addition, there is also a **'monitoring gap'**, since the EU lacks the instruments to monitor the performance of the member state in respecting democracy, the rule of law, fundamental rights, and the other values mentioned in Article 2 TEU. A predictable mechanism that would treat all member states equally would contribute to increasing the legitimacy of EU action in the field.

Challenge: There is a need for a better functioning monitoring system, which can be created by rethinking the mandate of the Fundamental Rights Agency (FRA). The FRA could, in close cooperation with the Venice Commission and other bodies, contribute to formulating more precise standards to be used to monitor and assess performances of the member states.

Biography

Monica Claes is Full Professor of European and Comparative Constitutional Law at Maastricht University, and Head of the Department of International and European Law of the Law Faculty.

Previously, she was Professor of Constitutional Law at Tilburg University (2008-2010), and senior lecturer, lecturer and junior researcher in European and comparative constitutional law at Tilburg University (2007) and Maastricht University (1993-2007). She holds a PhD in Law from Maastricht University (2004, *The National Courts' Mandate in the European Constitution*, published by Hart, Oxford, 2006); an LLM from the College of Europe, Bruges (1992, distinction), and an MA and BA in law from the Katholieke Universiteit Leuven (1991, *summa cum laude*). Monica is an ERC laureate (2007).

Panel II - Constitutional evolution of the EU

Trends in differentiation of the EU Law and lessons for the future

Steve Peers

The use of differentiated integration has grown, at the level of primary law and in practice, with the last four Treaty amendments.

In particular, it is relevant to the single currency and related measures on economic governance, including treaties outside the EU legal framework and special laws within it. It is also highly relevant to Justice and Home Affairs law.

There is a formal procedure for enhanced cooperation among groups of Member States, although it is rarely used.

Questions arise about the EP's position as regards these measures, in terms of voting by MEPs from non-participating Member States, as well as further future Treaty amendments.

- 1. OVERVIEW: DIFFERENTIATED INTEGRATION**
- 2. DIFFERENTIATED INTEGRATION IN PRACTICE**
- 3. ROLE OF THE EUROPEAN PARLIAMENT**

1. OVERVIEW: DIFFERENTIATED INTEGRATION

KEY FINDINGS

- The **legal framework** for differentiated integration has **changed over time**, allowing **new forms** of differentiated integration and making it **easier to adopt**.
- Differentiated integration has also developed **outside** the EU legal framework, **closely connected** to differentiated integration measures within that legal framework.
- Differentiated integration has also developed **within** the EU legal framework where it is **not formally provided for**, again **closely connected** to differentiated integration measures which are formally provided for within that legal framework.
- The development of differentiated integration is frequently (but not always) legally and politically **controversial**, and some forms of differentiated integration are **less frequently used** than others.

Initially, the Community Treaties (as they then were) **did not formally provide** for differentiated integration. The first significant provision for such integration was the original Treaty on European Union (TEU), ie the Maastricht Treaty, which provided for **Economic and Monetary Union** (EMU) to start potentially among a limited number of Member States, and also provided for a potentially permanent opt-out from this policy for the UK and Denmark. Some of the economic governance measures in this area (such as sanctions for Member States which breach budget deficit rules) only apply to 'euro-zone' States (ie the Member States participating in EMU).

The Treaty of Amsterdam then provided for another area for differentiated integration: **Justice and Home Affairs** (JHA) law. In particular, the UK, Ireland and Denmark did not have to participate in the rules regarding civil cooperation, immigration and asylum. As for the **Schengen rules**, they were extended to further Member States only when the existing Schengen States considered those Member States ready for this. The UK and Ireland were permitted to apply to opt in to only part of the Schengen rules, while Denmark applied those rules only in the form of international law.

Furthermore, the Treaty of Amsterdam provided for the first time for **enhanced cooperation**, the general possibility of some Member States going ahead of others to adopt some EU law that does not apply to all Member States. However, the possible authorisation of enhanced cooperation was subject to fairly **strict conditions**. Next, the **Treaty of Nice amended the rules** on enhanced cooperation, to make it easier to authorise.

Most recently, the **Treaty of Lisbon amended** the rules on differentiated integration in several respects. As regards **EMU**, it inserted a new Article 136 into the Treaty on the Functioning of the European Union, providing for the adoption of measures concerning economic governance that would only apply to the euro-zone Member States. As regards **JHA**, it extended the opt-outs of the UK, Ireland and Denmark to include also police and criminal law cooperation, and gave the UK the power to opt-out of pre-existing police and criminal law measures as of 1 December 2014. As regards **enhanced cooperation**, it amended the rules again in order to facilitate the adoption of this form of cooperation.

2. DIFFERENTIATED INTEGRATION IN PRACTICE

KEY FINDINGS

- The use of differentiated integration in the field of **EMU** has been stronger in practice since the enlargements of the EU in 2004-2013.
- The use of the **JHA opt-outs** has grown over time.
- **Enhanced cooperation** has been used since the Treaty of Lisbon entered into force, but in quantitative terms, its impact has been modest.
- The use of differentiated integration **outside the EU framework** (but linked to it), and **within the EU framework** (even where it is **not formally** provided for) has become a factor since the entry into force of the Treaty of Lisbon.

When EMU was established in 1999, only two Member States without an opt-out (Greece and Sweden) were a non-participants, and Greece joined EMU soon after (2001). Only two Member States were given formal opt-outs from **EMU** (Denmark and the UK), although these opt-outs have been applied in practice. A number of Member States joining the EU after the original TEU entered into force do not participate in EMU (Sweden, Poland, Hungary, the Czech Republic, Romania, Bulgaria and Croatia). After the entry into force of the Treaty of Lisbon, Article 136 TFEU has been used several times to adopt economic governance measures for euro-zone States only (some of the 'six-pack' measures, and both of the 'two-pack' measures).

As regards **JHA**, initially the UK and Ireland opted in to all civil law measures, all measures on irregular migration, and almost all asylum measures. This changed by the mid- to late-2000s, after which point the UK and Ireland opted out of most second-phase measures adopting the Common European Asylum System, as well as many measures relating to irregular migration and some civil cooperation measures.

Following the entry into force of the **Treaty of Lisbon**, the UK and Ireland have increasingly used the opportunity to opt out of police and criminal law measures. Also, Denmark is no longer covered by measures in this field adopted since that Treaty entered into force. The UK has invoked its **block opt-out** over measures adopted before the entry into force of the Treaty of Lisbon, although it has also sought to opt back into a number of these measures.

The partial application of the **Schengen rules** by the UK and Ireland has been approved by the Council, although Ireland's application has not been put into force yet, and the UK is not yet applying the Schengen Information System in practice. There has also been a lengthy delay extending the Schengen system to Romania and Bulgaria. Cyprus and Croatia do not yet participate in the Schengen rules either.

Enhanced cooperation was used for the first time in 2000, when it was authorised for the adoption of a Regulation on choice of law in **divorce**. It was used for a second time when adopting EU legislation on a **unitary patent**. A third use of enhanced cooperation has been authorised, as regards a **financial transaction tax**, although in this case the participating Member States have not yet adopted the proposed legislation in this field.

Outside the EU legal order, groups of Member States have adopted a treaty establishing the **unified patent court**, linked to the EU's unitary patent legislation, as well as treaties providing for financial assistance to Member States, the 'fiscal compact' and a bank resolution fund, all linked to **EMU**. **Inside the EU legal order**, legislation giving banking supervision powers to the European Central Bank and establishing an EU banking resolution fund applies to Eurozone States, and willing participants among non-eurozone States, only.

The use of differentiated integration has been **legally controversial**, particularly as regards the scope of the JHA opt-out, EMU, the unitary patent and the financial transaction tax. In a series of cases brought to the CJEU, the UK has challenged its inclusion within EU measures extending social security rules to third States, on the grounds that its JHA opt-out should apply. It has lost two of these cases (the third is pending). The CJEU has also clarified that EU development powers apply to readmission clauses with third states; that EU transport powers apply to aspects of criminal law information exchange as regards road traffic offences; and that criminal law provisions in a treaty relating to intellectual property protection are ancillary.

As regards EMU, the UK objected to aspects of the Fiscal Compact treaty, but did not challenge it. Various treaties related to EMU have been challenged in the national courts, as well as the CJEU (*Pringle* case). Spain and Italy challenged the EU's unitary patent legislation, and the UK challenged the authorisation of the financial transaction tax.

3. ROLE OF THE EUROPEAN PARLIAMENT

KEY FINDINGS

- The EP **rarely has a formal distinct role** as regards differentiated integration, except as regards authorisation of the approval of enhanced cooperation.
- The question arises whether the EP should have a **bigger role**, as regards suggesting the use of enhanced cooperation and limiting the role of MEPs from non-participating Member States.
- Further questions arise as to whether there should be Treaty amendments regarding the use of differentiated integration, and if so, what form they should take.

Differentiated integration in the field of **EMU and JHA** is triggered automatically. A proposal is made by the Commission, with the relevant legislative procedure then becoming applicable. The non-eurozone Member States automatically do not participate in Eurozone legislation not applicable to them, and Denmark automatically does not participate in non-Schengen JHA measures. The UK and Ireland have three months to opt in to JHA proposals (they can also opt in after such measures are adopted, and have occasionally done so).

With enhanced **cooperation**, there is a two-step process. It is authorised when a group of Member States request the Commission to make a proposal for enhanced cooperation. If the Commission does so, then it must be approved by the Council (by qualified majority) with the consent of the EP. There are special rules for foreign policy and aspects of criminal law, but they have not been used yet.

There is no special procedure for the use of differentiated integration **outside the EU legal framework** (and no formal role for the EP). Within the EU legal framework, the EP's normal role applies.

Usually the **non-participating Member States** have observer status but no vote, while the EP has its ordinary powers (with **all MEPs voting**), as do the other EU institutions (with all Commissioners, CJEU judges, et al having a vote). As an exception, where differentiated integration is adopted within the ordinary EU legal framework, all Member States can vote.

The question arises whether the **EP ought to play a greater role** in triggering enhanced cooperation, given that it is not used in practice much. For instance, the EP could suggest that a group of Member States may wish to trigger the procedure, as regards EU legislative proposals which are stuck in the Council.

Another question arises as to whether there ought to be a **Eurozone Parliament**, or whether the MEPs from non-participating Member States ought to abstain as regards proposed measures which do not affect their Member State (at least for the time being).

Finally, the EP could consider if it supports **further Treaty amendments** relating to the use of differentiated integration, and if so, what form they should take.

Biography

Steve Peers is a Professor of EU Law and Human Rights Law at the University of Essex. His research interests include EU Justice and Home Affairs, Constitutional, External Relations, Human Rights, Internal Market and Social Law. He is the author of three editions of EU Justice and Home Affairs Law and the co-author of Commentary on the EU Citizens Directive, and the co-editor of EU Immigration and Asylum Law: Text and Commentary (2 editions); Commentary on the EU Charter of Fundamental Rights; and European Union Law. Also, he has written over eighty articles on many aspects of EU law in journals including the Common Market Law Review, European Law Review, International and Comparative Law Quarterly, European Law Journal Yearbook of European Law and the Cambridge Yearbook of European Legal Studies, as well as many chapters in books. He has worked as a consultant for the European Parliament, the European Commission, the Foreign and Commonwealth Office, the House of Lords Select Committee on the European Union and the Council of Europe, and contributed to the work of NGOs such as Amnesty International, Justice, Statewatch and the Immigration Law Practitioners' Association.

Panel II - Constitutional evolution of the EU

Looking ahead: pathways of future constitutional evolution of the EU

Carlos Closa Montero

Following the effects of the economic and fiscal crisis and the institutional instruments created to deal with it, different actors (from governments and EU bodies to scholars) have aired proposals for EU reforms. In some cases, these require Treaty revision. Future constitutional evolution faces the challenge that the very stringent EU revision requirement (i.e. unanimity) poses. Several options are available but none of them seems totally satisfactory.

EXECUTIVE SUMMARY

1. DEMANDS FOR EU CONSTITUTIONAL DEVELOPMENT

2. LIMITATIONS OF CURRENT PROCEDURES FOR CONSTITUTIONAL EVOLUTION

2.1. THE UNANIMITY REQUIREMENT AND ITS EFFECTS

2.2. CONSTITUTIONAL EVOLUTION VIA EXTERNAL TREATIES AND LESS THAN UNANIMITY

3. OPTIONS AND CHALLENGES

3.1. OPTION 1 CONSTITUTIONAL DEVELOPMENT WITHOUT FORMER TREATY REFORM.

3.2. OPTION 2 ADHESION TO EXISTING REVISION PROCEDURES (ARTICLE 48)

3.3. OPTION 3 REACHING OUT BEYOND THE CURRENT PROCEDURES

3.4. OPTION 4 BY-PASSING EU TREATIES AND ACTING OUTSIDE THE EU FORMAL STRUCTURE

4. CONCLUSION

REFERENCES

EXECUTIVE SUMMARY

Background

The economic and fiscal crisis has demanded EU responses which, in formal terms, adopted a heterogeneous form: EU secondary legislation, revision of the TFEU and, most noticeable, the negotiation of new treaties which bound EU member states outside the EU treaties themselves, were negotiated outside of EU prescribed procedures and required less than unanimity for entering into force. These instruments did not close all issues opened by the crisis and this, together with EU's own development itself, has prompted the revision agenda. Actors (involving national government, EU bodies and scholars) have opened the discussion on new reforms needed which comprise from a repatriation of EU powers back to member states to creating a fully-fledged economic and political union. Independently of the substance of the changes implemented, future constitutional evolution faces the constraint posed by the strictness of the EU revision requirement: unanimity. In fact, extra-EU Treaties (i.e. the TSCG and the TESM) have already applied a less than unanimity requirement for entering into force and these alternative rules have proved their efficiency.

Options and challenges

This analysis presents several options through which future EU constitutional development may advance. Each of them combines specific advantages and disadvantages and specific solutions on how to address the issues of democratic receptiveness and accountability in constitution making (even if constitution making implies a reduction of EU powers) legitimacy, and efficacy (i.e. the possibility for each of these procedures to deliver successful treaty revision and/or constitutional development). None of them provides an optimal mix of these criteria, nor none of them seems to be more likely than the others. Main EU actors (both institutions and governments) may face tough choices if EU constitutional development is taken seriously.

1. DEMANDS FOR EU CONSTITUTIONAL DEVELOPMENT

The reform of macroeconomic and fiscal governance during the crisis has left a number of pending issues both on the substantive dimension (such as the “constitutionalization of the Partnership Agreements contemplated in the Two Pack or the issue of the eurobonds) as well as substantive issues (such as the improvement parliaments’ role in the scrutiny of fiscal and macroeconomic governance including *inter alia*, for instance, Troika’s accountability to the EP). A number of actors, mainly from governments and EU institutions, have suggested lines for reform that take in the direction of future constitutional development. In addition, the British Prime Minister and a number of other politicians in the UK have argued strongly in favour of reforms for the EU that may include a repatriation of powers to member states. Reactions range from those who oppose formal Treaty revision (given the costs and risks that they involve) and demand reforms to proceed within existing treaties to those who frontally oppose British Prime Minister proposals.

Previous experiences of EU constitutional development demonstrate clearly that once reform appears on the table, it is highly unlikely that its agenda can be totally controlled by some actors and the menu of issues may expand to accommodate the demands of different member states and EU institutions as well.

2. LIMITATIONS OF CURRENT PROCEDURES FOR CONSTITUTIONAL EVOLUTION

Current procedures for treaty revision prescribe unanimity. In the context of an ever-growing membership and increasingly significant treaties, unanimity has empowered a large group of veto players. The number of potential veto players intervening in each round of domestic ratification processes has increased dramatically over time. Parliaments always play a role, and this may be affected by the requirement for a majority and the composition of the chamber at any moment, as well as by the intervention of an election between negotiation and ratification. Courts have increasingly intervened in ratification even though they have seldom exercised a power of veto *stricto sensu*. Voters, via referendums, have become the latest addition to the ever-increasing list of veto players. At a minimum, this means that the duration of the ratification process when unanimity is required has increased significantly.

2.1 The unanimity requirement and its effects

The unanimity rule creates a “paradox”: given the opportunity to receive payments on the side, each voter (or actor) will have incentives to falsify his preferences, generating negative externalities for other voters. Hence, even if all voters agree in principle to a policy proposal, they are likely to fail to reach a unanimous consensus, if subjected to the unanimity rule (Parisi & Klick, 2003: 11). Unanimity might produce deadlocks and, in this sense, be inefficient. Because of this, its main proponents for constitutional design, Buchanan and Tullock (1962) argued that unanimity operates as a kind of “aspirational” rule that *inspires* operational rules.

Despite of these predictions, the EU has been able to complete a number of successful *negotiations* under unanimity. However, constitutional developments in the EU depend on a two level game (Putnam; 1988): negotiations have to be ratified by a set of different domestic actors. In a very simple situation, it could be assumed that, in parliamentary democracies, a government that negotiates a treaty has also a majority in parliament to support its ratification. However, the real situation is far more complicated: majorities for ratification can be larger than simple, requiring perhaps the support of parties which does not support the government and that may have different preferences. Also, several chambers may intervene in ratification and these may have different composition. Or an election may intervene between negotiation and ratification

changing the composition of the government and the set of initial preferences. Higher courts, whether Supreme or Constitutional, may be called to adjudicate on treaties' constitutionality (Closa; 2013).

Last but not least, referendums have become an increasingly used procedure for ratification, and this has created deep obstacles for successful treaty revision in several occasions. Altogether, the growth in the number of member states intervening in treaty revision has provoked a huge increase of the number of veto players (i.e. domestic actors with the power to block ratification) creating an authentic minefield (Closa; 2004). Among all these, referendums are arguably the most powerful obstacle to treaty ratification. In any case, it must be stressed that is the unanimity requirement the one that transform domestic procedures into devastating devices in an ever growing membership union. Not surprisingly, extra-EU treaties have recently rehearsed ratification under less than unanimity rules.

2.2 Constitutional evolution via external treaties and less than unanimity

The rigidities of the ordinary revision procedure, the demands of the British government, the urgency required by the crisis and the fact that the new treaties affected only euro members created the conditions for using alternative requirements. Ratification with less than unanimity happened with the two external treaties, the TSCG (Fiscal Compact) and the TESM. The first of these required ratification by 12 out of 17 euro members in order for it to enter into force. This threshold permitted the effect of potential veto players (such as the Irish voters through a referendum) to be neutralised. In practice, the treaty was ratified very quickly (within ten months) by 23 states (even though five of these – Latvia, Lithuania, Hungary, Sweden and Poland – adhered only to the governance provisions of Title V). At the end of the day, only the UK has not signed nor ratified the TSCG since the Czech government formed after the 2013 legislative election decided to sign the treaty and put it to ratification. This happened in coincidence with the end of tenure of President Vaclav Kalus who had blocked before ratification of the Lisbon Treaty. The requirement of the TESM demanded ratification by euro states holding 90% of the fund capital. The minimum possible number of states ratifying would be nine (since the four biggest euro members accounted for 77.3% of the capital). The treaty entered into force after a round of ratification of eight months, and all euro member states finally became party to it. Both cases prove that treaties can be ratified more easily under less than unanimity requirements, and show that states may also accommodate their specific demands in these conditions.

The series of two new external treaties (i.e. the TSCG and the TESM) plus the limited revision of the TFEU (Article 136) permits us to compare the role that domestic actors may play under different ratification requirements. The revision of Article 136 proceeded under unanimity, and the general assumption that it did not grant new powers to the EU, as well as the fact that the Article applies solely to the members of the euro area, guided the analysis by the governments of certain EU member states (e.g. Denmark, Greece, and Latvia), allowing them to submit it to less constrictive ratification procedures. This allowed an easier passage even though all the customary domestic veto players were entitled to participate. Given its limited significance, not many potential veto players perceived it as a threat, and only the Czech President (Vaclav Klaus) used the opportunity to threaten to veto the ratification by refusing to put his signature on the Czech instrument.

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3. OPTIONS AND CHALLENGES

Several options permit EU constitutional development. Each of them combines specific advantages and disadvantages and none seems to be optimal. None of them seems to be more likely than the others.

3.1 Option 1 Constitutional development without former treaty reform.

Several changes to the functioning of the EU could be accomplished within the existing current EU legal framework using mechanisms such as inter-institutional agreements or enhanced cooperation. Whilst this option is relatively low cost in comparison to formal revision ones, its disadvantage is that it does not address some of the most pressing issues raised by economic and fiscal governance changes, such as the issues on democratic accountability and legitimacy via an increase in EP involvement.

3.2 Option 2 Adhesion to existing revision procedures (article 48)

The main advantage of the existing revision procedures is their reliance on a Convention including EP and national parliaments' representatives. Given the nature of the issues on which reform is predicated, the possibility of applying the simplified revision procedure (i.e. without a Convention) seems very slim.

The main weakness of existing procedures derives from its ratification rules which combine the unanimity requirement with full discretion for member states to choose the agents taking part in ratification processes. Although these rules have permitted 7 EU treaty reforms, the growing number of EU member states and veto players taking part in ratification clearly show their limits. The collapse of the EU Constitution and several other instances of partial failure to ratify (i.e. Denmark in 1992, Ireland in 2000 and 2008) illustrate these limitations. The introduction of the so-called referendum lock in the UK and the need to use referendum in some member states cast doubts on the ability to successfully ratify new treaties under an ever enlarging set of veto players.

3.3 Option 3 Reaching out beyond the current procedures

This option assumes the existing procedures for Treaty revision and ratification but provides an emergency mechanism for an eventual ratification failure. Essentially, this is the path proposed in 2002 by the European Commission Penelope Project (European Commission, 2002) through its *Agreement on the Entry into force of the Constitution*. The project designed an ingenious solution. First, all member states would ratify the Constitution, thus fulfilling the requirement of unanimity. Second, but at the same time, they would approve a *Solemn Declaration* confirming their decision to continue to be part of the EU. Should a member state fail to approve this declaration, it would then leave the Union and conclude an agreement with the Union that would regulate its future relationship. Third, the treaty on the constitution would enter into force according to the conditions laid down in the agreement (specifically, with a three-quarters majority of the member states making the declaration). It would apply to states that, by making the declaration, wished to remain in the Union.

The Penelope Project presented some moot points despite its attractiveness: could failure to ratify the declaration cancel the former commitments assumed by a member state or, in other words, could the withdrawal of a member state be imposed by a subsequent obligation? And, at the end of the day, Penelope did not solve the real political question: why would a member state that could foresee its inability to ratify the said declaration consent to be left on one side and leave the way clear for the other member states to advance without it?

3.4 Option 4 By-passing EU treaties and acting outside the EU formal structure

EU member states have in the past used this path to deal with issues related to the EU by means of an extra-EU treaty. Both the Schengen Agreement and the Prüm Convention illustrate the procedure, and the more recent TESM and TSCG also follow this approach. The advantages of this path are large: these treaties have normally bypassed the unanimity requirement and have entered into force only for those member states that ratify them. Hence, they introduce flexibility and secure efficacy since they have dealt with the challenges raised, in particular, during the crisis.

But this approach has significant limitations, as the drafting of both the TESM and the TSCG show. They bypassed the formal requirement of a Convention in article 48 TEU and the involvement of EP and national parliaments was nill (despite the anecdotal involvement of the EP President in an informal capacity). Hence, the democratic quality of the process is very low. In parallel, it lacked transparency (although TSCG drafts were leaked). Finally, the result of this approach creates a variable geometry within the Union which could be extended ad infinitum.

CONCLUSION

Constitutional evolution seems to be inherent to EU nature. By and large, it has proceeded in the past via formal Treaty revision. Given past difficulties with ratification, the main question seems to be whether constitutional development is possible under the current rules, what its cost is and what the alternatives are. Specifically, any future treaty revision would at some point need to address the question of whether future changes can proceed within the strictures of Article 48: chiefly, the requirement for unanimity and the discretionary addition of veto players (such as voters in referendums), which create a true minefield for successful ratification. Even if ratification were to be achieved, the minimum price for this seems to be an increasing internal differentiation or flexibility, granting different statuses to different countries.

Alternatives to the bypassing of unanimity have emerged in practical and theoretical forms. In practical terms, external treaties (i.e. the TSCG and the TESM) have entered into force through ratification requirements that applied lesser requirements than unanimity. Proposals such as the Commission's Penelope Project have also discussed procedures that formally apply unanimity whilst offering an escape route under less than unanimity. But alternatives do not take us far.

Legal bridges (such as the Penelope Project) present real feasibility problems, and the price to pay would be to leave some member states behind. The same applies to the possibility of totally new external treaties: whilst they offer the attractiveness of a smoother ratification (as the TSCG and the TESM prove), they present similar political dilemmas, with the marginalisation of those states that are not prepared to move. Future scenarios are not very stimulating. States may decide to postpone sine die any revision of the treaty, given the difficulties of reaching a successful negotiation, first, and ratification, afterwards. In a second scenario, states may decide to muddle through with an untidy mixture of current rules and new ad hoc requirements. The effect, no doubt, will be the reinforcement of a hard nucleus and the potential exclusion of recalcitrant states. At this point, the Union, as far as its future revision is concerned, seems to be caught between a rock and a hard place.

Biography

Carlos Closa Montero is Professor at the Institute for Public Goods and Policies (IPP) and Director of the Research Area European, Transnational and Global Governance at the Global Governance Programme/Robert Schuman Centre for Advanced Studies at the European University Institute (EUI), Florence. Previously, he was professor at the University of Zaragoza and Complutense (Madrid) and Visiting Professor at the College of Europe (Brugges) and the Instituto Universitario Ortega y Gasset (IUOG), Madrid. He was also Visiting Fellow at the Minda de Gunzburg Centre of Harvard University (2002) and Jean Monnet Fellow (1995-1996) and Salvador de Madariaga Fellow (2004) at the European University Institute (Florence). He is currently Visiting Professor at the University of Groningen (the Netherlands) and Universidad San Pablo-CEU (Madrid). Between 2004 and 2008, he was Deputy Director of the Centre for Political and Constitutional Studies (CEPC, Ministry of Presidency, Spain). He also served between 2005 and 2009 as member of the Venice Commission for Democracy through Law (Council of Europe) representing Spain. Between 2007 and 2009, he served as member of its Enlarged Bureau in 2007.

He has published a large number of articles (in Spanish, English and Italian) on EU citizenship, the EU constitutional structure and the relationship with the Member States in journals such as *Common Market Law Review*, *Journal of European Integration*, *Law and Philosophy* or the *Revista de Estudios Políticos* (in Spanish). His latest book is *The politics of ratification of EU Treaties* (Routledge; 2013).



Panel III

European democracy

Luciano Bardi

The structure of the Europarty system after the 2014 elections

Enrico Calossi

European Parliament Political Groups and European Political Parties: between cooperation and competition

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European Citizens' Initiative - assessment of first lessons

Panel III - European democracy

The structure of the Europarty system after the 2014 elections of the European Parliament

Luciano Bardi

What follows is an analysis of the 2014 European Parliament's elections' impact on the structure of the party system at European level. Such an assessment is of the foremost importance as a party system's development is linked to the model of democracy that will emerge in the political system as a whole. In particular the inclusiveness and stability of EP party groups, as well as the Europarty system's overall institutionalization, are examined.

- 1. INTRODUCTION**
- 2. TYPES AND DEVELOPMENT OF EP PARTY GROUPS: FACTORS AND INDICATORS**
- 3. THE IMPACT OF THE 2014 ELECTIONS ON THE EUROPARTY SYSTEM'S STRUCTURE**
- 4. CONCLUSIONS**
- 5. REFERENCES**

EXECUTIVE SUMMARY

Background

As the competences of the European Union (EU) have expanded, and corresponding concern with the democratic deficit has grown, attention to the effects of the elections of the European Parliament (EP) has also grown. Expectations about a positive impact of the elections were frustrated by the EP's relative lack of powers. The severity of this problem has been reduced as the powers of the EP have expanded, but the EP itself still remains insufficiently politicized to have an effective impact on EU policy making.

In normal democracies, political parties play a central role in overcoming this problem, by presenting the voters with a limited number of alternative visions or programmes and by providing a system within which compromises can be negotiated and coalitions built as well as policies being agreed upon and enforced.

For a party system to exist a structure is needed that will determine the outcomes of party interactions within it. The system is thus defined by the units that make it up (the parties) and by its structure, which in turn determines the outcomes of the usually competitive interactions in which the parties engage with one another in electoral, legislative, or governmental arenas.

Knowing the structure of party competition is important because it constitutes an element for the understanding of key characteristics of the political system as a whole. The party system can be a very important factor for the overall working of democracy in that it affects mechanisms of representation, governmental stability and performance, as well as, ultimately, the legitimacy of governmental outputs.

Aim

The overall aim of this study is an assessment of the 2014 EP elections' impact on the Europarty system, especially with a view to its potential role in the promotion of democracy in the EU. Such an assessment in turns requires an analysis of the changes produced by the elections in the Europarty system's structural characteristics. More specifically this study intends to:

- Measure the impact of the elections on the Europarty system's units in the parliamentary arena, the EP party groups, in terms of changes in their inclusiveness and their dependence on their respective largest national delegations.
- Measure the impact of the elections on the Europarty system's structural elements (i.e. number of party groups, number of effective parties, percentage of MEPs being non-attached or in one-party groups, percentage of of MEPs in the so-called EP core groups).
- Draw conclusions for the development of the Europarty system and for its potential impact on EU democracy on the basis of such findings.

1. INTRODUCTION

As has been noted (Bardi et al. 2010: 97), “a transnational party system requires more than simply the presence of transnational parties”. For a party system to exist a structure is needed that, according to Giovanni Sartori (1976: 43-4), will determine the outcomes of party interactions within it. The system is thus defined by the units that make it up (the parties) as well as by its structure, which in turn determines the outcomes of the usually competitive interactions in which the parties engage with one another in electoral, legislative, or governmental arenas.

Knowing the structure of party competition is important because it constitutes an element for the understanding of key characteristics of the political system as a whole. In particular, in domestic settings, the party system is a very important factor for the overall working of democracy in that it affects mechanisms of representation, governmental stability and performance, as well as, ultimately, the legitimacy of governmental outputs.

At European level the political system's structure is such that some of these features are not directly affected by the party system. It could be argued however that this is precisely the reason why thirty five years after the first universal suffrage elections of the European Parliament (EP) the European Union (EU) is still affected by the democratic deficit the elections were meant to overcome. An assessment of the party system at European level is therefore of the foremost importance, as its full development is a prerequisite for a model of democracy similar to those that prevail in the Member States (MS).

At European level the party system is effectively limited to the electoral and legislative arenas. This allows us to focus on the characteristics of the EP party groups when at national level we would ordinarily dedicate the same attention to the parties' head offices and to their grass-root organisations, that is their respective parties in central office and parties on the ground (Katz and Mair 1993). In other words, our assessment of the impact of the 2014 on the Europarty system will be based the EP party groups, as units of the system itself. Although the correspondence between parties at European level and EP party groups is still incomplete and far from exact, this choice is justified as that composed by the EP party groups is the best developed party system at European level.

2. TYPES AND DEVELOPMENT OF EP PARTY GROUPS: FACTORS AND INDICATORS

EP party groups' have been classified in three different types/categories (Bardi 2002): 1. transnational groups; 2 multi-party groups; 3.one-party groups. The first category consists of groups that consistently include MEPs from all or most of the MS. EPP, S&D and their previous incarnations clearly belong to this category. ELDR/ALDE are usually also included, even if occasionally they have fallen short of this criterion's parameters. The reason for this exception is that historically they form with the other two the core of the EP party system. Their total force is regarded as a positive indicator of The EP party system's institutionalization. Multi-party groups normally include a smaller, albeit significant (between 40 and 60% of the total) number of national components. It consists of three groups in the current EP: the Greens-EFA, the GUE/GNL and the ECR. In general, this seems to be a composite category representing a moderate but perhaps growing source of instability and resistance to the EP party system's institutionalization. One-party groups are defined as those in which one national delegation accounts for at least 50% of the membership. In the current EP this distinction belongs to the EFDD, as 24 of its 48 MEPs belong to the UKIP. With the non-attached members they are considered obstacles to achieving a true supranational Europarty system as they remain closely identified with the largest national delegation, even if they include smaller parties from other countries.

The effects of elections on EP party groups are usually monitored through indices that measure their inclusiveness and cohesion (Bardi 2002). Inclusiveness can be assessed by observing changes in group membership and, more specifically, by looking at trends in the number of countries represented in each one of them. On the other hand, EP party group cohesion can be seen in the degree of agreement expressed in roll-call

votes by the different national party delegations that compose them. Empirical studies of these phenomena have cumulatively produced a positive assessment of EP party group institutionalisation. The significance of such studies however is still open to question (Carrubba et al 2008). Consequently, here we will limit ourselves to an analysis of inclusiveness and, through a study of appropriate indicators, the impact of the 2014 elections on the Europarty system's structure.

Along with the institutionalising effect that the day-to-day operation of the EP has on the party groups, EP elections are probably the main factor in the development of Europarties and of their system. MEPs are elected according to 28 different electoral laws. Their development is thus influenced by and subject to very complex and diversified institutional conditions that can act as constraints, incentives, or, in a more neutral sense, just as factors in the formation of the Europarties themselves.

The fragmentation of the European electoral arena allows the survival of virtually all relevant components, and sometimes even some that are less significant, of most of the national party systems. This feature makes the EP-based party system very sensitive to individual parties' realignments and to changes in voters' opinion trends that may take place at the national level. The high proportionality of the majority of the national laws used in EP elections contributes to this phenomenon. In addition, even parties with relatively irrelevant electoral support at EU level can get seats in the EP because of the over-representation that smaller states enjoy (for example, the seat/population ratio is 1/69000 for Malta, as opposed to 1/897000 for France). Finally, the continuous expansion of the EU can be either a positive or a negative factor in the evolution of EP party groups. Historically isolated national parties may find allies among the representatives from other MS; on the other hand, the absorption of new delegations by existing EP party groups may be problematic.

Besides those deriving from the electoral law(s), other factors derive from the EP's rules and procedures as well as by the EP's day-to-day operation. Fulvio Attinà (1994: 55 *passim*) identified, explicitly or implicitly, the most important of these factors. Belonging to one of the main groups of the EP can be very important for the individual national party delegations: to obtain material resources, but above all to secure political advantages, such as the allocation of positions, rapporteurships and chairs in important parliamentary committees and of otherwise desirable high office positions in the EP. This view is also expressed, in reverse, by those who emphasize the disadvantages to which are subject MEPs who do not belong to any EP party group (Marzocchi, 1997).

The attention of academics to the development of specific indicators for the study of political parties at European level and in particular of EP party groups has been rather limited. In addition, some of the indicators used for parties at national level (such as the level of membership, budgets, electoral volatility, stability) cannot be used because of the peculiarities of the EU political system. As a result, a group's inclusiveness and cohesiveness are considered the main indicators of its development and institutionalization. Both are important because EP party groups, to be truly European, must not only develop and consolidate their partisan features and attributes, but they must also do so in ways distinct from their national counterparts'. Cohesion is certainly a key factor for the stability and for the functional efficacy of the EP party groups as such. Inclusiveness on the other hand dilutes national identities and favours the development of European ones. Several studies have tried to measure the cohesion of EP party groups through the analysis of roll call votes (Attinà, 1990; Raunio, 1997; Hix and Lord, 1997; Kreppel 2002; Hix and Noury 2009), or of MEPs' attitudinal data (Kirchner, 1985; Bardi, 1989; Schmitt and Thomassen 1999; Otjes 2014). In this study the discussion will be restricted to the main conclusions found in the literature.

The studies on cohesion, especially those based on voting behaviour in the EP, reveal very high levels of intra-group cohesion. These findings can be explained by, among other things, the symbolic, rather than political, value of many decisions in the EP. This lowers the level of potential internal dissent and makes it easier for decisions to be (near)-unanimous (Bardi, 2001). In any event, voting behaviour throughout the EP, regardless of party distinctions, is generally very cohesive (Hix and Noury 2009). This could also be a consequence of the well-known trend in EP to present a united front in the common struggle against national interests' and intergovernmental concerns' resilience. In any case, it remains doubtful that high absolute levels of cohesion can be considered as indicators of high EP party group institutionalizations. MEP attitudinal data, not being

influenced by the institutional pressures that influence voting behaviour, reveal lower levels of cohesion (Bardi 1989; Schmitt and Thomassen, 1999).

Inclusiveness on the other hand, is particularly apt to indicate the degree of Europeanisation of EP party groups. As they incorporate increasing numbers of national delegations, these tend to distance themselves from their respective national parties, thus becoming more similar and ultimately more European. This certainly applies to the transnational groups, within which the relative importance of individual national components is declining steadily, mainly due to the continued expansion of the EU and the simultaneous entry of many new national delegations. This obviously has consequences for the party system. EP party group inclusiveness can be observed through: a) trends in EP party group size; b) trends in the number of countries represented in within each EP party group; c) trend in the relative size of the largest delegation within each EP party group. The usefulness of the first two indicators is intuitively obvious; the merits of the third are suggested by the observation that very strong delegations may be able to dominate their respective parliamentary groups and objectively oppose their transnationalisation (Hix and Lord, 1997).

Operational indicators of these variables are: a) the number of EP party groups; b) the size of the groups; c) the percentage of MEPs belonging to the three core transnational groups; d) the percentage of non-attached MEPS or belonging to one-party groups. A decline in the number of groups should be considered positive for the consolidation of the system as according to Sartori (1976), declining fragmentation favours the institutionalization of the system's "rules of the game". In addition larger size groups, namely the transnational ones, are inherently adaptable and complex, attributes that allow them to adopt flexible strategies and avoid potential obstacles (Huntington (1968). If increasing numbers of MEPs adhere to transnational groups, then the EP party system becomes more institutionalized. But the number of one-party groups is perhaps the most important indicator of institutionalization, in a negative sense, of the EP party system. One-party groups, by definition, lack the transnational dimension that distinguishes Europarties from their national counterparts. One-party, groups are then, with the non-attached MEPs, elements of resistance to the institutionalization of the EP party system and a decline in their number should be considered as an indicator of the system's consolidation.

3. THE IMPACT OF THE 2014 ELECTIONS ON THE EUROPARTY SYSTEM'S STRUCTURE

The eighth EP elections, which were held in May 2014 were expected to produce very important results for the overall EU institutional balance, as a result of the decision by the Europarties to indicate their candidates to the EU Commission's Presidency, and for the Europarty system, because of the projected success of so-called Eurosceptic parties. The first expectation became reality when on 22 October 2014 the Commission led by Jean-Claude Juncker, the EPP's designated candidate was voted in by the EP. The actual impact of the elections on the Europarty system requires a more in-depth analysis than the simple observation that the new EP includes a "much higher number of anti-European MEPs" as Mr Juncker himself declared when commenting on his own Commission's approval. It is true that Euro-resistant, if not necessarily Eurosceptic, MEPs has increased by at least 40% over 2009 and now account for more than 20% of the whole EP, but these numbers alone do not permit meaningful conclusions on the type of change election results may have produced on the party system; some of the possible changes require more complex, also qualitative, analyses. To put it simply, even the rise of potential "opposition" within the Europarty system is not per se a negative factor for its development and additional analytical criteria need to be applied.

EP fragmentation, for example, is to be considered more of a hindering factor for Europarty system consolidation than ideological opposition to Europe. On the contrary, groups with a strong ideological basis and common values are more resistant than others to difficulties. Common membership in EP party groups should then be viewed positively as it cements cross-national solidarity irrespective of the groups ideological and value orientation.

Figure 3: Number of Member States represented in the EP party groups 1979-2014 and relative size of largest national delegation (ND- 2014 only)*

Party Family	EP Terms									Largest ND %	
	1979	1984	1989	1994	1999	2004	2007	2009	2014	2009	2014
EPP	7/9	9/10	12/12	12/12	15/15	25/25	27/27	26/27	27/28	15.3	15.4
S&D	9/9	9/10	12/12	12/12	15/15	23/25	25/27	27/27	28/28	11.7	16.2
ALDE	8/9	7/10	10/12	10/12	10/15	20/25	22/27	18/27	21/28	14.5	11.9
EUL/NGL			4/12	5/12	10/15	14/25	14/27	11/27	14/28	22.9	21.2
Greens-EFA			7/12	7/12	12/15	13/25	14/27	14/27	17/28	26.3	26.0
ECR								11/27	15/28	47.4	28.6
EFD								12/27	7/28	25.8	50.0

Source: Updated from Bardi (2008) EP official sources

* Current acronyms are used to indicate EP party groups in the two tables, although some have undergone changes over the eight EP terms

As we have mentioned, the three transnational EP party groups connected to the three historical transnational federations, the EPP, S&D, and the ALDE certainly represent the core of the Europarty system and their overall inclusiveness must be considered a positive indicator of its institutionalisation. On this point, the impact of the 2014 elections has been negligible and, if anything, slightly positive. Figure 1 shows that the S&D still includes, as it did in 2009, MEPs coming from all member states, while the EPP falls short of this goal because of the British Conservatives' decision to leave the group. But this was already the case in 2009. The ALDE, penalised in some countries by electoral thresholds that they find difficult to pass, actually attracted delegations from more countries (21/28 as opposed to 18/27) than they did in 2009. These figures indicate an overall positive trend towards inclusiveness. The Greens--European Free Alliance (EFA) and the European United Left/Nordic Green Left (EUL/NGL) have grown out of two groups that have a long history in the EP, the Rainbow group and the Communists. They have gone through countless changes and in some cases real transformations. In general, they include fewer national components than the core transnational federations, for which reason they are still considered multi-party groups. Nonetheless, they exhibit in 2014 comforting and growing levels of inclusiveness. The overall picture for the five longer established groups is completed by data on the relative size of the largest national delegations. This index is an, admittedly rough, indicator of an EP party group's potential homogeneity: the lower the score the lower the propensity of the largest national delegations' tendency to maintain an exclusively national identity and to take positions that diverge from the rest of the group's. In four cases out of five this index is below the 25% threshold, a level that affords single national delegations sufficiently high integration in the group, and it is only slightly above that for the Greens-EFA. Also on this score the difference between the three transnational EP party groups and the multi-party ones is visible, as the former fall on average (14.5% in 2014) about 9 points below the level (23.6) of the latter.

The last two EP party groups in Figure 1 are the most recent additions to the Europarty system as they were both formed in 2009. The 2014 elections have had opposite effects on them. The ECR has seen its inclusiveness score increase (from 11/27 to 15/28) whereas the EFDD's has dropped to a level (7/28) that is very dangerous for its very survival, as demonstrated by its temporary collapse in October 2014 when Latvian MEP Iveta Grigule's defected, to be replaced a few days later by Polish MEP Robert Iwaszkiewicz in a move that allowed the group to still include representatives from at least seven MS, as required for the formation of an EP party group. The ECR score indicates potential for it to become a multi-party group, not only in terms of numbers, which it already has, but also in terms of developing the degree of internal homogeneity that would make it a more stable part of the Europarty system. This view is comforted by the fact that the largest national delegation in the group, the British one, accounts now for less than 30% of its total membership, whereas in 2009 it stood at over 47%, a level very close to what would have technically made the ECR a one-party group, that is an entity to be considered structurally and not only ideologically, an obstacle to Europarty development. This is what has happened instead to the EFDD. Not only is the group very unstable, as we have indicated, but it is also dominated by one delegation, the UKIP, that accounts for exactly 50% of the group's membership. The fact that there is also another large delegation in the group, the Italian 5 Star Movement's with over 35% of the total membership, does not mitigate this fact, as it is even more likely that the two delegations will agree to strive and maintain their individual autonomies and identities, a fact confirmed by their joint decision to appoint two co-presidents, respectively representing them both. Overall, data on inclusiveness indicates a growing distance between the longer established groups and at least one of the newcomers, the EFDD, consistently with, but with less dramatic effects than, what was expected to happen as a result of the 2014 elections.

Figure 4: Europarty system indicators 1979-2014

Term	Nr. EP party groups*		Effective Parties**		% of non-attached MEPs or in One-Party Groups		S&D, EPP, ALDE Total Seat %	
	Beginning	End	Beginning	End	Beginning	End	Beginning	End
EP I 1979-1984	8	8	5.2	5.0	33.9	19.6	63.4	64.5
EP II 1984-1989	9	9	5.3	5.2	29.3	18.5	62.4	63.1
EP III 1989-1994	11	9	5.0	3.8	20.8	11.4	67.6	77.8
EP IV 1994-1999	10	9	4.6	4.3	21.2	11.8	70.2	73.0
EP V 1999-2004	9	8	4.2	4.2	1.3	5.1	73.9	73.5
EP VI 2004-2009	8	8	4.4	4.0	4.4	3.8	75.7	77.1
EP VII 2009-2014	8	8	4.6	4.5	5.0	4.3	71.7	72.2
EP VIII 2014-2019	8	NA	5.4	NA	13.3	NA	63.8	NA

Source: Adapted and updated from (Bardi: 2008).

Note: The first figure in each cell refers to the beginning and the second one to the end of the relevant term.

*Non-attached counted as one group

** N = Effective party index (Laakso and Taagepera, 1979).

The data in Figure 2 allows for a more in-depth discussion of the evolution of the Europarty system. The table includes values for four measures of Europarty system institutionalization. The operationalisation of the number of EP party groups is self-explanatory. One-party groups (defined as groups where one national party delegation has at least 50% of the members) scores and the percentages of MEPs not belonging to transnational or multi-party groups, that is one-party group members plus the non-attached, are included in the table as measures of overall MEP resistance to Europarty incorporation. Conversely, total seat percentages for the three transnational party groups are included to monitor the size of the Europarty system's core. Finally, Laakso and Taagepera's effective number of parties index, once the total number of parties is known, adequately measures the relative size of parties. For many years the general indication emerging from the data was that the Europarty system was on a path to consolidation. Considering the high number of national parties that obtain representation in the EP, the number of EP party groups has remained satisfactorily stable as the EP party groups have demonstrated an ability to incorporate new parties. At the same time, the relative weight of the larger party groups had increased, as demonstrated by the effective parties indicator, which declined visibly between 1984 and 2009. The significant decline in the percentage of MEPs belonging to one-party groups or being non-attached confirmed this impression. Within this fairly clear cut picture, a contrast could be observed between post-election values and those registered at the expiration of each term. Generally, all party-system institutionalization indicators' values were much more positive at the end of each term than at its beginning. Overall, these findings, based on post-election and end-of-term data confirmed the research hypotheses suggested by the literature. The hypothesis that institutional and political pressures in the course of the legislature favour inter-group co-operation and eventually foster group integration is indeed consistent with the data. At the same time also the other hypothesis that elections can produce very disruptive effects on the Europarty system appears to be confirmed.

This last consideration applies also to the 2014 elections which indeed a rather negative impact on the Europarty system's development. Only one of the indicators in Figure 2 presents a value that is in line with 2009. The number of EP party groups, 8 including the non-attached, presents no change with 2009. With few

exceptions in the 1984-1999 period, this has been a constant value and it appears that it would be rather difficult to see it decline. As a result, a non-increase has to be seen positively. The other three indicators, however, present a very different scenery. The effective party indicator, that is the most direct measure of the Europarty system's fragmentation, at 5.4 in 2014, is the highest ever recorded in the EP's history, in the exasperation of a negative trend that had already started in 2009. Remarkably, not even the 2004-2007 enlargements had produced alterations in the stable/positive trend exhibited by this indicator up to 2009. The Europarties' efforts at pro-actively socializing the political forces of future member states into the European mainstream prior to enlargement had important positive effects for Europarty system development. Paradoxically, however, the success that Europarties demonstrated in attracting the overwhelming majority of the new national party delegations might have caused a slackening of their identity and cohesiveness. Whatever the reason, the ability of the three core transnational groups to incorporate growing numbers of MEPs has suffered a very visible reversal in 2014. As this is not coupled with a decline in the number of national delegations attracted by the three transnational groups, the drop is to be accounted to overall negative results for the core parties across the 28 MS. Be it as it may, the size of the Europarty system core, at 63.8% of all MEPs has reverted to levels not registered since the 1980s. Again, also in this case a reversal of the trend had been experienced in 2009, a fact that makes the current score even more significant. Its impact on the Europarty system could be less negative if it were paralleled by a progress in the trends exhibited by the multi-party groups, Greens-EFA and GUE/NGL, especially if the category should be augmented by analogous progress by the ECR. The data at our disposal, however, does not permit such an assessment, which will require a longer term perspective. As has been noted, inter-election periods allow for a socialization of newly elected MEPs and, sometimes, for the incorporation of incoming national party delegations. In the course of the term that has just begun, this might mitigate the rather disruptive effects of the 2014 elections. But the EP's 7th term's experience has not been very reassuring, as improvements between its beginning and end have been rather modest. If this, like all trends initiated in 2009, should continue, improvements in the next five years could be rather modest. Finally, another non positive finding concerns the re-emergence of one-party groups (the EFDD technically being one) and the parallel trebling (from 4.3 in the outgoing EP to 13.3 in the newly elected one) of the percentage of MEPs that are in one-party groups or non-attached.

4. CONCLUSIONS

EP election can be important factors in the development of Europarties and of their system. But contrary to what was expected at the eve of the EP's first elections in 1979, their effects may not always be positive. In general, indicators have shown trends reflecting the strengthening of the Europarty system. However, indicator scores have displayed clear inconsistencies if measured at the beginning and at the end of each term. The EP's insulation from the pressures of national politics, a condition which favours Europarty institutionalization, occurs only during the term and ends at election time. Elections can indeed produce disturbances and also negative effects on the EP party groups. Elections formalize the incorporation into the EP of the new member states party delegations. These may take some time to find a precise location in the EP party group system and cause problems for its extant institutionalization. At the same time realignments of national delegations, which occur as a result of the vote and national party system turbulence, may have even more serious effects. These realignments are facilitated by the nature of the second order of the EP elections (Reif and Schmitt 1980). This makes them more volatile than domestic ones. In particular, the protest vote that characterizes them can be very changeable and reward anti system parties, sometimes changing substantially the composition of national delegations from one election to another with devastating effects for some EP party groups. For example, the national delegations that are crucial for the survival of some of them may disappear because of their inability to overcome national electoral threshold, causing at the same time the end of the groups themselves. In the course of the EP's elected terms, some of these negative effects are countered as part of the EP's daily activities that progressively renew and favour within-EP party group convergence. As we have seen, this is normally reflected in values that are better at the end than at the beginning of each term

This particular feature of the Europarty system has been confirmed in 2009-2014. But the very modest size of the during-term improvements have proven insufficient to positively redress the decline in the trend in most if not all indicators that emerged from the 2009 elections. The effects of the 2014 elections have been even more dramatic and it is unlikely that the situation will improve considerably between now and 2019. It is the very nature of the presently recalcitrant parties that makes this prospect unlikely. In the past, temporarily resistant national party delegations and MEPs hesitated in joining the existing party groups because of a lack of knowledge of the EP as well as of the opportunities that were offered to them and not because of a deliberate predetermined intention to isolate themselves. In the current EP, however, parties in the EFDD and, although at a lesser extent, in the ECR, have based their electoral success on the very notion of resistance and in some cases of outright opposition to Europe and to the Europarty system. As such, it is very unlikely that they will come to any sort of compromise with the core parties.

What remains to be assessed is how serious/dangerous this situation is. It is certainly not positive for the Europarty system as such, especially with a view to its potential role in the promotion of democracy in the EU. For it to be affirmed, it is necessary for the highest possible number of Europarties, irrespective of their potential role as majority (government) or minority (opposition), to be actively part of the system by accepting its "rules of the game". To this end the attitudinal disposition of certain parties is even more relevant than their numbers. On the other hand, the current levels of Eurosceptic and Euro-resistant EP party groups should not seriously impair the current EP's ability to perform its functions, which exclude the day-to-day support of an executive. Only in this case, would the sizeable presence of anti-system parties lead to a paralysis of the institution. Barring this, the emergence of "opposition" EP party groups or sizeable national delegations, should the EFDD prove unable to maintain its unity, can be seen as a positive factor for the EP; by contributing to the creation of a more confrontational set of dynamics within the EP party system, they would, in all likelihood, favour its politicization.

Biography

Luciano Bardi is Full Professor of Political Science at the University of Pisa, where he teaches courses in Comparative Politics, European Union Politics, and International Relations, and Part-Time Professor at the European University Institute (EUI – Florence) where he is director of the Observatory on Political Parties and Representation (OPPR). He was also Chair of the Executive Committee of the European Consortium for Political Research (ECPR). He has published extensively in the field of Comparative European Politics and on EU Parties and Party System, publishing his articles in journals as “West European Politics”, “The International Spectator”, “Party Politics”, “International Political Science Review” and others.

Panel III - European democracy

European Parliament Political Groups and European Political Parties: between cooperation and competition

Enrico Calossi

The European integration process has led to the creation of the Political Groups in the European Parliament and the Political Parties at the European Level. This study aims to provide a comprehensive analysis of the relations between the two structures at the European level, with regard to their conceptualisation, their historical development, the quantification of the different resources of the two structures, and forms of cooperation which occur between the two.

EXECUTIVE SUMMARY

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EXECUTIVE SUMMARY

Background

Political parties have been important actors of the European integration. With the passing years political parties have increased their relations with similar parties notwithstanding the existence of political borders. As soon as these borders have become more porous the relations amongst parties have become stronger. This process has led to the creation of several organisations at the European level of which the most relevant are the Political Groups in the European Parliament and the Political Parties at the European Level. These structure have progressively increased their resources, becoming less dependent, functionally and politically, from the national parties. Most of the literature has concentrated its efforts in analysing the Europeanisation of the national political parties, while few have been devoted to analyse the tensions between the national actors and the European actors and practically no effort has been done to study the relations between the two Euro-level party organisations.

Aim

The aim of the present study is to provide a comprehensive analysis of the relations between the Political Groups in the European Parliament and the Political Parties at the European level.

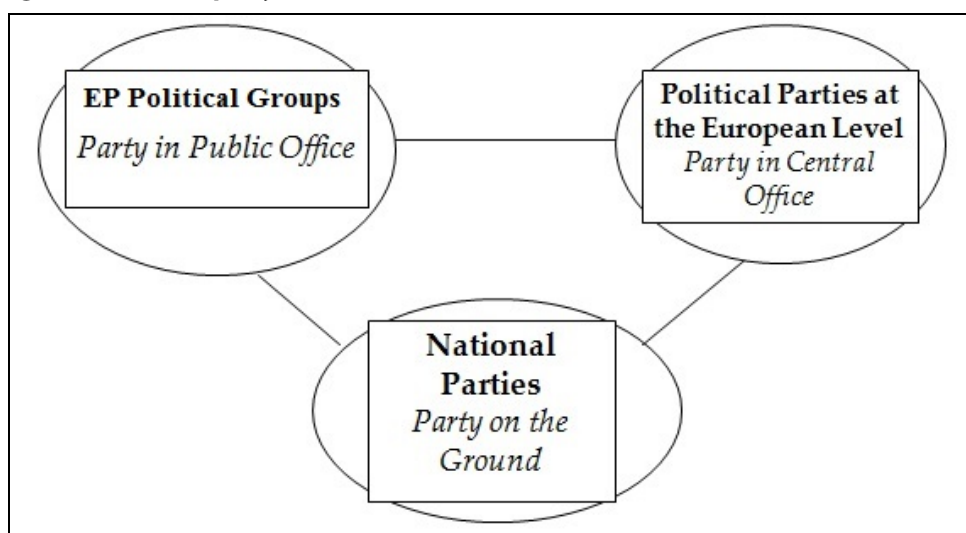
- The first objective of the study is to verify if the most prominent conceptualisation of the organisation of party politics at the European level, the three-faces approach to the study of Europarty, is still valid for all the different political families.
- The second objective is to investigate the importance of the history to better understand the current stage of relations between the two Eurostructures.
- Even if there is a general consensus in considering Political Groups as much stronger than Political parties, the third objective aims at quantify this difference in resources, trying also to measure the variance of this difference amongst the different political families.
- The fourth objective aims at analysing the forms of cooperation which occur between the Political Groups and the Political Parties at European Level. In particular it is important to investigate at what extent the two Eurostructures are integrated and whether this objective of a stronger integration and, at the same time, a minor dependence from the national parties, is shared by all the political families.

1. INTRODUCTION

Prominent scholars Richard Katz and Peter Mair (1993) asserted that political parties at the national level can be studied dividing their organisation in three different faces: the Party in Public Office, the Party in Central Office, the Party on the Ground (PoG). The first face represents party members which occupy positions in national institutions such as parliamentary assemblies, executive cabinets, etc.; the second face represents party members which seat in central bodies of the party such national assemblies, secretariats, etc.; finally, the PoG is made up of ordinary members enrolled in the local branches of the party.

Scholars generally agree on considering this division in three faces as a useful tool to analyse the organisation of political parties and their internal distribution of power. According to Bardi (2006) this division in three faces can analytically applied to study party politics also at the European level, where PPO is represented by European Parliament Political Groups and the PCO by the Political Parties at the European Level. The main difference is that at the European Level the PoG is not generally represented by individual members but by the national parties. The relations between these three faces then would be the “Europarty”⁸, as expressed by Figure 1.

Figure 5: The Europarty Structure



Source: Calossi 2011

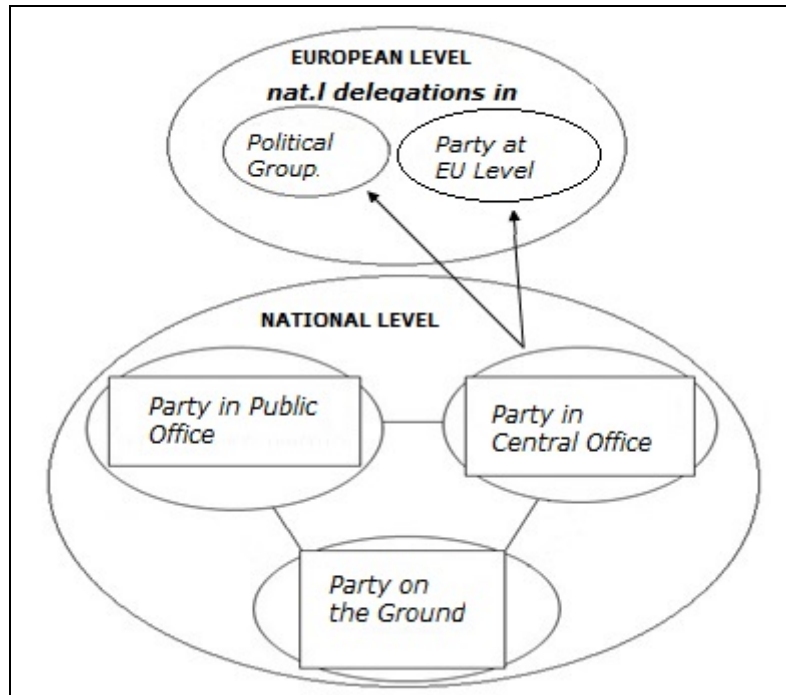
This model is useful to study the level of integration of the three faces as such an integration could be considered as a long-term objective of all the European political families. Certainly this can clearly applied to those political families, as for example the Populars, the Socialists, the Liberals or the Greens which, even if at different degrees, consider the process of European integration as a long-term and not-reversible process. In such cases this model is useful to understand at which degree the integration between the three faces has gone forward. According to this perspective the full integration between the three faces is an objective of political actors. In addition, for those political which advocate to the evolution of the European Union in a quasi-statal entity the three-face scheme, useful to study the national parties, should be used simply to analyse at what extent European parties have become more similar to national parties.

This pro-integration perspective is not shared by all the political actors at the European level. On the contrary, for many political actors the European integration should be halted while for others it should be completely reversed. Amongst this diverse group of Euro-critics, Euro-realists, Euro-sceptics or Anti-European parties, many

⁸ By some other authors the term Europarties has also been used as a shorter version and as “nickname” for the Political Parties at the European Level (Bressanelli 2014).

seek however forms of cooperation at the European level. These alliances cannot be simply analysed through conceptual models which have been created in order to analyse national parties. In reality the alliances of those parties do not function as and neither aim at functioning as national parties. In these cases, the European level of party activities rather than being conceptualised as an autonomous structure would be more usefully interpreted as a European face (the “fourth face”) of national party organisation (Sozzi 2011). Thus, the party scheme could be interpreted Figure 2 does, showing how the party delegations in the Political Group and in the Party at European Level are under the direct control of the Central Office of Party. Thus, according to this model, national parties rather than being a face of the Europarty (the PoG) are still at the heart of political world in the EU; on the contrary the European structures are mere a weak and dependent face of the national party.

Figure 6: The European dimension as Fourth page



Source: Author's elaboration

2. WHO FIRST? THE IMPORTANCE OF HISTORY

If we limit our study only to the political parties at European level there is no any doubts that EP Political Groups are older, being they established in 1952 inside the first Common Assembly of ECSC. But outside the European Parliament, alliances of national parties at the European level existed even before Regulation 2004/2003 in 2003 clearly expressed the existence of the Political parties at European Level.

The first transnational associations of political parties were basically external to the institutions and were formed by left parties. This allowed socialist parties, which till the First World War were generally opposition parties, to coordinate their activities with sister parties, while the bourgeois exponents could do that through institutional and official diplomatic channels. Thus, the first partisan transnational association was the Second International (aka Socialist International) in 1889. Communist parties established their own International in 1919. Successively, other political movements, as consequence of the organisational "contagion from the left" (Duverger 1953), formed their own political internationals. The most relevant were in 1925 the International Secretariat of Democratic Parties of Christian Inspiration (become in 1961 the Christian Democrat World Union), in 1947 the Liberal International, in 1983 the International Democrat Union, and finally in 2001 the Global Greens. So, also before the establishment of the European Community at least four political families had already their International. However, even if the majority of the member parties of the Internationals were Europeans, the European integration and the shaping European Community's political space were not at the center of their interests and activities. So, during the first phase of the European integration the only supranational structures were the party groups inside the Parliamentary assembly of the European Community.

Only the decision to introduce direct elections, however, caused the formation of extra-parliamentary party organizations. Although the concrete implementation of direct elections was delayed until 1979, in the seven years following 1972, the three " Transnational Party Federations" were formed in the expectation that direct elections would be required and encouraged the creation of real parties political pan-European. These party organizations corresponded to three party groups then existing in the European Parliament (the conservative "European Progressive Democrats" and the "Communists and Allies" did not create such extraparliamentary structures) and were the Confederation of Socialist parties of the European Community, founded in April 1974, the Federation of Liberal and Democrat parties of the European Communities, established in March 1976 and the "European People's Party - Federation of Christian-Democrat parties in the European Community", which collected the Christian democratic parties, created in June 1976 (Hanley 2008). So, the perspective of electing directly the EP was at the base of the choice for the pro-European party families to establish supranational structures to deal primarily with the elections or, at least, the coordination of national parties' electoral campaigns.

Before the introduction of the funding of the PPELs only other two party families decided to establish their own extraparliamentary organisation: the Greens which in 1984 established the "European Green Coordination" (EGC), and the some regionalist progressive parties which in October 1994 established the "European Free Alliance" (EFA).

The federations seemed therefore to be born as "emanation of the political groups in the European Parliament who felt necessary to rely on party organizations present at the European level" (Coosemans 2000).

In the same period there were nominal changes that they should prepare some federations to get closer to real political parties. In the early nineties seemed normal to think the forthcoming adoption of a statute for European political parties, thus the main political families made their steps to be ready for such an improvement. In 1992, the Confederation of Socialist parties assumed the name of the Party of the European Socialists (PES); In 1993, the Green Coordination became the European Federation of Green Parties (EFGP) and also in 1993, the Federation of Liberal Democrat and Reform Parties took the name of European Liberal Democrats and Reformists (ELDR).

Figure 7: Evolution of transnational party organisation

Party Family	nature	1889-1914	1919-1939	1945-1958	1958-	70s – 80s	90s - 2004
Socialists	Parl.			Socialist Group in ECSC	Socialist Group in EP		Group of the PES
	Extra Parl.	2nd Int.l	Socialist Int.l			CESP	PES
Christian Democrats / Populists	Parl.		Seg. Intern. Partiti d'Ispirazione Cristiana	Christ. Democrat Group in ECSC	Christ. Democrat Group in EP	Group of EPP	
	Extra Parl.					EPP	
Liberals	Parl.			Liberal Group in ECSC	Liberal Group in ECSC	ELDR	
	Extra Parl.			Liberal Int.l			
Communists and left wings	Parl.					Several groups in EP	GUE-NGL
	Extra Parl.		3rd Int.l / Komintern	Kominform			
Greens	Parl.					Rainbow Group	
	Extra Parl.					EGC	EFGP / EGP
Regionalists	Parl.					Rainbow Group	
	Extra Parl.						EFA

Source: Hanley 2008

All the party families which established transnational party federations (the European People's Party, the Party of European Socialists, Party of European Liberals, Democrats and Reformists, European Green Party, European Free Alliance) before the introduction of the public funding to PPEs were pro-European. Without any doubt the introduction of such monetary resource has become the stimulus for the establishment of all the other PPEs. Figure 4 shows us the high number of parties that applied for recognition (and funds) at the EP after 2004. Most of them, with the exception of the EDP and, partially, of the EL, are not pro-integration parties.

Figure 8: Political Parties at European Level established after 2004

Full name PPEL	Acronym PPEL	Year of recognition (year of dissolution)	Closer Political Group
European Democratic Party	EDP	2004	ALDE
Party of the European Left	EL	2004	GUE-NGL
Alliance for Europe of the Nations	AEN	2004 (2009)	
EUDemocrats	EUD	2006	GUE-NGL
Alliance of Independent Democrats in Europe	AIDE	2006 (2008)	
Alliance of European Conservatives and Reformists	AECR	2010	ECR
European Christian Political Movement	ECPM	2010	ECR
European Alliance for Freedom	EAF	2011	EFD ²
Movement for a Europe of Liberties and Democracy	MELD	2012	none
Alliance of European National Movements	AENM	2012	none

Source: Parties' and groups' websites

3. WHICH COMPETITION? WHO IS STRONGER

Some authors emphasise the importance of groups emphasizing their greater force than the PPEs (Attiná 1990; Bardi 1994; Bowler, Carter, Farrell 1995; Attiná 1997; Hix e Lord 1997; Carrubba, Gabel 1999; Kreppel 2002; Noury 2002; Bardi e Ignazi 2004; Hix, Noury e Roland 2007, McElroy, Benoit 2010; Bressanelli 2014), others have focused rather on the latter (and previously on federations) emphasizing the progressive consolidation and their potential for further development (Bell e Lord 1996; Hix 1994; 1996; 2002; Ladrech 2000; 2007; Jansen 2001; Delwit, Külahci e van De Walle 2004; Johansson e Raunio 2005; Jansen 2006; Hanley 2008; Bardi, Calossi 2009; Gagaték 2009; Calossi 2011), but regarding the relation between the two Eurostructures, there is a general consensus in considering it as an unbalanced distribution of resources and responsibilities, with the groups in a dominant position with respect to PPEs.

This section aims to evaluate this unbalanced distribution taking in to account three different elements.

3.1 Economic resources

A valid indicator to measure the balance of powers between groups and parties is by comparing the financial resources that come from the European Parliament. These resources are not the only ones political parties collect – the EP funds up to 85% of PPEs' expenses: this means PPEs need to find other 15% of their total expenditures, which is usually member parties' fees - but certainly represent a significant proportion of total revenue. In addition, as the two Eurostructures are funded by the same institution this allows us to understand which of the two is held by the European institutions as the most important. Figure 5 reports also the funds which since 2009 have been received also by the political foundations at European level (Bardi et al. 2014, Gagaték, Van Hecke 2011).

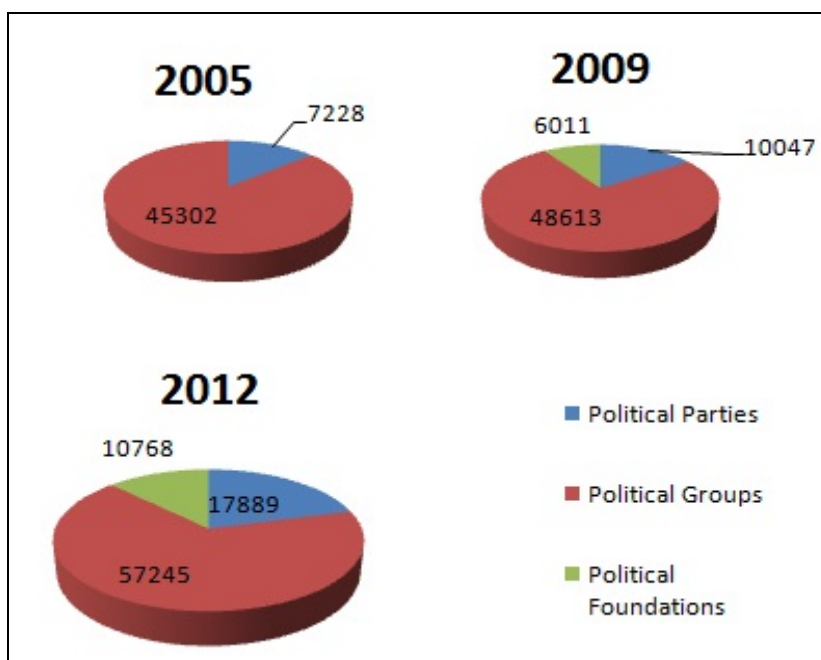
Figure 9: EP funds to Political Groups, PPEs and Eurofoundations

Kind of Eurostructure	2005	2006	2007	2008	2009	2010	2011	2012
Political Parties	7228	8155	9317	9971	10047	13145	16087	17889
Political Groups	45302	47610	48795	56335	48613	53772	54863	57245
Political Foundations	-	-	-	-	6011	6274	9221	10768
Political Parties	13.8%	14.6%	16%	15%	15.5%	18%	20.1%	20.8%
Political Groups	86.2%	85.4%	84%	85%	75.2%	73.5%	68.4%	66.6%
Political Foundations	-	-	-	-	9.3%	8.5%	11.5%	12.5%

Expressed in thousands of Euros. Source: <http://www.europarl.europa.eu/>

In 2005 political groups were receiving the large majority (86%) of funds the EP devolves to partisan activity at the European level. At that time the groups' funds were more than six times higher than those of parties. This amount has decreased significantly in the years due to increase share of funds given to the parties (up to 21%) and to the beginning of funding in 2009 for the political foundations. However the latest figures show that still the two thirds of the funds allocated by the EP are devoted to the political groups. Nowadays these resources are still more than three times bigger than those received by political parties. Graphs in figure 6 well describe this evolution.

Figure 10: Funds to Groups, Parties and Foundations



Source: <http://www.europarl.europa.eu/>

3.2 Staff

Even if political parties have progressively increased the number of their employees (in 1984 the Popular, Liberal and Socialist parties had in total 14 employees; in 2013 they had 65 employees out of a total of 101 for all the 13 PPELs) these figures are still very far from those given by the Political Groups (see Figure 7). In addition, we have to consider that Political Groups can also exploit EP's staff resources for some functions.

Figure 11: Staff of Groups and Parties

Political Group (2014)	Staff	PPEL (2013)	Staff	Ratio
EPP	129	EPP	28	4.61
S&S	240	PES	25	9.60
ALDE	94	ALDE	12	5.22
		EDP	6	
ECR	72	AECR	3	18.00
		ECPM	1	
GUE-NGL	53	EL	4	13.25
Green-EFA	80	EGP	12	5.33
		EFA	3	
		EAF	1	

Source: Political Groups' and PPELs' websites

As showed by the figure, all the PPEs have staff resources many time less prominent than those of the political groups. The range varies from the EPP party which has a staff 4.61 times lower than that of EPP group, to the AECR party + ECPM party staff which is 18 times lower than that of ECR group. However, the AECR is still quite young in comparison with the other parties and could increase its strength in the future.

3.3 Criteria for being established

Budgetary rules of the EP indicate the total amounts of funds which are to be allocated respectively to political groups, political parties and political foundations. For political parties is decided that the 15% of the total amount is equally shared by the extant political parties, while the other 85% is given proportionally to the number of MEPs' signatures collected by each PPEL. Similar criteria are established for the division of funds amongst the political groups. Thus, one of the main interests of the already established political parties and political groups is to make difficult the recognition of new actors.

Both for parties and groups there are two qualitative criteria applicants need to match in order to be recognized by the EP. For the groups, MEPs who share the same "political affiliation" can form a group. Thus, each political group is assumed to have a set of shared principles, and political groups that cannot demonstrate this may be disbanded (as it happen twice in the past). No other tentative has happened after 2001 but the procedures to stop the formation of such a group are quite weak and the decision by the EP works as an ex-post sanction. To be recognised, political parties "must observe the founding principles of the European Union, namely the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law". Also in this case the control by the European Parliament is not ex-ante but only ex-post, on request of a certain number of other MEPs. To conclude we can affirm that qualitative criteria are not relevant to limit the establishment of new groups or parties.

Thus, the difference between the two processes of recognition must be analysed through the quantitative criteria. For political groups it is stated the need of at least 25 MEPs coming from at least one fourth of member states (i.e. seven). For parties the quantitative criteria is more easy to be match. Even if an applicant political party "must have participated, or intend to participate, in elections to the European Parliament" - it is not difficult to declare this intention - it must have in at least one quarter of the Member States (i.e. seven), one or both of the following: "(a) it must have received at least 3% of the votes cast in each of those Member States at the most recent European Parliament elections (b) or it must already be represented by Members, whether Members of the European Parliament for those states, or Members of the national Parliaments of those states, or Members of the regional Parliaments of those states, or Members of the regional Assemblies of those states". In practice, as minimum criteria, seven regional parliamentarians can form a political party at the European level and, after being accepted, access to the 15% of the total amount of funds which is equally shared amongst all the extant political parties. For example, nowadays PPEL EUDemocrats can boast only two MEPs as its members and in the previous legislature had only one.

This shows at what extent political parties are weaker than political groups in defending their main funding source because they are unable to limit the accession of new competitors into the political scene of new recognized (and funded) political parties.

4. WHICH COOPERATION? RELATIONS AND FUNCTIONS

After having described the tensions and the difference of power between the two Eurostructures, this section will deal with the traces of cooperation between the two. The relations between groups and parties are of two types: from a point of view of their **membership** and from a point of view of the composition and activity of the **governing bodies**.

4.1 Membership

Regardless what conceptual model is considered more useful for analysing the party politics at EU level (the three-faces model or the model of the EU level as the fourth face of national parties) national parties represent the core membership of political groups and PPELs⁹. Between the two affiliations there is no relationship: a national party can be member of a PPEL without belonging to a Political Group or it can enrol its members to a group without being affiliated to any PPEL.

Speaking of the relationship between the two Eurostructures is intuitive to think that it is stronger and less difficult if the two membership tend to coincide.

On one side, therefore, we investigate how many member parties of the group are also members of the party at European level (**Party Europartisation of the group**). Considering also that not all national delegations are equal in amplitude and which differ by the number of MEPs which they have, we investigate also another element, i.e. how many MEPs of the group belong to the PLE (**MEPs Europartisation of the group**).

On the other hand, a further indicator of the level of integration between groups and PPELs can be seen in the correspondence between national parties that are part of the PPEL and the national parties that are in the parliamentary group. In other words, the parties that belong to a political party at European level and to a correspondent parliamentary group can play an important liaison function between the two structures. A larger proportion of the national parties which are both members of the PPEL and of the group thus can promotion a greater integration between the two Eurostructures (**Party Congruence between PPELs and Political Groups**).

Figure 12: Party Europartisation of the Group

Political Group (2013)	Parties in PG	1st PPEL	2nd PPEL	Parties in PPEL	%
EPP	41	39 EPP	-	39	95.1
S&D	32	30 PES	-	30	93.7
ALDE	35	31 ELDR	4 PDE	35	100
G-EFA	20	12 EGP (1 obs)	6 EFA	18 (19)	90 (95)
ECR	9	8 AECR	1 ECPM	9	100
GUE-NGL	23	8 EL (2 obs)		11 (13)	34.7 (43.4)
EFD	9	0	-		0

⁹ Some PPELs allow also the individual membership, but only the EAF is based only on individual membership.

Source: Parties' and groups' websites

All groups reveal very high level of party Europartisation, with the exception of the European Left which comprises only one third of the national parties of the GUE-NGL. More clearly the EFD can be considered a group without any relevant affiliated PPEL.

Figure 13: MEPs Europartisation of the Group

Political Group (2013)	MEPs in PG	1st PPEL	2nd PPEL	MEPs in PPEL	%
EPP	265	263 EPP	-	263	99.2
S&D	184	161 PES	-	162	88
ALDE	84	75 ELDR	9 EDP	88	100
G-EFA	55	44 EGP (2obs)	6 EFA	50 (52)	90.1 (95.5)
ECR	55	54 AECR	1 ECPM	55	100
GUE-NGL	35	18 EL (6 obs)		18 (24)	51.4 (68.6)
EFD	30	0 EUD	-	0	0

Source: Parties' and groups' websites

This figure shows that the four historical political families have now gained a high level of identification between their and PPEL and their own group. With the partial exception of the PES – that due to the presence of the Italian PD, then not affiliated to the PES - controls only the 88% of MEPs of the S&D group, the Populares, the Liberals and the alliance between Greens and Regionalists control more than 90% of their respective groups. Similarly the ECR presents high degree of identification with the AECR. In this case, however, also studying the genesis of the party reference AECR, it seems very clear that the PPEL is emanation of the group, rather than being two structures with different backgrounds who seek to coordinate in order to resist the pressures of the national parties. On the extreme left and on the extreme right the levels of Europeanisation continue to be weak.

Figure 14: Party Congruence between PPELs and Political Groups

Political Parties at EU level	Member Parties	Parties in Political Group	%
EPP	47	39	83
PES	30	28	93.3
ELDR	57	31	54.4
EGP	34	13	38.2
EFA	33	6	18.2
EL	27	8	29.6
AECR	9	8	88.9
EDP	12	4	33.3

Source: Parties' and groups' websites

The two major parties (PPE and PSE) have a high rate of party congruence between PPEL and group. The main reason for these high values lies in the fact that the two PPE shall allow national parties from outside the EU to join only in the form of parties "associated" or "observers". The Liberals have a different attitude and allow the membership with full rights of parties also from non-EU parties. This raises the total number of parties affiliated companies (the highest of all) and reduces the congruence between PPEL and the group. Among the smaller political parties stands the value of AECR, which has only one party in addition to those that are already part of the group. The EFA is not surprising for its low levels of congruence because its main mission is to represent the regionalist parties of small nations: it is obvious that only a few of its member parties are able to elect MEPs. As regards the European Left also this indicator confirms its poor relations with the group. The low level of congruence rather than being motivated by the presence of extra-EU member parties (which are 5) is due to poor electoral performances of several members of the EL, which therefore remain outside parliament and the group.

MEPs presence in the PPEL bodies

Another way to evaluate the strength of relations between the two structures that act at the supranational level, is to detect whether and how these structures are connected to each other through the presence of MEPs in the main decision-making bodies of parties (Congresses, Boards and Executives). It is also interesting to know what party bylaws foresee about the consultation and the cooperation with the political groups.

Figure 15: Official relations between MEPs and PPELs

Political Parties at EU level (2013)	Congress	Board	Executive	Official cooperation with group
EPP	All MEPs without v.r.	Presidents of nat.l delegations with v.r.	Group president with v.r.	with EPP
PES	One MEP for nat.l delegation with v.r. MEPs without v.r.	Group representatives with v.r.	Group president without v.r.	with S&D
ALDE	MEPs without voting rights	One MEP without v.r.	Group president without v.r.	with ALDE
EGP	MEPs who are EGP members with v.r.	4 MEPs with v.r.	no	with Greens-EFA
EFA	MEPs without v.r.	MEPs without v.r.	no	with Greens-EFA
EL	MEPs without v.r.	no	no	With group «of Left»
AECR	MEPs without voting rights	no	no	with ECR
EDP	MEPs with v.r.	no	One for nat.l delegation with v.r.	with ALDE
ECPM	MEPs without voting rights	no	no	No group
EAF	MEPs with voting rights	no	no	No group
MELD	MEPs with v.r.	MEPs with v.r.	no	No group

v.r.: voting rights. Source: Author's elaboration

Obviously all the PPEs allow MEPs to participate, with or without voting rights, to their congresses: PPEs are financially dependent on the number of signatures collected amongst MEPs! For the other bodies the level of integration between the two Eurostructures is different: Socialists, Populars and Democrats (and at a lesser extent the Greens) are those which grant more rights to MEPs. Of the big and pro-Europeanist parties the ALDE is the only one which does not consent so much prerogatives to MEPs. Maybe this is due to vague coincidence between party's and group's membership as we have seen in section 4.2.

The newest and variously Euro-sceptic parties do not guarantee special rights to their MEPs (with the exception of the EAF, which is formed exclusively by individuals). This is coherent with the model of the European level as fourth level of national parties and under the control of the party in central office. These parties clearly aim to limit the possibility that national delegations begin to behave as an autonomous actor.

Regarding the official forms of cooperation between parties and groups, all the pro-European parties declare their clear affiliation to a political group; contrarily, the Eurosceptic parties do not mention any clear reference to existing political groups. A middle ground position is represented by the European Left and the AECR. The AECR, although it cannot be considered a pro-European party, clearly indicates its relations with the ECR Group. The European Left, beyond any discussion about its pro- or anti-Europeanism, does not explicitly mention the GUE-NGL, but speaks about a general "group of the Left". Perhaps this is due to the very low level of Europartisation of the group and also to the various political orientations that exist amongst the members of the group (Calossi 2011).

CONCLUSIONS

So far, when scholars and practitioners were discussing about the effectiveness of European Political Parties, they agreed on the fact that a strengthening in resources and an institutionalization of the organisational framework were essential in order to perform the function of "contributing to forming a European awareness and to expressing the political will of the citizens of the Union", as originally expressed by Article 191 of Treaties. In order to match this objective the successive Commission's proposals have basically aimed at increasing the level of autonomy of the Eurostructures, in particular of the PPEs which have always been the weaker side, through increasing their prerogatives - they are the only actors which can perform electoral campaigns at the EU level - and increasing their economic resources. These efforts were also encouraged by the continuing development of Europarties, especially in terms of the cohesiveness and inclusiveness of their EP components, the Party Groups, and potentially in terms of the better integration of the organizational components. This has naturally led scholars to consider implicitly this development as one-way without possibility of reversal. The adoption of the three-face scheme was both useful under an analytical point of view, but also a good example of a teleological perspective. In this cultural context it has become also normal to consider the organisations and the internal relations of the best structured Europarties, mainly the EPP and the Socialists, as the ultimate goals to which the other parties tended. This picture cannot be anymore considered completely true.

Many of the political parties that were established after the introduction of the EP funding do not aim to achieve those levels of organisation and autonomy of the Eurostructures towards the national parties. Basically these parties adopt organizations that are consistent with their political objective, which is to reduce the level of integration in the European countries. Some can also consider this objective at odds with the objectives stated by art. 191. The is that, without many doubts, few scholar had noticed before that the provisions laid down by article 191 are two and that they are partially in contradiction with each other. Most of time has been spent underlining the aim of "contributing the European awareness" and less has been devoted to analyse the objective of "expressing the political will of the citizens of the Union". It is without any doubts that a part of the will of EU citizens is against the existence of the EU itself or, at least, is against further integration. And there are signs that in the future this opposition could persist.

So some final recommendations is both for scholars and practitioners. For scholars, it could be better from now on to using conceptual models that take into account that not all the political actors at the EU level want a

further integration, aim for a higher autonomy of their representatives in the EU institutions and thus consider the older (and pro-European!) parties as models to follow. For practitioners, a recommendation could be to avoid to consider the new political actors as *contra legem* since a larger interpretation of art. 191 could be useful to understand better the will of people and considering also that, like it or not, a vague feeling of anti-Europeanism is legitimately part of the overall European awareness.

Biography

Enrico Calossi since 2011 has been Coordinator of the “Observatory on Political Parties and Representation” (OPPR) at the European University Institute (EUI) in Florence. He obtained a PhD in Political Science at IMT–Lucca and was for 2 years Post-Doc Fellow of the University of Pisa. His fields of research are political parties at national and at European level, political corruption, and Italian and EU foreign policy. He wrote the books “Organizzazione e funzioni degli Europartiti. Il caso di Sinistra Europea” (2011) and, as co-author, “How to Create a Transnational Party System (2010) and “Political Parties and Political Foundations at European Level. Challenges and Opportunities” (2014). His articles have appeared on “Italian Politics”, “Quaderni di Scienza Politica”, “Studi parlamentari e di politica costituzionale”, “Contemporary Italian Politics”, and “Relações Internacionais”.

Panel III - European democracy

European Citizens' Initiative - assessment of first lessons

Marta Ballesteros

This table is based upon a study provided at the request of the AFCO and PETI Committees. It aims at identifying difficulties faced by organisers when setting up and running a European Citizens' Initiative (ECI). It analyses possible solutions and proposes recommendations to improve the ECI as an effective tool for participatory democracy in the EU. The aim is to propose measures to ensure a straightforward ECI process with less costs and burdens for EU citizens. The ultimate goal is to define concrete actions to empower EU citizens to actively participate in shaping the future of Europe.

ISSUES	OBSTACLES	CORRESPONDING RECOMMENDATIONS ¹⁰
HORIZONTAL ISSUES		
<p>Personal and data protection liability of the ECI organisers</p>	<ul style="list-style-type: none"> • Difficulties in operating as an informal ECI citizens' committee • Uncertainty and risks linked to the personal (and data protection) liability for organisers 	<p>1) 'Citizens' Initiative Centre': a one-stop-shop for support and information to the ECI organisers could be set up. Such a Centre could consist of an office and an online platform and it could provide the following services:</p> <p>c. Provision of a single set of detailed guidelines and training material on the rights and obligations of ECI organisers and on all administrative procedures through the ECI process as well as on the follow-up to successful and unsuccessful initiatives. The support should cover matters such as the IT requirements for the on-line collection system and the legal aspects of ECIs including:</p> <ul style="list-style-type: none"> ii. the legal status of the ECIs and the organiser's liability; iii. the applicable data protection rules. <p>The Centre could be provided by pulling resources together from the Commission, the European Parliament, the European Economic and Social Committee, the Council and the Committee of the Regions¹¹.</p> <p>11) Revise Article 6 and Annex III and IV of Regulation 211/2011 to establish a simplified single statement of support form.</p>
<p>Information and support on the ECI process</p>	<ul style="list-style-type: none"> • Difficulties in finding contacts in other Member States • Organisers do not know what they have to do/do not know how to handle the ECI process • Commission's conflict of interest 	<p>1) 'Citizens' Initiative Centre': a one-stop-shop for support and information to ECI organisers could be set up. Such a Centre could consist of an office and an online platform and it could provide the following services:</p> <p>a. Support for search for potential partners or support staff (such as pro-bono IT or legal experts);</p> <p>b. Replies to accreditation and information requests;</p> <p>c. Provision of a single set of detailed guidelines and training material on the rights and obligations of ECI organisers and on all administrative procedures through the ECI process as well as on the follow-up to successful and unsuccessful initiatives. The support should cover matters such as the IT requirements for the on-line collection system and the legal aspects of ECIs including:</p> <ul style="list-style-type: none"> i. those related to the ECI legal bases under the Treaties and the possible development of more articulated proposals for legislative acts; ii. the legal status of the ECIs and the organiser's liability; iii. the applicable data protection rules. <p>The Centre could be provided by pulling resources together</p>

¹⁰ The numbering corresponds to the numbering of the recommendations under section 3.

¹¹ This will be discussed in section 'Information and support on the ECI process' 2.1.2.

ISSUES	OBSTACLES	CORRESPONDING RECOMMENDATIONS ¹⁰
		from the Commission, the European Parliament, the European Economic and Social Committee, the Council and the Committee of the Regions ¹² .
Funding and support to run ECI campaigns	<ul style="list-style-type: none"> • Costly process • Burdensome process ECI	<p><i>If the ECI process is revised in light of the proposed solutions presented in previous sections, the costs and burdens involved will be significantly reduced and the need for financial support will diminish as well¹³.</i></p> <p>7) The ECI citizens' committee should receive reimbursement for travel costs to participate in the European Parliament's hearing for all its members (seven instead of three)¹⁴.</p>
Transparency of funding and support to run ECI campaigns	<ul style="list-style-type: none"> • Limited tools for enforcement leading to risk of diminishing the credibility of the ECI 	<p>9) The Commission could proceed to regular random checks for the transparency obligations of ECI organisers regarding financial support. Checks could be carried out primarily on the Commission's own initiative while keeping the possibility of checks derived from complaints, which is the current system¹⁵.</p>
Awareness of EU citizens on ECI	<ul style="list-style-type: none"> • EU citizens are not aware of the ECI 	<p><i>Empowering citizens to get more easily organised to launch ECIs and reducing the cost and burdens of the ECI process with the solutions proposed in the previous sections, would allow them to run more efficiently their campaigns. This would increase the reputation, the awareness and the success of the ECI as a tool for participatory democracy across the EU¹⁶.</i></p> <p>1) 'Citizens' Initiative Centre': a one-stop-shop for support and information to the ECI organisers could be set up. Such a Centre could consist of an office and an online platform and it could provide the following services:</p> <p style="padding-left: 20px;">b.Replies to accreditation and information requests.</p> <p>The Centre could be provided by pulling resources together from the Commission, the European Parliament, the European Economic and Social Committee, the Council and the Committee of the Regions¹⁷.</p>
REGISTRATION BY THE EUROPEAN COMMISSION		
Identifying the legal bases for launching ECIs	<ul style="list-style-type: none"> • Lack of legal expertise and costly legal services • Unclear legal bases for the ECIs • Unclear scope (Treaty changes or not) of the ECI • Uncertainty on legal analysis by the Commission due to the 'two step' legal 	<p>1) 'Citizens' Initiative Centre': a one-stop-shop for support and information to the ECI organisers could be set up. Such a Centre could consist of an office and an online platform and it could provide the following services:</p> <p style="padding-left: 20px;">a. Support for search for potential partners or support staff (such as pro-bono IT or legal experts);</p> <p style="padding-left: 20px;">b.Replies to accreditation and information requests;</p> <p style="padding-left: 20px;">c. Provision of a single set of detailed guidelines and training material on the rights and obligations of the ECI</p>

¹² This will be discussed in section 'Information and support on the ECI process' [2.1.2](#).

¹³ This will be discussed in section 'Funding and support to run ECI campaigns' [2.1.3](#).

¹⁴ This will be discussed in section 'Funding and support to run ECI campaigns' [2.1.3](#).

¹⁵ This will be discussed in section 'Transparency of funding and support to run ECI campaigns' [2.1.4](#).

¹⁶ This will be discussed in section 'Awareness of EU citizens on the ECI' [2.1.5](#).

¹⁷ This will be discussed in section 'Information and support on the ECI process' [2.1.2](#).

ISSUES	OBSTACLES	CORRESPONDING RECOMMENDATIONS ¹⁰
	examination system	<p>organisers and on all administrative procedures through the ECI process as well as on the follow-up to successful and unsuccessful initiatives. The support should cover matters such as the IT requirements for the on-line collection system and the legal aspects of the ECIs including:</p> <ol style="list-style-type: none"> i. those related to the ECI legal bases under the Treaties and the possible development of more articulated proposals for legislative acts; ii. the legal status of the ECIs and the organiser's liability; iii. the applicable data protection rules. <p>The Centre could be provided by pulling resources together from the Commission, the European Parliament, the European Economic and Social Committee, the Council and the Committee of the Regions¹⁸.</p> <p>2) The Commission should provide more information and more detailed evidence and motivated arguments in the refusal or acceptance letters for registration of the ECIs by¹⁹:</p> <ol style="list-style-type: none"> a. Considering and analysing separately each of the different points of request of a proposed ECI; b. Clarifying EU competences in the field of the proposed ECI by providing factual information on the actions taken and planned at EU level. <p>6) In light of the up-coming judgements of the Court of Justice of the European Union, the Commission could clarify if the ECIs can propose EU primary law amendments (Treaty, Charter of Fundamental Rights). This would inform the work of the legal support provided by the 'Citizens' Initiative Centre'²⁰.</p>
Translations of the text of ECIs to campaign in different Member States	<ul style="list-style-type: none"> • Lack of language expertise by organisers and costly translation services 	<p>5) The European Economic and Social Committee – which has already proposed to offer its services, the European Parliament and/or any other EU institution could provide the organisers with free translation services for the text of their ECIs used to request signatures during their campaigns in different Member States²¹.</p>
ONLINE COLLECTION SYSTEM (OCS) CERTIFICATION BY MEMBER STATES		
Online Collection System (OCS) Certification by Member States	<ul style="list-style-type: none"> • Difficulties in signing the ECIs online with the Commission OCS • Signatories' emails cannot be collected 	<p>3) Commission servers storing the online signatures collected were offered for free as a temporary service from July 2012. The Commission should confirm this measure on a permanent basis²².</p> <p>4) The Commission should improve the current free software</p>

¹⁸ This will be discussed in section 'Information and support on the ECI process' [2.1.2](#).

¹⁹ This will be discussed in section 'Identifying the legal bases for launching ECIs' [2.2.1](#).

²⁰ This will be discussed in section 'Identifying the legal bases for launching ECIs' [2.2.1](#).

²¹ This will be discussed in section 'Translations of the text of ECIs to campaign in different Member States' [2.2.2](#).

²² This will be discussed in section 'Online Collection System (OCS) Certification by Member States' [2.3](#).

ISSUES	OBSTACLES	CORRESPONDING RECOMMENDATIONS ¹⁰
	<ul style="list-style-type: none"> • Non-unified OCS system across Member States • Short deadline to certify the OCS 	for the online collection of signatures (including the collection of signatories' emails) to increase its user-friendliness while ensuring high security standards. This could be done through an interactive process enabling all stakeholders and users involved to contribute with their experience on the difficulties encountered ²³ . 11) Revise Article 6 and Annex III and IV of Regulation 211/2011 to establish a simplified single statement of support form ²⁴ .
COLLECTION OF STATEMENTS OF SUPPORT BY ORGANISERS		
Requirements to sign the ECIs	<ul style="list-style-type: none"> • Numerous and different data requirements • Signatories are reluctant to give their ID data • Some EU nationals and third-country nationals cannot sign the ECIs • Age limits • Unclear rules of conduct for EU officials 	11) Revise Article 6 and Annex III and IV of Regulation 211/2011 to establish a simplified single statement of support form ²⁵ . 10) The Commission could clarify the position of EU officials so that potential signatories/campaigners among them can exercise their rights while being sure to respect their obligations ²⁶ .
One year collection time for signatures	<ul style="list-style-type: none"> • Short collection period • Uncertainties on the starting date 	<i>Should the ECI process be streamlined and simplified according to the proposals presented above, it is possible that this timeframe would not be considered tight anymore²⁷.</i>
Minimum number of signatures per Member State	<ul style="list-style-type: none"> • The system might not guarantee full equal treatment of EU citizens 	<i>These issues were long debated during the negotiations of the Regulation and the current rule was considered acceptable since it avoided only gathering support from a large group of citizens from one 'bigger' Member State, while gathering purely nominal numbers of signatures in smaller Member States. Moreover, two ECIs reached the thresholds proving that it is possible to comply with the requirements. In addition, the lowering of the threshold could risk diminishing the European dimension of the ECI. For these reasons, none of these ideas have been currently retained²⁸.</i>
VERIFICATION OF STATEMENTS OF SUPPORT BY MEMBER STATES		
Verification of Statements of Support by Member States	<i>At the time of drafting of this report, only two ECIs had been formally submitted to the European Commission. For this reason, no conclusions could validly be drawn on this phase. Overall, it does not seem that the main obstacles for the ECI organisers were encountered in this phase of the process²⁹.</i>	
SUBMISSION BY ORGANISERS TO THE EUROPEAN COMMISSION		

²³ This will be discussed in section 'Online Collection System (OCS) Certification by Member States' [2.3](#).

²⁴ This will be discussed in section 'Requirements to sign ECIs' [2.4.1](#).

²⁵ This will be discussed in section 'Requirements to sign ECIs' [2.4.1](#).

²⁶ This will be discussed in section 'Requirements to sign ECIs' [2.4.1](#).

²⁷ This will be discussed in section 'One year collection time for signatures' [2.4.2](#).

²⁸ This will be discussed in section 'Minimum number of signatures per Member State' [2.4.3](#).

²⁹ This will be discussed in section 'Verification of Statements of Support by Member States' [2.5](#).

ISSUES	OBSTACLES	CORRESPONDING RECOMMENDATIONS ¹⁰
Meeting of the ECI organisers with the Commissions and EP hearing	<ul style="list-style-type: none"> • Limited reimbursement for hearings • No possibilities to invite subject-matter experts • Not enough time for exchanges with MEPs • Confusion about the hearing's purpose and structure • Difficulties in getting publicity and visibility on specific ECIs 	<p>7) The ECI citizens' committee should receive reimbursement for travel costs to participate in the European Parliament's hearing for all its members (seven instead of three)³⁰.</p> <p>8) The European Parliament could clarify, in its rules of procedure, the aim and structure of the hearing, including the role of other EU institutions, to establish proper grounds and opportunities for the organisers to fully present their requests and engage in a dialogue with MEPs on the follow-up to their ECIs³¹.</p>
The ECI as a tool for direct participatory democracy: follow-up to successful and unsuccessful ECIs	<ul style="list-style-type: none"> • Uncertainties on the follow-up and on the legal arguments behind successful and unsuccessful ECIs and on the role of organisers • Uncertainties on the nature (agenda setting tool or right of initiative) of the ECI 	<p>12) Revise Article 11(4) TEU to clarify³²:</p> <ol style="list-style-type: none"> a. If the ECI can propose EU primary law amendments (Treaties, Charter of Fundamental Rights), in light of the Court of Justice of the European Union case-law; b. If the ECI is a citizens' right of initiative requesting the proposal of a specific legislative act or an agenda setting tool to raise issues of concern for citizens willing to see it dealt with at EU level. <p>1) 'Citizens' Initiative Centre': a one-stop-shop for support and information to the ECI organisers could be set up. Such a Centre could consist of an office and an online platform and it could provide the following services:</p> <ol style="list-style-type: none"> b. Replies to accreditation and information requests; c. Provision of a single set of detailed guidelines and training material on the rights and obligations of the ECI organisers and on all administrative procedures through the ECI process as well as on the follow-up to successful and unsuccessful initiatives. The support should cover matters such as the IT requirements for the on-line collection system and the legal aspects of the ECIs including: <ol style="list-style-type: none"> i. those related to the ECI legal bases under the Treaties and the possible development of more articulated proposals for legislative acts; ii. the legal status of the ECIs and the organiser's liability; iii. the applicable data protection rules. <p>The Centre could be provided by pulling resources together from the Commission, the European Parliament, the European Economic and Social Committee, the Council and the Committee of the Regions³³.</p>

³⁰ This will be discussed in section 'Funding and support to run ECI campaigns' [2.1.3](#).

³¹ This will be discussed in section 'Meeting of the ECI organisers with the Commission and EP hearing' [2.6.1](#).

³² This will be discussed in section 'Identifying the legal bases for launching ECIs' [2.2.1](#), and in the section 'ECI as a tool for EU direct participatory democracy' [2.6.2](#).

³³ This will be discussed in section 'Information and support on the ECI process' [2.1.2](#).

Biography

Marta Ballesteros is a Senior Lawyer and Policy Advisor for Milieu responsible for the development and management of projects supporting public sector clients to define effective legal and regulatory frameworks in different areas of EU law including fundamental rights, environmental protection, climate and energy or consumers' rights related to environmental claims. She has more than 20 years of experience monitoring the implementation of EU law and delivering high quality studies and legal analysis including recommendations to EU Institutions. Marta has led projects in Milieu providing studies on the implementation and enforcement of EU law, the implementation of the rights of children with disabilities in EU Member States with the comparative assessment providing recommendations for EU action and more recently, the implementation of the European Citizens Initiative. She holds law degree by the University Autónoma of Madrid with specialisation in human rights law by the Institute of Human Rights in Madrid and in European law and institutions by the Université Catholique de Louvain la Neuve.



Panel IV

Transparency Register

Transparency Register - Institutional and Constitutional Aspects

David Coen

Constitutional and institutional aspects of lobbying

Panel IV - Transparency Register

Constitutional and institutional aspects of lobbying

David Coen

The EP is interacting with a growing numbers of special interests. This is reflected in the increasing accreditations and hearings with policy stakeholders. Private groups take up the greater part of the total 1,549 accredited organizations (50%) and appear more often at hearings. They are followed by NGOs (23%) and Professional Consultancies (14%). Committees dealing primarily with market integration & regulation (ITRE, ENVI, IMCO, ECON) have the densest concentration of interests, largely private groups. While there is a solid a Socio-Legal & foreign affairs cluster, that sees mostly public interests. Overall, OLP and Own Initiative Reports are more likely to observe interests' activity than Consultation Procedures. *Significantly*, as a percentage the EP observes more private interest activity than the Commission across all policy fields examined. The Transparency Register offers one of the most transparent lobbying databases in the world. However, the registry faces issues regarding the direct availability of information on special interest activity which reduces the positive impact of the project.

- 1. Introduction**
- 2. Special Interests & Activity on the TR**
- 3. Issues & Recommendations regarding the TR**
- 4. Hearings, Reports & Special Interests**
- 5. Hearings, Reports & Special Interests**
- 6. Initial Conclusions**

1. Introduction

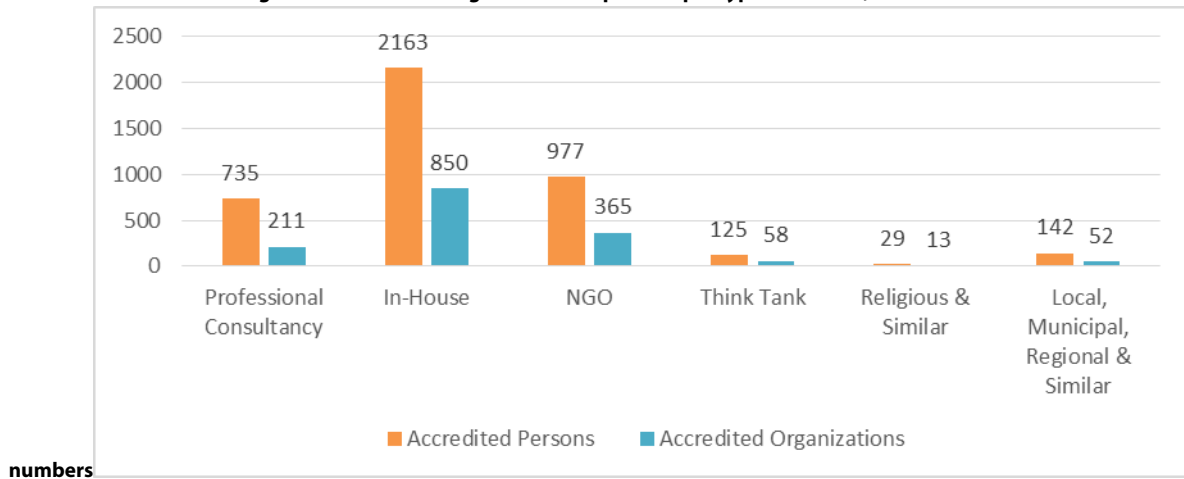
Special interests aim at **influencing EU policy** primarily **through the supply of information to institutions**. To make best use of their resources and maximize their impact, interest organisations target actors, institutions and stages in the policy cycle that offer greater opportunity of influence. Thus, the more powerful and accessible the policymaker the more attention he/ she will receive from interest groups. The European Parliament has acquired a more powerful role within the institutional architecture of the EU. In particular the Lisbon Treaty shifted almost all remaining policy areas into the Ordinary Legislative Procedure. Consequently, the EP has become a central target for special interests, observing heightened focus during the committee amendment phase. Special interests that aim to contact EU institutions and their members must register, *voluntarily*, on the Joint Transparency Register (TR) and abide by the Code of Conduct that sets rules on how lobbyists are expected to act. The TR set up in June 2011 merged the Commission's Register for Interest Representatives (RIR) and the EP's Register of Accredited Organizations.

At the time of data collection for this study, the TR had more than 6,500 groups registered, **1,549 special interest organizations with at least one person accredited to enter the EP, and 4,063 accredited persons in total**. Thus, the TR offers a large pool of information on special interests that visibly monitor and aim at influencing EU policy directly through the EP.

2. Special Interests & Activity on the TR

In the TR registered interest groups provide information on their organisation, such as legal name, persons of contact, accredited persons, mission statement, head and secondary offices' address, among others. They classify themselves under one of **6 categories of organization and select as many of 36 policy fields of interest**. Special interests that wish to enter the EP on a more permanent basis apply for an accreditation that is for specific individuals of their organization, i.e. the accreditation is not transferable.

Figure 16: Accredited organizations & persons per type of interest; absolute



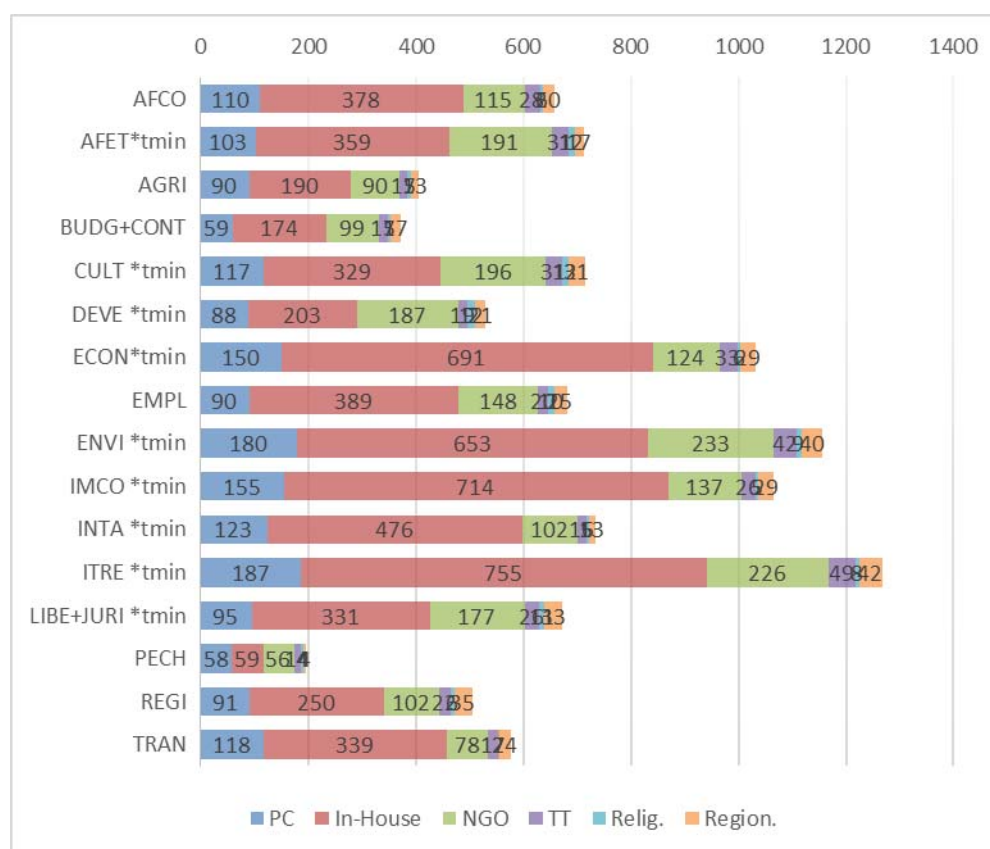
Results show that **the broad majority of accredited organizations and accredited persons fall under private interests**. *In-House* groups, which primarily comprise of associations and companies, are the largest group, taking up more than half of both categories. In contrast, *NGO* groups, linked to public interests and civil society, follow as the second largest category, with 23% for both accredited organizations and accredited persons. *Professional Consultancies*, primarily comprising of public affairs consultancies, take up 14% of the total accredited organizations, while their percentage of accredited persons reaches 18% of the total. The remainder is divided between *Think Tanks*, which include mostly research groups and academic institutions, and representatives for *Local, Municipal & Regional* interests.

The data weakens the assumption that the EP is, at least in accreditation terms, an institution where primarily public interests cluster around. On the contrary, there is **clustering of special interests primarily from the**

private sector, with a smaller presence of NGOs. However, the increasing numbers of interests does suggest that the EP's role in the policy process is maturing in light of co-legislation and dialogues and that this in turn has created demand for more diverse interests and technical information.

In comparing EP interest accreditations with Commission interest registrations, it is significant that the ratio of NGOs to In-house groups falls. That is to say more NGOs in total numbers and as a proportion of interest groups are active in the Commission than the EP. One explanation of this result is that NGOs have limited resources available and must make strategic choices about which venues to focus on. The other notable undercounting in interest representation was in the public affairs category as law firms have refused to register on the grounds of lawyer-client privilege. **Out of 211 accredited professional consultancies, only six were law firms.**

Figure 2: Special interest activity across Committees based on accredited interests per policy field³⁴



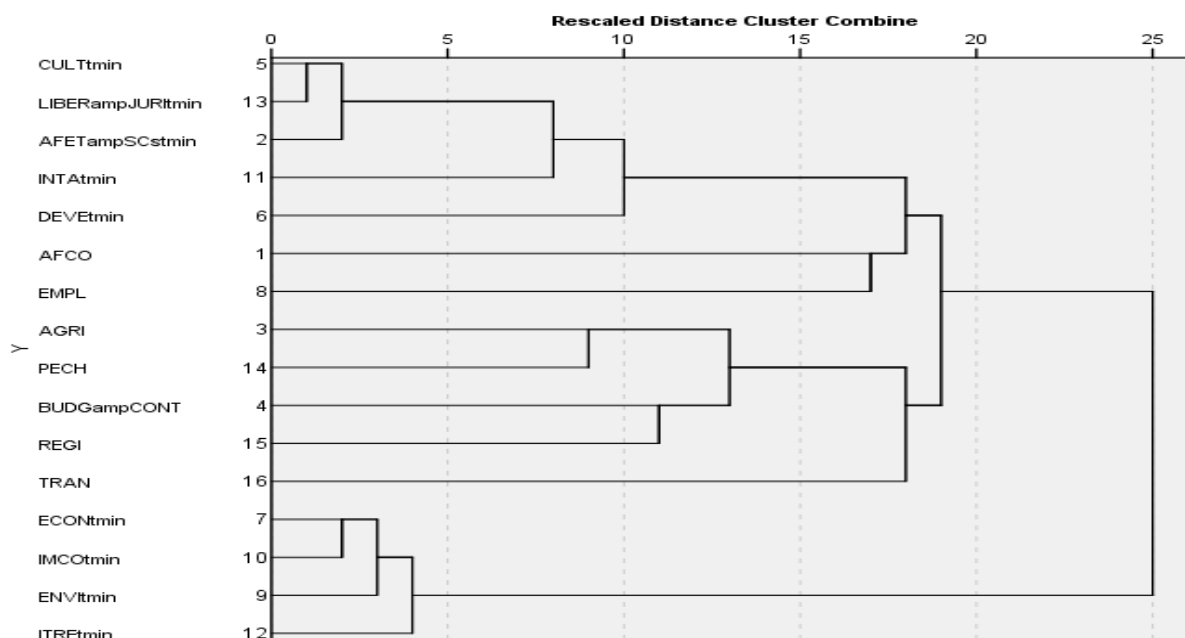
The study notes that special interests' objectives largely fall under multiple policy areas (and committees). As such, interest groups cluster around different groupings of policy fields rather than focus on a specific field. Previous studies show that the characteristics of policy fields are linked to the variation in the supply of different interest groups. Policy fields which are largely linked to distribution and public goods are more likely to face NGO type groups. In-House type groups are more likely to cluster around policy fields that deal with regulation and private goods. Thus, even though private interests might dominate lobbying of the EU overall, it is possible that public interests are found in similar numbers across specific fields.

In examining the density and diversity of accredited interest across 36 policy areas and 18 committees it became clear that **policy characteristics are largely driving lobbying activity. Committees linked to**

³⁴ *tmin: Committee includes more than one policy field, but only one policy field of interest per groups is considered.

market regulation and integration, such as ITRE, ENVI, IMCO and ECON, were receiving the most attention. These results follow patterns similar to the European Commission's DGs. This information suggests that the EP is being approached in a jointed up strategy by special interests seeking to influence central aspects of the EU project, e.g. market integration, rather than distributive or social aspects of policy. To explore these assertions further we conducted a cluster analysis that indicates different groupings of types of interests across committees. The closer the vertical line linking Committees is to 0, the stronger the cluster.

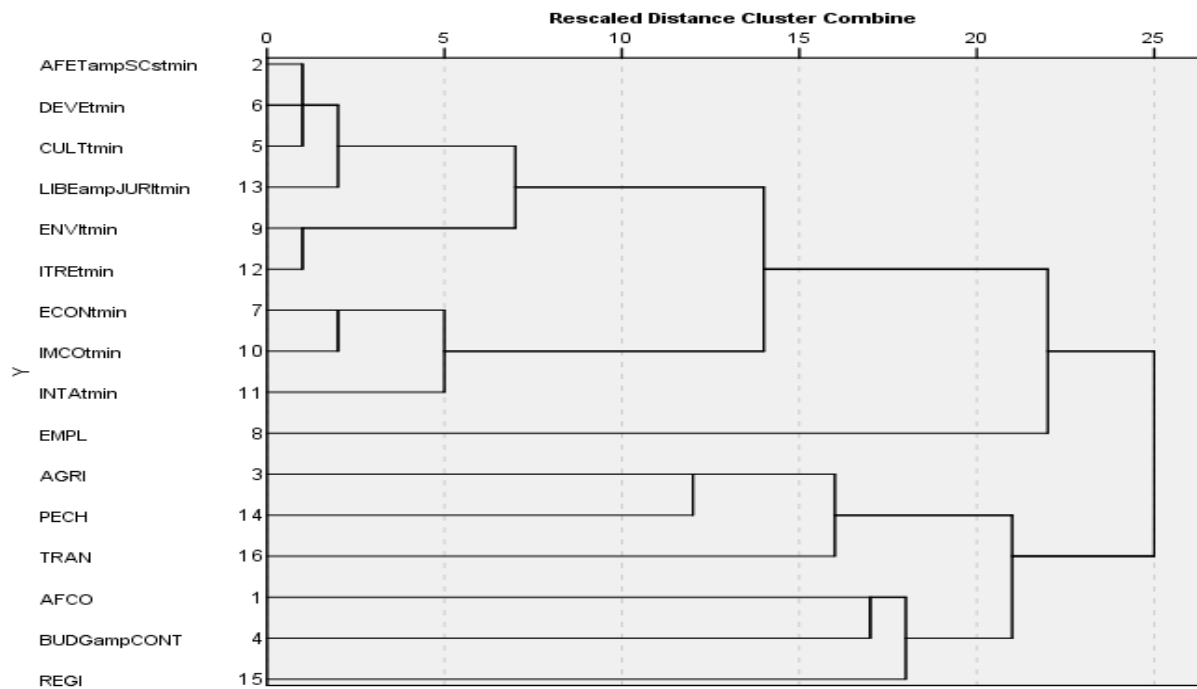
Figure 3: In-House groups; cluster analysis across Committees



In the case of *In-House groups* (figure 3) we observe **CULT, LIBE & JURI joined by AFET** (and its sub-committees) falling **under a broader cluster, along with INTA and DEVE**. This grouping highlights two points. First, In-House groups pay close and equal attention to the output of the above three mentioned committees. Moreover, INTA and DEVE are perceived to be impacted by the output of CULT, LIBE and AFET. Second, this cluster indicates that **associations and companies see a close link between foreign policy, trade and development**. They follow and attempt to influence all three committees, either to further expand free trade or protectionism. The other central cluster of committees consists of those dealing with policy on EU market integration. **ECON and IMCO are linked very closely and cluster along ENVI and follow ITRE**. This verifies the existence of a strong private interest core that runs across all the committees central to market integration. Companies and associations perceive that industry can be impacted as a result of output from one of these committees. Moreover, ENVI that covers multiple policy fields is deeply embedded within the core of economic and business interests' focus.

In the case of NGOs we observe a more defused activity. Due to resource limitations and their focused interests, they tick fewer policy field boxes and committees. Thus, their clustering overall is not as dense, with fewer branches across committees. **NGOs follow and attempt to influence specific committees rather than address multiple ones**. Thus, here we observe **smaller tightly knit clusters**. First, **AFET, CULT, DEVE and LIBE are much closer**; INTA joins the branch much later. This highlights the difference in perception between the two types of groups, and the position of trade and development in EU policy. For NGO groups, DEVE is linked to legal affairs, civil rights and foreign affairs but much less to trade. This means that the two largest categories of interests focus on different types of committees and have less communication between them, at least formally within the institutions.

Figure 4: NGO groups cluster analysis; cluster analysis across Committees



Studies have also indicated a link between the output of institutions and lobbying density and type. We examined the relationship between special interest activity and output utilizing covariance analysis. Results confirm that overall output (reports, legislation, etc.) per Committee and the number of special interests covary. In particular, **special interests are more likely to follow committees when output is under the Ordinary Legislative Procedure or Own Initiative Report.**

These results offer an understanding as to where MEPs will be facing more special interest activity and by which types of groups. It also shows where MEPs could potentially make more/ less space for different types of groups. At the same time the lack of formal registration by groups that approach them should raise concern.

3. Issues & Recommendations regarding the TR

The main aim of the TR is to provide “...citizens with a direct and single access to information about who is engaged in activities aiming at influencing the EU decision making process, which interests are being pursued and what level of resources are invested in these activities.”

We recognize two main issues regarding the TR and lobbying activity. On the one hand the information it provides is not easily accessible, despite being available. On the other hand, a portion of the activity remains excluded. We briefly elaborate on these issues below.

The information on the TR is available for citizens in a downloadable file in *xml* format **that is not easily read by most popular data analysis software**, including *Excel*, *Access* or *STATA*. Moreover, while analysis of the file by more advanced programming software packages can be done it **requires expertise**. This applies both to information on the European Parliament specifically (accredited organizations). As well as information on the European Commission (registered organizations). Thus, **although the TR enhances the transparency of the Institution, the lack of easily accessible information on lobbying has the opposite effect**. Linked to this TR provides information that is **not tailored for direct analysis of special interest activity around the EP or the Commission**. For example registered special interests are not required to provide information on which specific Committees or DGs they are interested in but instead choose from 36 policy fields. **This makes the location of the lobbying footprint more challenging**.

Information on the TR should be made more easily available to the EU's citizens in a more accessible and easily read data format.

Registered interests are responsible for renewing information regarding their organization. However, groups register and do not renew information in an automated and regular basis; date of registration and last update are often the same. This raises concerns regarding the activity of these groups and the validity of the information on special interests available to the EU and its public.

Registered interest groups can be asked on annual basis to renew or maintain the information made available on the TR.

The voluntary nature of the TR raises questions about interests that may potentially opt to not register and lobby unregulated. **Specifically regarding the EP**, besides non-registered interests, **non-accredited interests may still enter the Institution** through MEPs' invitations. **This information is not available to the public or EU institutions** and raises concerns regarding the transparency of representatives' activity.

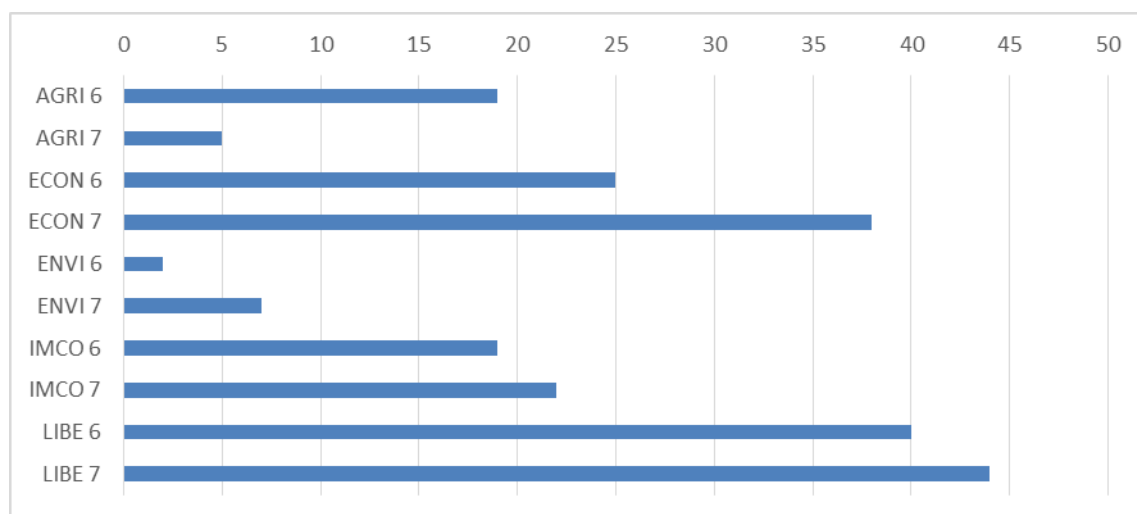
Though the TR may retain its voluntary nature, some form of cost for unregistered groups or formal incentive for registered groups should be considered.

That said, the legitimacy of the institution in terms of transparency and special interests can be further increased through adjustments of the TR, rather than an overhaul.

4. Hearings, Reports & Special Interests

To examine the variety of access we examined the attendees invited at events³⁵ from a sample of 5 Committees (AGRI, ECON, ENVI, IMCO, and LIBE) for the 6th & 7th EP. Results are in agreement with arguments on increased activity of the European Parliament post Lisbon Treaty linked to demand for further advanced information-expertise. Events and speaker across almost all Committees examined increased from the 6th EP to the 7th EP; the only exception being AGRI.

³⁵ events include Hearings, Joint Hearings, Public Hearings and similar. We have largely excluded workshops and Hearings of Commissioners as well as Interparliamentary Debates

Figure 6: Total number of Events per EP for the 5 Committees examined

We note that **a total of 2084 speakers participated in 221 events**, across the two Parliaments. **Fewer than half of the speakers were non-institutional representatives**. That is to say **a total of 1063 speakers were representing special interests and experts** (including agencies). **IMCO invited most non-institutional speakers** despite coming in third in terms of number of events; approximately 357 speakers, across 41 events. **LIBE invited most speakers in total and conducted most of the events**; approximately 984 speakers (342 non-institutional) across 84 events. The above confirm earlier results regarding variation in private and public interests' activity. However, the number of speakers from universities and think tanks (outside of Workshops) has also increased. Nonetheless, it is worth noting that some speakers seem to appear more often than others.

Table: Top 9 Interest Groups at events for the 5 Committees examined³⁶

Interest Group	Total	EP6	EP7
Amnesty International	9	5	4
BEUC	28	13	15
BUSINESSEUROPE	16	5	11
Bruegel	7	2	5
CEPS	14	6	8
ETUC	13	5	6
European Banking Federation	6	3	3
Finance Watch	5	0	5
Open Society Foundation	8	3	5

These results suggest that the EP is demanding more policy expertise. This is potentially a result of more reports being produced under the Ordinary Legislative Procedure. However, the Institution risks potential capture by the creation of formal insiders across different categories of groups, all gathered at the EU level.

As part of the study conducted we examine interest groups mentioned in reports of rapporteurs across 5 Committees of the 7th EP (AGRI, ECON, ENVI, IMCO, LIBE). Approximately a total 300 reports from AGRI, LIBE and IMCO have been examined so far. In fewer than 2% of these reports are lists with the names of policy stakeholders the rapporteurs have been in contact with mentioned. This occurs despite the fact that groups are

³⁶ Preliminary results.

abstractly mentioned in the reports. This suggests *this particular aspect of tracing the lobbying footprint should be revisited*.

5. Initial Conclusions

The analysis shows that as the EP has gained greater co-legislative powers the numbers and types of interests have increased. In house groups, which primarily consist of business associations and companies, dominate the TR with about 50% of actors. Moreover, the greatest activity is concentrated on the regulatory and integration focused committees such as **ITRE, ENVI, IMCO and ECON**. However, NGOs are better represented in committees that focus on foreign affairs and development.

The **EU through the TR has created one of the most transparent lobbying databases and systems in the world**. However, **the registry faces issues regarding the availability of information which reduce the positive impact of the transparency project**. In similar fashion, information regarding special interests attending hearings or contributions to reports is not easily accessible. Finally, although the voluntary nature of registration as well as accreditations provides reliable information, some information on special interests representation is lost as we do not collect those directly invited by MEPs into the EP. **This limit makes mapping of lobbying activity of interests difficult and reduces the transparency of the TR**.

Biography

David Coen is Professor of Public Policy, Head of Department of Political Science, Director of the School of Public Policy and founding Director of the Institute of Global Governance at University College London. He has held the Fulbright Distinguished Fellowship at the Kennedy School of Government at Harvard University and held visiting fellowships at the Centre for European Studies Harvard, Nuffield College Oxford University, and Max Planck Institute. In 2014/15 he will be a Distinguished Fellow at the European University Institute in Florence. Recent publications include; *Lobbying the EU*, (2008) Oxford University Press, and *Handbook of Business and Government* (2010) Oxford University Press.

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