An EU "fit for purpose" in the global age

Rescuing the European project: EU legitimacy, governance and security

Edited by Olaf Cramme

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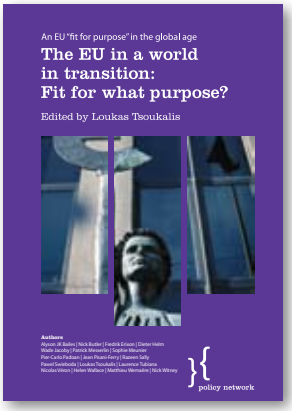

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About the project

Organised by Policy Network, in partnership with the European Institute of the London School of Economics and ELIAMEP (Hellenic Foundation for European and Foreign Policy), the EU "fit for purpose" project was initiated in May 2008 when Professor Loukas Tsoukalis presented to a workshop in London a substantial critique of the challenges and choices facing the EU in the 21st century.

Subsequently, a programme of study and events, co-directed by Olaf Cramme, Maurice Fraser, Roger Liddle and Loukas Tsoukalis, was organised around the central theme of this initiative: what the role of the European Union is as a political entity in a rapidly changing world and how it should reform itself, both internally and externally, in order to overcome and respond to the multifaceted challenges of the global age we now live in.

Over a period of 12 months, the project has sought to engage with a wide-ranging group of distinguished academics, policymakers and government advisers from across Europe, looking at the key clusters of policy choices facing the EU post-2009. High-level symposia and public events took place in Hydra, Paris and London.

Three publications mark the climax of this project:

- Rescuing the European project: EU legitimacy, governance and security *(edited by Olaf Cramme)*
- The EU in a world in transition: Fit for what purpose? *(edited by Loukas Tsoukalis)*
- After the crisis: A new socio-economic settlement for the EU *(edited by Roger Liddle)*

In addition, a synthesis report provides a compact analysis on how the EU needs to evolve and operate if it is to live up to the expectations and hopes of many of its citizens.

All of the publications are available in hard copy and online. Further information about the project and the organisers is available at:

Policy Network	*www.policy-network.net*
European Institute at the LSE	*www.lse.ac.uk/europeaninstitute*
ELIAMEP	*www.eliamep.gr*

Acknowledgements

Marrying ambitious policies with real life politics is sometimes an ungrateful task. This is particularly true in the context of European integration. When we embarked on this project, our desire was thus to promote a more intelligent and profound public debate about the choices that policymakers face over the future of Europe.

Whether or not the outcome lives up to this objective is for others to judge. But the process itself was certainly a highly rewarding one, thanks to the outstanding contributions made either in writing or through presentations at events across Europe.

First and foremost, I am very grateful to all those who have engaged so constructively in this initiative. From my project co-directors Loukas Tsoukalis, Roger Liddle and Maurice Fraser I have learnt a great deal about EU politics and their respective contributions to EU thinking are truly inspirational.

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Finally, thanks are due to colleagues at ELIAMEP, the LSE and CERI/Sciences-Po who helped make this endeavour not only productive, but above all enjoyable.

Olaf Cramme
London, October 2009

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Chapter 1

EU integration at a crossroads: closing the expectation-reality gap

Olaf Cramme

When European voters were asked in June 2009 to cast their ballot for the election of the European Parliament, the political circumstances could not have been more agitated. The world had just suffered one of its worst economic crises, marking the end of an era in economic, political and ideological terms. Governments across Europe were intensely debating costly rescue operations for their respective financial systems while political parties of all colours were attempting to interpret the looming paradigm shift in their favour and to their tastes. And on top of all this, the EU itself was confronted with the weighty challenge – unprecedented in scale and scope – of navigating its member states through these times of crisis. In short, the perfect menu for a mature political contest with clear policy choices, strong personalisation and greater visibility for the EU institutions was all but arranged. Indeed, the stakes of the elections seemed to be exceptionally high.

Why we need to be concerned about EU legitimacy

However, instead of a feast for European democracy we witnessed yet another political low point which was characterised by a further decrease in the turnout (to just 43%) and little to no interest in the manifestos and campaigns of the EU-wide political parties; and this despite hard-fought, yet successful, attempts by many politicians to equip the European

Parliament with real power in EU policymaking. Moreover, the subsequent manoeuvring surrounding the re-election of Commission President José Manuel Barroso did not change any of this assessment – quite the contrary given the absence of an alternative candidate for his position and thus real competition for political direction. For those who were hoping for the emergence of a more democratic and expedient "political Europe" the June elections and their aftermath were nothing but a disappointment.

But do we also need to be concerned? Over the last fifty years or so, the European Union has suffered a number of low points and setbacks – only to emerge fitter and stronger afterwards. This is particularly true for those defeats inflicted by European citizens when directly consulted on important EU questions. Consequently, with this in mind, many policymakers and observers of the integration process have not run scared in spite of the most recent negative referenda in France (2005), the Netherlands (2005) and Ireland (2008). They do not believe in a popular rejection of a project which is perceived as select and top-down in its approach. Instead, they point to the constitutional and institutional complexities of the EU integration process, which require diligent and time-consuming explanations before European citizens are ready to give their blessing to major decisions reached at the EU level. Has the positive outcome of the second Irish referendum in October 2009 proved them right once again?

At the same time, attitudes towards and opinions on specific aspects of European integration provide an ambivalent picture. National support for membership of the EU, as measured by the Eurobarometer (Sept 2009)[1], has stabilised at a level just over 50%, even though only a minority of EU citizens maintain that their overall image of the EU is positive. True, those with a negative image of the EU are much fewer in most member countries, with a significant number of "don't knows". The economic crisis, in turn, does not seem to have directly affected (positively or negatively) citizens' attitudes as far as the perceived benefits of membership are concerned – the situation is exactly the same as that recorded in August 2008 – while expectations for the EU to deliver in sensitive policy areas such as terrorism, climate change and foreign and security policy, remain very high. On the other hand, there are still slightly more who think that the EU is "going in the wrong direction" than those who see the EU as "on the right track". And even more worryingly, just over a third of the EU population believes that their voice actually counts in the EU while a majority believe that this is not the case.

All this should not come as a surprise. Despite its spectacular past successes, ranging from the single market and the euro to the consolidation of democracy and peace on the European continent, there is evidently something discomforting about the EU in 2009. This unease is manifested in the inward-looking mood of Europe, the resurgence of nationalistic tendencies and the faintness of the European idea. It is not only that the relative weakness of the popular mandate granted, either directly or indirectly, at various points in the recent EU integration process has slowed down or severely disrupted this very process, but also that seasoned observers of the European scene now broadly agree that the EU's legitimacy has indeed been eroded – a problem that will not be resolved by the adoption of the Lisbon Treaty alone.

Some may still dispute the existence of such a legitimacy problem or "democratic deficit".[2] But they misjudge at least one central point in relation to the dynamics of European integration: it is correct to point out that so far the EU has almost exclusively dealt with issues that are actually of little interest to citizens, or at least perceived to be so, from trade liberalisation and economic regulation to peacekeeping in Kosovo. From this standpoint, the low level of political participation is justified by the low degree of importance people attach to such issues. However, precisely because this is already changing, as the EU begins to deal with more salient issues, such as macroeconomic management, immigration, the environment and possibly also taxation, the "passive consensus" has come under considerable strain in recent years and is likely to be further weakened in the future. In other words, legitimacy is likely to become even more of a problem as the EU expands into new areas under the pressure of both internal and external factors.

Two important developments epitomise this tension. First, more and more political parties in Europe, mostly populist but no longer exclusively so, cultivate (and exploit) anti-EU feelings among those citizens who have been negatively affected by societal and economic changes in recent years. While the causes of anti-Europeanism are of course manifold, there is increased evidence that the losers from change, in particular those with low-income and insecure jobs, are turning against the EU, which is perceived as an important vehicle of change. Therefore, in today's world a major challenge for mainstream politicians lies in how they rebut the, often unfounded, accusations of a growing number of people, who blame the EU for prejudicial and unwanted developments.

Secondly, current reform processes and institutional arrangements are increasingly coming under attack from parts of the European elite itself – both on the left and the right. Germany, the biggest member state of the EU, offers two revealing examples in this context. On the one hand, it is argued that recent decisions by the European Court of Justice constitute a violation of salient national interests, raising serious questions about the attribution of competences when it comes to defining and ensuring common EU rules. At the core of this criticism lies the concern that the non-political actors of EU policymaking have developed a degree of activism and autonomy, which tend to weaken the political legitimacy of member states, ultimately jeopardising the voluntary compliance of governments to implement EU norms and directives. The functioning of labour markets and the welfare state are cases in point.

On the other hand, the German Constitutional Court, in an unprecedented ruling on the institutional arrangement of the EU, has put a big and bold question mark behind any form of closer European cooperation in sensitive national policy areas, let alone deeper integration. Karlsruhe has not only denied the European Parliament its role as a genuine democratic representation of EU citizens' interests, but has also drawn sharp new dividing lines on questions of legitimacy and sovereignty which are bound to complicate EU decision-making on future big questions. Essentially, the ruling attempts to cement the EU *status quo* despite the fact that the dynamics of the single market and the monetary union demand further adjustments, for example on fiscal policy, if Brussels is to deal with crises like the current one in a more effective manner. While it was always unlikely that Germany would be the country to bury the Lisbon Treaty, this damning verdict by the senior counsels has already startled those EU federalists who tend to consider the German system as a potential role model for deeper integration.

Tackling the expectation–reality gap

Needless to say, major discrepancies are evident vis-à-vis the next steps required to work through this conundrum of relatively weak popular support, the rise of "intelligent Euroscepticism" and growing nationalistic reflexes on the one hand, and high expectations and demands placed on the EU by large sections of the European elites and those outside, on the other. This is really the crux of the matter.

Some believe that the way out would be through a more rigorous application of the concept of "subsidiarity". The disentanglement of competences would not only create a better understanding on the part of EU citizens, it would

also help streamline the EU policymaking process as a whole, so they argue. The underlying assumption seems to be that the EU may at present be attempting too much rather than too little. But how can this be reconciled with the continuous expansion of an EU agenda that appears to be driven by a variety of factors linked to the internal dynamics of economic integration and the global age?

Others have gone even further beyond the agenda in question, pointing to growing inequalities and a powerless and effectively disfranchised underclass which has bred a hitherto unknown degree of alienation and cynicism that seems to rock the very foundations of our liberal democracies. According to this view, the most difficult challenge for the EU as a political entity is providing a stable framework for the peaceful coexistence and continuous compatibility of capitalism and democracy in Europe under the conditions of the 21st century.

Indeed, historians remind us that during the *Trente Glorieuses* European integration was successfully married with a "European Social Model" in its different national versions, which in turn managed to tame capitalism in the interests of justice and cohesion. But capitalism was by no means dispelled or even dissipated; on the contrary, it was strengthened and, most importantly, legitimised in the eyes of the vast majority of our society. Nowadays, however, widespread feelings exist which deem our capitalist systems to be beyond reasonable control, overwhelmed by the unprecedented level of global interdependence and capital flows around the world. As such, is it realistic to believe that the EU should act as a political project to re-tame capitalism without reversing globalisation and cutting back on the benefits of openness?

In many respects, we have now come full circle. Meeting this or any other big external challenge requires the EU to live up to the expectations alluded to above. This, in turn, seems to put a real strain on current EU governance, be it in relation to the institutional design or the manner in which EU politics is, or is not, conducted. Yet, democratically elected politicians per definitionem depend on some form of popular mandate and/or support in order to undertake major reforms, on the provision that the overarching interests in Europe remain aligned.

Taking this a step further, the quandary we face with the weakness of legitimacy finally comes down to the question of what could possibly be done to make the European Union again take big and bold decisions in the name and best interests of its citizens; decisions which are respected by a

clear majority of our populations, including both the winners and the losers from any resulting change. This is where the focus of the European political debate now has to be.

The essentials: narrative, identity and output

It goes without saying that there is no silver bullet that enlightens all and answers this question. For instance, one crucial factor is difficult to influence: political leadership. Few will disagree that the major advances in European history have been initiated by outstanding personalities and visionary politicians; by a quality leadership that some believe is lacking in Europe in this age. Additionally, the EU does not and will never resemble the United States of America, where the president accumulates a range of powers which not even the supporters of a "United States of Europe" can dream of. Rather the opposite is the case in Europe, as demonstrated by the widely held view that institutional reforms after the Lisbon Treaty seem now to have reached their limit for some time to come. As a consequence, the task is to find ways in which the EU can gradually expand its basis of legitimacy; only this will allow EU policymakers to act more decisively, coherently and consensually.

To begin with, European integration needs a new narrative and a new normative foundation. While this insight has now become commonplace, efforts to act on it have yielded very little. In fact, these efforts have primarily been hampered by the Union's increased diversity, reflected in its varying ideological, cultural and political preferences. Any attempt to construct such a foundation or narrative in antagonism to others (the US, Islam, etc) or in view of a narrowly defined political goal ("Europe as a protector against globalisation") is therefore bound to fail. Instead, besides its indispensable roots in history and formal emphasis on common values, Europe needs to identify itself through widely held principles such as "openness" and "competition" coupled with "inclusion" and "solidarity", which can transcend their abstract meaning in real life European integration and be applied in a variety of political contexts, both internally and externally.

Second, and directly related to this, any configuration of representative democracy, whether national or trans-national, must reflect a shared sense of identity to achieve legitimacy. Despite the EU being a *sui generis* political entity and the recognised constraints of direct representation in Europe, there are now strong indications that the Union's "identity deficit" has begun to undermine the integration process as a whole. In particular, the gulf between elite and popular perceptions of what the EU is actually

all about and what it is capable of achieving remains wide open. While some want to rectify this problem through better communication strategies, others judge that what may be needed is a stronger collective sense of "we" among European peoples.

Indeed, the weaker the shared identity, the less likely Europeans will give their consent to developments in Europe, which they cannot always fully appreciate. At best, the problem of "understanding" refers to the technical details of the issue at stake. Yet, it is equally possible that EU citizens actually do want to comprehend and control the broader context in which the EU is supposed to progress. Or, at the very least, how it relates to "others" in the equation. The emptiness of EU identity might therefore be a real obstacle when seeking different forms of popular support for further integration.

Of course, sceptics argue that there is no such thing as a European identity: nothing, in any case, that we can build upon. However, identities are always plural and full of uncertainties and internal divisions. What matters here though is substance and familiarity. Many inveterate optimists therefore believe that renewing our efforts to build a "common European house" through the creation of truly European spaces of education, research and sport, or the establishment of more pan-European networks and institutions, with higher degrees of visibility, will ultimately pay off.

Third, some have understandably asked why we waste time, resources and energy in ensuring broad-based support for nearly every aspect of the EU project when important commonalities and preferences already exist. In order to take a big decision, Europe primarily needs a big idea which, in turn, can ultimately succeed in overcoming the worrying mismatch between promises and results that has so far thwarted any attempt to increase EU legitimacy. According to this reading, the self-inflicted crisis of an inward-looking EU can best be cured by a renewed focus on "output legitimacy"; in other words, the kind of legitimacy founded on the ability of institutions to deliver the goods and hence meet the expectations of European citizens.

Correspondingly, the idea has to be in line with the concerns expressed by citizens; for instance in public surveys over an extended period of time. Tackling climate change, energy security and a more effective common foreign policy appear to be the favourites in this context. In fact, they might even be the last available *cartes blanches;* the last of a series which have essentially carried the EU forward in previous decades. Brussels

should therefore make the most out of them, by devising, if necessary, new *ad hoc* mechanisms that help to ensure successful delivery and implementation. Indeed, it is not uncommon to believe that if the EU fails to act on these fronts, any question of legitimacy will sooner or later become obsolete.

Constructing a new narrative, facilitating a stronger sense of identity and renewing the focus on output legitimacy are all factors which may well make a positive difference to EU legitimacy. Yet in the case of identity, it seems at best a long-term prospect and ultimately a case of "gardening" rather than "engineering".[3] Increasing legitimacy through effective output, on the other hand, is certainly feasible in the mid-term and also uncontroversial as long as its focus remains on common problems where decisive action at the EU level is supported by a clear majority of member states. However, will it also deliver on those ambitions and policy aspirations which tend to be more divisive, in particular in the socio-economic realm? In this case, the road is likely to reach its limit very soon.

The contestables: flexible integration and politicisation

Given the scope of the legitimacy challenge, it is now time for the European Union and national policymakers to look much more seriously at two of the more contested approaches. One of them is flexible or differentiated integration. Here, the central assumption is that a Union of 27, that will continue to grow, simply cannot function in the same way as the EU12 or EU15 did. Despite the fact that voting records and the number of adopted rules and directives do not suggest a slow-down in EU policymaking processes after the big bang enlargement of 2004, the successive widening of diversities and interests has inevitably led to questions of how politics at the lowest common denominator can be avoided.

Proponents of flexible integration draw attention to the previously successful use of flexibility and differentiation, listing the euro, Schengen and the Treaty of Prüm as prime examples. Indeed, all major advances and important acts of integration since the Single European Act have been based upon some form of flexibility, allowing those who opted out, to sidestep or postpone the tricky question of popular legitimacy. Several models are therefore being discussed: multi-speed, hard-core, *avant-garde,* or Europe *à la carte*. The core emphasis of the Lisbon Treaty on "enhanced cooperation" seems somehow to be a compromise between all of these slightly diverging options. Yet, should it also become a core norm

of European integration?

The crux of the debate about flexible or differentiated integration is that its supporters have often little or nothing in common, ranging from those who look for practical ways of surmounting EU deadlock, all the way to those who use it as leverage against stubborn partners, or simply those who yearn for "the good old days" when EU affairs were decided by a handful of like-minded Europeans over an expanded lunch break. High politics in the EU has so far been essentially a matter of intergovernmentalism, potentially leading to the accentuation of national prerogatives and unsatisfied demands. But the mission we seek is essentially a common one. Hence, the task must be to unite behind a more positive understanding and strategy of flexible integration by using it as a functional tool as opposed to an ideological stick. This applies in particular to those issues, such as macroeconomic coordination, where the practical need for more firm decision-making structures, especially in times of crisis, coincides with individual interests in a particular form of economic governance. Otherwise, risks may well outweigh the opportunities.

A second powerful approach put forward for tackling the legitimacy crisis is the politicisation of the EU. If you want to raise awareness and improve understanding of the EU; make the debates and ballots more interesting and worthwhile at the European level. If you want a strong mandate for reform and policy change, ask and involve the European people. Needless to say, democracy cannot simply be shifted from the nation state onto this singular EU design. And there are, of course, difficult questions around the use of referenda *per se*. However, advocates of the politicisation agenda have tried to show how some form of democratic politics in the EU could work, even without further institutional change. A "winner-takes-more" model for the European Parliament, increased transparency in the EU legislative process, or a genuine contest for the high places in the European Commission are only some of the many proposals.[4]

While this approach appears attractive – and there is growing approval at least for its rationale – it remains an equally controversial one. Compelling arguments have been made for why a mediated emphasis on partisanship and the injection of "majoritarianism" in the essentially consensual processes of the EU carry considerable risks, or at the very least, require a number of tough preconditions. Moreover, it remains uncertain whether an EU which is politicised along the lines suggested above will actually pave the way for more effective and positive action. Hence, are those who recognise the limits of the functionalist method just more willing to run

these risks than those equally committed Europeans who raise legitimate concerns with regard to greater EU politicisation?

Finally, a third group of pro-Europeans have adopted the middle ground: while they recognise the political void and its damaging implications for European integration, they believe that only by restoring the direct link between national political classes and EU policymaking can the legitimacy gap actually be closed. From this point of view, the European Parliament is part of the problem, and not the solution. Reforms should consequently facilitate the European role of national legislators in order to empower citizens on EU issues.[5] Greater polarisation is welcome – but not necessarily in the Brussels bubble. Yet, could such an approach really be reconciled with the desire for building a common European house? Difficult choices have to be made, while the prospects for re-opening the Pandora's Box of further institutional restructuring in the EU are rather small, at least for the foreseeable future.

Confronting the choices: a rallying call for greater legitimacy

Barack Obama's presidential election campaign and his subsequent victory have probably been the most astonishing and impressive events in recent political history. More importantly, they have given a new dimension and meaning to what we call a "mandate for change and reform". However, there is very limited scope at the European level to try to follow his example of replacing polarisation with reconciliation and cohesion politics, for obvious reasons. Nonetheless, exploring and pursuing different means in the quest for greater legitimacy must now be an essential task; not least because it will assist better and bolder policymaking in the EU.

This is particularly true because "holding the line" is simply not an option. While the experience of the Ortoli Commission is nowadays mentioned to warn against experimentation, activism and reform which could weaken rather than strengthen EU capacity, current world politics and developments do not allow for defensive stances. European integration does not take place in a vacuum; rather it needs to be re-justified through action in order to sustain its relevance. In addition to this external dimension, the EU is confronted with its own dynamics – changes that have created a set of new challenges which, in turn, have thrown up new choices and questions with regard to deeper integration. Internal security, immigration and asylum are cases in point.

In all these domains, EU policies and measures are so far of a "cooperative" rather than an "integrative" nature – unsurprisingly, one might say, given that providing security and residence or work permits for those coming from outside the EU belong to the litany of most sensitive political issues for member states. But since the EU, with its open economies and borders, adds its own important dimension to security and immigration challenges, how long will it manage to balance the resulting tensions between calls imposed from outside for joint responses and the highly resilient role of national systems? In other words, is there yet another expectation-reality gap in the making, which might directly affect the credibility and legitimacy of the EU?

There is a lot at stake for European policymaking in the years to come. Warnings of an immediate crisis should be treated carefully, but EU integration is clearly at a crossroads: for some, Europe is already doing too much and needs to be reigned in. For (many) others, the European Union is (part of) the answer to the numerous policy challenges Europe's proud nations are confronted with. Consequently, for EU federalists, intergovernmentalists or members of other schools of thought who sympathise with the latter position, the imperative must be to secure, renew and expand the foundation upon which European policymaking is legitimised. In confronting the choices, the simple truth is that the more robust the foundation, the more decisive EU action will be. This is something all pro-Europeans can rally behind.

Chapter 2

Making Europe matter: a realistic path to legitimacy

Maurice Fraser

After more than 50 years, the EU still rests on the mere "passive consensus" of its member states' citizens. The resilience of this consensus is by no means negligible: it has survived economic slumps, civil war and genocide on its south-eastern doorstep, diplomatic ineffectiveness, geopolitical divergences and profound disagreement at the highest level over its decision-making procedures and spending priorities. Furthermore, it has not faced competition from any other international and supranational institution for the delivery of the predominantly economic objectives which it set itself in its founding treaties in 1957. As such, it has been able to monopolise the space in which the peoples of Europe seek to build prosperity and realise their aspirations, with two exceptions: collective security, of which the NATO alliance remains the ultimate guarantor; and the ethical space of shared norms and values embodied in the Council of Europe and the European Convention of Human Rights – a space in which the European Union increasingly seeks to co-locate itself.

Given the daunting challenge of reconciling the competing – and often conflicting – interests of proud and ancient nation states which, throughout their histories, have readily resorted to threats, blackmail and war, and of substituting for a precarious balance of power a system of rules and decision-making which all accept as binding, one could readily conclude

that the uniqueness of the EU's achievement is its own validation. To be sure, that reality was not lost on the post-war generation, and arguably on most of the next one as well. Yet, surely the resounding success of the EU – measured in peace and prosperity, and lived and felt (if not always consciously) by its citizens – would have definitively settled the question of its legitimacy?

That expectation was, with hindsight, a fanciful one. The Union's legitimacy has not been exhausted but it has been eroded. Every formal indicator of popular participation and engagement in the European project since the heady days of the 1992 single market programme has revealed varying degrees of apathy and disconnectedness, sometimes spilling into overt hostility. The relentless decline in turn-out at European Parliament elections, confirmed in June 2009, is just one graphic marker. Hence the concern among Europe's elites that the passive consensus among the wider population over the EU's purpose and legitimacy now rests on precarious foundations.

Twenty-five years of argument over the nature of the EU's democratic deficit, with proposed remedies variously privileging the democratisation of the EU's institutions or the democratic reality of the nation state, have yet to yield convincing answers. That apparent failure may, as intergovernmentalist scholars argue, be simply because we are posing the wrong question of an essentially regulatory and value-neutral institution which was never intended to occupy the democratic space of the nation state; an institution which quietly, and for the most part competently, performs the low-salience tasks which we have set for it. On this view, public indifference is not to be confused with deep-seated and corrosive alienation.

The analysis is compelling, but, given what we know about the challenges facing a European Union in relative economic and demographic decline, and, in all probability, mired in low growth for some time to come – with all that these trends imply for Europe's political weight in the world – it would be curiously negligent, not to say irresponsible, for its members not to strain every sinew in mobilising widespread support for the collective responses which will be needed, and whose negotiation will test their cohesion to the very limit. For that effort to succeed, something less than transformational is needed. Notably, it will require more attention to both the "input" legitimacy and the "output" legitimacy of the Union.

What is the EU for?

For the EU to reconnect to its citizens, a wise start, it is often argued, would be a clear explanation of its mission and purpose, over and above the securing of peace and prosperity, now that these precious goods, rightly or wrongly, are taken for granted. The task of explanation is not made easier by the existence of several rationales and paradigms of European union, which, whilst stimulating lively debate among scholars, also compete and conflict with one another in simplified form within the public space, and which confuse the citizen more than they enlighten him.

Is it a community of values...

At the most elementary level of debate there are two rival contentions about the nature and purpose of the EU. One is that the EU is first and foremost a union of values, and that without the explicit and repeated affirmation of those values within a shared "life-space", our common engagement as Europeans becomes unintelligible, and incapable of sustaining institutions characterised by a degree of complexity and opacity. The "values-driven" account of the EU's legitimacy rests on converging and conflicting historical accounts of Europe's cultural and intellectual inheritance: on the one hand, the Judeo-Christian strand; on the other, the Enlightenment tradition, with its roots in classical antiquity (although a less schematic historical account would attach greater significance to the synthesis of the two currents within the west's dominant political and ethical construct of Natural Law).

Much time and effort have been expended in recent years on the articulation of these values – at Copenhagen in 1993, Amsterdam in 1997, Laeken in 2001, in the European Convention which drafted the ill-fated Constitutional Treaty, at Berlin in 2007, and, finally, in the Lisbon Treaty (whose fate, at the time of writing, was still hanging in the balance). But, if we are to consolidate those values, we need to be clear that the impact of Lisbon Treaty ratification on the public consciousness would be something less than transformational.

The problem with "values-based" efforts to bolster the EU's legitimacy is that, at the end of the day, people cannot simply *consume* values; nor, outside the ranks of the most politically committed, do ordinary people find inspiration in abstractions and high-flown rhetoric. The European Community vindicated itself not by standing for peace and prosperity but

by *delivering* peace and prosperity, without, for the most part, becoming enmeshed in the distributional questions which fall to national governments to resolve, and which will always be subjects of lively contestation. Indeed, values-based attempts to derive a European demos, and a distillation of European identity distinct from American identity, such as the manifesto of Jürgen Habermas and Jacques Derrida in 2003, have been notable for their empirical flimsiness and their lack of appeal outside a narrow political and intellectual constituency.

Of course, there are goods which rest on an overwhelming consensus: they are the "political" or civil rights which, even before the establishment of the European Communities, already formed part of the life-worlds of post-war Europeans; and the "safety net" of social protection afforded by most advanced industrial economies. These rights are secured and enjoyed at the level of the EU's member states, subject to the political oversight of the Council of Europe and the legal adjudication, *in extremis,* of the European Court of Human Rights. They take their place in the Charter of Fundamental Rights annexed to the Lisbon Treaty, alongside the "new" socio-economic rights which gain an unprecedented status, albeit qualified by the need to interpret such rights within the different political, cultural and legal frameworks of the member states. This qualification is not only an affirmation of the decentralising principle of "subsidiarity"; it is also a recognition of the incommensurability of such rights in specific national contexts, and of the need to reconcile competing entitlements and policy options within the uniquely legitimising context of a demos.

At the end of the day, the idea of the EU as a community of values rests on those values which are uncontested – of freedom, democracy, the market (or "social market") economy and the rule of law. It has taken two or three hundred years to consolidate those values – not without pathological and dystopian excursions which have sullied Europe's name. But, as I have suggested, "values" are not enough.

...or an instrument for delivering goods?

The other way of understanding the EU is as a vehicle for delivering outcomes for its citizens which are beyond the reach of nation-states acting alone. This "instrumental" account of the EU – unsentimental, "Anglo-Saxon," overly reductionist, functionalist or materialist to some tastes – has taken on a new lease of life in recent years, mainly for three reasons.

Firstly, because it can be rendered in accessible everyday language capable of engaging a wider audience than Europe's policy elites. Secondly, its

language of "outputs" marks an explicit repudiation of the bewildering self-absorption which characterises lengthy negotiations over institutional reform. And thirdly, because the very nature of the challenges now facing the nation-states of Europe – climate change, energy security, international terrorism, organised crime, migratory pressures, failing states, weapons of mass destruction (to say nothing of economic dislocation) – present, paradoxically, as much of an opportunity for the EU to vindicate itself as they present an existential threat to Europe as a whole. What is more, it is in such cross-border areas of policy that the logic of interdependence and the case for collective action within the EU framework is most easily apprehended by the agnostic and the politically indifferent.

The shift to the language of deliverables and outcomes – a shift explicitly encouraged by EU Commission President Barroso – is intended to convey a sharper focus on those goods which make a measurable difference to the lives of ordinary people, and which self-evidently defy the best efforts of nation states to deliver them on their own. An older generation of euro-enthusiasts may balk at such a banal rationale for European union, but it is at the everyday level that the Union stands the best chance of reconnecting to the citizen.

Why "input legitimacy" matters (too)

Few would dispute that the "output legitimacy" described above is, by closing the so-called "delivery deficit", a necessary condition of a confident, prosperous and flourishing Europe. And few would deny that Europe's shared values, though affirmed now and then in judgements of the ECJ and ECHR, are for the most part lived intangibly, at the level of the member states, without the label "European" emblazoned on them. The tenacity of those values should not be underestimated: they have formed the normative basis of Europe's universalising mission over the centuries, and now they provide much of the rationale and most of the rhetoric for the EU's "soft power". They took strength from the overwhelming moral imperative to reunite the European family in the wake of communism's collapse.

In the face of a new challenge to the European way of life, akin to the existential threat posed by the Soviet Union in the post-war period, it is reasonable to assume that Europeans would demonstrate solidarity and once again frame a collective response in defence of their shared values. By extension, it is not unreasonable to assume that public allegiance to the EU would, in those circumstances, be vigorously reaffirmed: as a civil power, it is, after all, the "only show in town".

But the most realistic scenario for the EU, as far as we can peer into the future, is, regrettably, not one which mobilises its values in the service of its goals: it is one of continuing indifference and sullenness, fed by a sense of remoteness from the EU's institutions and ignorance of its decision-making procedures. Such alienation is not only corrosive of "legitimacy" in the abstract: it risks impeding the Union's ability to act decisively in the interests of its citizens, as political leaders shy away from the electorally riskier option of action at EU level. Within this scenario, the interests of citizens will, in practice, only be aggregated at nation state level, and will be translated into national policy re sponses which, given the defiantly global nature of the EU's challenges, will be less than the sum of their parts.

It is precisely for this reason that "input legitimacy" has a role to play. Without greater public confidence in, and understanding of, the institutions of the Union, it will be harder for democratic politicians to frame credible policy responses. That is why input and output legitimacy cannot be addressed separately, as discrete goods in themselves.

But there are important caveats to input legitimacy. The value of public confidence in the EU's institutions and decision-making procedures is not to be measured in its approximation to any one ideal or blueprint of European democracy, since democracy will continue to be lived mostly at the level of the nation state. Nor, specifically, does it make sense to seek input legitimacy in models of "active" or participatory democracy, which lose much of their persuasive force when uploaded to the European level, as I shall argue below.

For all this, democracy, as one of the EU's defining values – one at the very heart of Europeans' self-understanding – has to be at least part of the answer. Why? Because, for so long as democracy fails to find adequate expression at the European level, where Europeans have pooled their sovereignty in the pursuit of shared goods, the EU will run the risk of undermining even the "passive consensus" which has sustained it until now. In the worst case, and most subversively, the Union could even find its citizens refusing to be bound by the decisions of the majority – the defining feature of a functioning democracy – and by the supremacy of EU law.

This scenario, whilst unlikely, is not so implausible as to be safely ignored. The current economic crisis has not so far carried us into the uncharted waters of aggressive economic nationalism, populism and violent street protest. For now, it is Europe's mainstream centre-right which has benefitted electorally from the crisis, not the political extremes. But who

can say with confidence that future economic shocks will not push voters towards more radical agendas? And who can be so sure that the most uncompromising versions of euroscepticism (and indeed Europhobia) which find a ready audience on the far left and far right, as the 2009 European Parliament elections confirmed, have already reached their high-water mark?

On one view, the new fault-line emerging between radical euroscepticism and the broadly pro-EU consensus spanning Europe's mainstream centre-left and centre-right opens up a more constructive opportunity – namely, to mark out fertile terrain for the enhanced political contestation sought by many EU scholars and commentators. Such contestation would, it is argued, deliver a much-needed shot in the arm to the continent's torpid polity. As an issue in itself, the argument over European integration could enjoy a clarity (repatriate power or pool more power?) which is bound to elude efforts to organise public debate around the notoriously slippery concepts of left and right. But we need to be clear that the price to be paid for such a route to input legitimacy could be irretrievable damage to the EU itself, for it is the Union itself which would become the issue.

A gradualist approach to reinforce EU legitimacy

The safer and surer way of reconnecting the EU to the citizen is to concentrate on those changes to the European conversation which command a large degree of consensus, and which reconcile values with self-interest. What is certain is that there can be no quick fixes: the EU is less a machine needing repair than a living organism – for the most part impressively self-sustaining, but prone to bouts of malaise to which, without adequate care and attention, it could yet succumb. Together, the following steps – addressing its input and output legitimacy in varying measures – can form the basis not of a mechanistic strategy for transformation and renewal (for no such strategy exists), but of a gradualist approach to securing the Union in its mission to extend peace and prosperity into the foreseeable future.

- "Europe needs a new narrative!" The call, made with increasing frequency, is well-taken and the need pressing. Appeals to "European values" cannot be left to rhetorical *"pieces d'occasion"* by politicians; nor can European values be affirmed solely within the formal and desiccated context of the Union's treaties. Rather, they should form part of a living narrative which locates values within Europe's past, present and future, and be communicated in a simple and engaging way.

- No single narrative can any longer fulfil the existential role performed by opposition to communism and dictatorship. Instead, new, "bespoke" narratives are needed for deployment before different audiences, using different idioms). Such narratives, however adapted and differentiated, need to be conceptually united by the Union's founding and allied concepts of freedom, openness and inclusion.

- In shaping such narratives, we neglect at our peril the intimate link between the romantic generosity of "values" (typically articulated in the international context as Europe's normative mission, based on universal values) and their grounding in prudence, or rational self-interest. Peace and prosperity are fine goods and principles, but in the aftermath of World War Two, they enjoyed real purchase in western Europe because they also defined the very conditions of existence – arguably more so than "freedom".

- In whichever policy area where there is full or mixed EU competence – trade, competition, asylum, environment, the "four freedoms" of people, goods, services and capital – the case for openness needs to be made vigorously, and grounded within a solid historical perspective of the principles of free movement and exchange which underpin Europe's social capital, and which have provided the basis of Europe's prosperity for centuries. "If Europe turns in on itself, it will die!"

- Nowhere is the case for openness so obviously married to self-interest than in the case of EU enlargement. The moral momentum generated by the return to freedom and democracy of the former Warsaw Pact members is (regrettably) now largely exhausted. The argument for EU membership for the countries of the western Balkans needs to be based on the over-riding priority of securing stability on the EU's doorstep – a need to which the horrors of the Balkan wars of the 1990s bears terrible witness. As for Turkey, the case for EU accession needs to be based at least as much on geopolitical imperatives in an unstable world as it does on that's country's readiness to embrace the rules and norms of EU membership.

- The message of openness should not be confused with a *laissez-aller* indifference to Europe's core values and identity. Public concern that dogmatic multiculturalism risks eroding national identity and social cohesion needs to be addressed, not disparaged and dismissed as racism or xenophobia. Specifically, it should be made clear that the inclusiveness and hospitality of Europeans is dependent on all communities – ethnic, cultural or religious – integrating within a shared national public space to whose rules they pledge unqualified allegiance. The idea of a social compact or contract – with the attendant concept of reciprocal duties – needs to be restored to the European lexicon, until now almost entirely dominated by the language of rights and entitlements.

- In so far as concerns about loss of identity manifest themselves inter alia in the form of disenchantment with, or hostility to, the European Union, it follows that a measured affirmation of national identity aimed at public reassurance will help diminish that sense of alienation and exonerate the EU from the charge that its commitment to economic liberalism and free trade is pursued at the expense of social and cultural cohesion.

- The input legitimacy of the EU is measured as much by the openness, transparency and intelligibility of its institutions and decision-making processes as it is by the level of political participation of its citizens. In these areas, there is scope, through the increased provision of information in an accessible format, for reducing the ignorance of the EU which, in turn, breeds suspicion of its work and motives. But it is unrealistic and even dangerous to judge the health of a body politic by the political activism of its citizens at either national or European level; such activity tells us little about their level of civic commitment or participation in their communities. The tacit consent of the "passive consensus" can be as suggestive of fundamental contentment in the public at large as it can be indicative of sullen acquiescence.

- To the extent that some reinvigoration of Europe's public space is desirable, the priority should be to foster civic engagement at local and national level, bridging the divide between citizens and their elected representatives which most democracies are currently experiencing, and which, sequentially, spills over into detachment and alienation from the policy debate which takes place at EU level.

The risks of EU politicisation

The idea of stimulating contestation at the EU level as a way of clarifying political choices and stimulating public interest and participation in the political process by offering clear and substantive policy alternatives, runs into several difficulties. First, the political labels of the pan-European parties who would present a common policy platform and an agreed candidate for the EU Commission presidency are notoriously slippery and misleading. A Swedish or Danish social democrat MEP is likely to be more liberal on trade than a French centre right MEP. An Italian centre-right MEP will be more welfarist and corporatist in social and industrial policy than a British Conservative MEP. It is for this reason that the manifestos of pan-European parties do not constitute substantive policy programmes.

Nor is there sufficient alignment between the choices of national political parties (and their representatives in government) and the preferences of MEPs of those same parties, whose loyalties are sometimes (though not always) transferred to their pan-European alliances. For instance, this was again illustrated in July 2009, when the socialist governments of Spain and Portugal expressed their support for the re-nomination of José Manuel Barroso as EU Commission President, in spite of his alignment with the centre-right European People's Party (EPP), even though this was in direct opposition to their own MEPs, who supported the line of the Party of European Socialists (PES), which was to oppose his re-nomination. The persistence of such intra-party divisions, and the confusion which this creates for voters, suggests that we are still some way from the clarity required for effective contestation of the kind which is normal within national polities.

Furthermore, there is a strong possibility that a strengthened domestic mandate for an EU Commission president – elected directly by the EU's citizens or indirectly by MEPs – would lead to conflict with the democratic representatives who make up the national governments of the member states. Who would be more legitimate?

Finally, there is a real risk that, in this scenario of enhanced democracy at the supranational EU level, the policies adopted on a majoritarian principle by an emboldened EU Commission or European Parliament, would be resented by political constituencies at national level, who will condemn the "remoteness" of the EU institutions' mandate, and call into question the democratic legitimacy of the EU, with potentially damaging consequences. Would a left or right wing voter feel as bound to accept an

opposing political agenda when it is implemented by a European executive of a different political stripe as he would if the programme were that of his own government? Conversely, as Stefano Bartolini and others have argued, is there not also a real risk that increased public participation within an energised EU polity would create expectations which the EU system, based on political *marchandage* and compromise, is incapable of satisfying?

To these familiar objections to the politicisation of the EU we must add the likelihood that, notwithstanding greater intra-party discipline within the European Parliament, the main ideological fault line in the foreseeable future is more likely to be between open and liberal (typically dubbed "pro-European") lines, and defensive and protectionist ("nationalist" lines) – with the attendant risk, as described earlier in this paper, of making the EU itself the issue.

The EU needs less verse, more prose

By general consent, and irrespective of the fate of the Lisbon Treaty, we have, for the foreseeable future, passed the high-water mark of European integration on traditional lines – that is, on the basis of ever-increasing Community competence and qualified majority voting under the Community Method. This, together with the emergence of a policy agenda (climate change, energy security, migration, terrorism, organised crime, proliferation of WMD, rogue states and failing states, and human development) which will test the notions of interdependence and collective action to their very limits, presents a valuable opportunity to build a new mission and a more empirically-based rationale for the EU – one which eschews windy rhetoric and which explains in layman's terms how the Union adds value to its citizens' lives.

This effort, accompanied by a systematic deployment of supporting narratives founded on enlightened self-interest, and a redirection of internal policy towards a recognisably European (and Atlantic) identity based on openness, social integration and inclusion, offers a more realistic path to a re-legitimised European Union than the unceasing mechanistic adjustments of old-school true believers on the one hand, or the other-worldly hankerings of the proponents of *souveraineté nationale* on the other.

Chapter 3

The EU's identity deficit: what it is and why it is important

Tony Fahey

Following the Irish referendum vote of 12 June 2008 which rejected the Lisbon Treaty and derailed its ratification throughout the EU, the vice president of the European Commission, Margaret Wallström, briefly became well-known on Irish television. Journalists turned to her as the face and voice of the European Commission in the commentary on the referendum result which, for a few days, flooded through the Irish media. Watching one of the most fluent and somehow reassuring performances she provided to news and current affairs programmes over this two or three day period, a friend in Dublin remarked, "Why wasn't she brought on before we voted?"

This question highlighted what stands out as a notable feature of the referendum campaign on Lisbon in Ireland in 2008 – the complete absence of European voices or faces. The debate consisted entirely of Irish public figures, drawn from Irish political parties, business organisations, trade unions and other lobby groups, who argued the merits and de-merits of the treaty with each other, mainly in terms of what it meant for Ireland. In mid-April 2008, almost two months in advance of the referendum vote, Commission President Barroso paid a two-day visit to Ireland and contributed a number of set-piece speeches on why the Irish electorate should say "yes" to Lisbon. Aside from that, EU leaders stayed away and

left it up to the Irish government to sell the treaty reforms, and the whole concept of the EU that lay behind them, to the Irish public. Ms Wallström, whose brief in the EU Commission is communication, did not communicate at all with Irish voters while the campaign was going on.

As we now know, the outcome of the second referendum, delivered in October 2009, was a different one. Against the background of the economic collapse which occurred in the intervening period, factors such as the fate of Iceland surely served as persuasive lessons on what it means for a small open economy to lack the monetary underpinning of the euro. However, our concern here is to note that, whatever the exact reasons why a significant part of the population changed its mind, the frame of reference in which the vote took place was again overwhelmingly national: Irish voters were asked by Irish leaders to give Ireland's assent to a project which, though run by European politicians and bureaucrats, was viewed largely from an Irish vantage point. Apart from one late visit by the re-elected Commission President Barroso, European leaders again stayed out of the referendum campaign and therefore remained voiceless, faceless, featureless and utterly unknown to the voters whose assent to their cause they claimed to seek. It may well be the case that the governance rules of the EU insist on this absence, that they preclude intervention by "outside" political figures in decision-making on EU issues within member states – or in other words that even if they give Ms Wallström the responsibility for communication in the EU they prohibit her from talking directly to EU electorates when that might matter most. If this is so, it is an instance where EU rules themselves draw a curtain between EU institutions and the voters who are expected to decide how those institutions should evolve.

The emptiness of EU identity

The national focus of votes on EU issues, whether in Ireland or elsewhere, is relevant to the question of an EU "fit for purpose" because it illustrates the consequences of what Glynis Breakwell referred to as the "emptiness" of EU identity.[1] Champions of the European project have often spoken of the need for a European demos, a people that is sufficiently united by a common identity for it to be capable of exercising democratic self-rule.[2] The early decades of European integration might have been conceived largely as an intergovernmental project requiring only voters' tacit assent. But the more ambitious agendas initiated by the Single European Act in 1986, which launched the single market, and the Maastricht Treaty in 1992, which among other things led to the creation of the euro, are a different matter. They bring the EU some steps closer to the goal of a

union of peoples and require more active popular consent, which in turn requires at least some shift in popular identity, and the emergence of some degree of a European "we", to bed down and sustain.

No doubt some such sense of the European "we" does exist, as it may have done since medieval times, but few would argue that it has gone much beyond a vague sense of cultural commonality or that it has the political binding capacity needed to create the early stages of a European demos. Certainly, when it comes to political identity, the EU is empty of that most basic of identity requirements – leaders whose names and faces are widely recognised. The frequent expansions to the EU's borders do not help either, since clear boundaries are often pointed to as basic requirements of social entities that successfully evoke a sense of collective identity.[3] People may be willing in survey interviews to claim some element of identification with Europe, or even with the European Union,[4] but these categories are vague and fuzzy in their minds – they have little cognitive content, much less emotional purchase. They do not really figure in whatever "we-feelings" serve to make up popular social identity, and even as cognitive images, they lack definition. As Breakwell says of the EU, "it has no unambiguous or unchallenged social meaning and has limited symbols. It has a short and unromantic history without what might be called heritage (the emotion-ridden myths, legends and personalities used by nations to claim distinctiveness, continuity, efficacy and esteem)".[5]

What this means is that as EU leaders have pushed ahead with the Europeanisation of the economy and the legal system and have sought to evolve governance mechanisms capable of running this increasingly integrated Europe (as was the purpose of the Lisbon Treaty), they have run ahead of the Europeanisation of the demos: they have failed to cultivate the common identity and the political institutions, such as transnational political parties, needed to mobilise voters on a European rather than a national basis. The result is that the voting public in the EU is not a European demos, even in incipient form, but a collection of national electorates which can see the EU mainly in their own national terms only. They are spokes lacking an image of a single wheel. It is important to recall here that for the purposes of identity formation it is not objective linkages that matter but the imagined ties that form the idea of collective "we" in people's minds.

Part of the problem here is that the Europeanisation of identity has progressed a considerable distance among the EU's leadership class and has, therefore, helped create a gulf between elite and popular perceptions

of how real and familiar the EU is. The thousands of national politicians, civil servants, business leaders, trade unionists, community activists, journalists and other opinion formers who make up that class regularly trek to Brussels and do business with each other under the umbrella of the EU institutions such as the European Commission, the European Parliament, the European Court of Justice and so on. This has transformed the EU into a familiar and living reality in their minds and has established it as an object capable of evoking some sense of positive identification.[6] However, this elite-level process of European reification and identity-formation simply highlights the absence of any equivalent narrative at the popular level. For most Europeans, the EU is a mystery, the opposite of a living and familiar reality: they know none of the main characters or organisations that connect the member states at the centre and little of the larger purpose or philosophy that binds it into a meaningful whole at the rim. Not only do they not identify with the EU, they simply can't identify it in the first place.

Why Ireland said "no"

It is worth looking again in some detail at the Irish rejection of the Lisbon Treaty in June 2008 as it exemplifies this deficit of identification and can reveal much about the nature and importance of identity issues for the EU. Unlike the French "no" vote to the ill-fated Constitutional Treaty in 2005, the Irish "no" to Lisbon cannot be explained as an expression of national frustration with high unemployment or sluggish economic performance. In June 2008, the Irish economic boom was still alive (or at least Irish voters were not yet aware that it was dying). There were plenty of Polish plumbers in the Irish labour market – in fact Ireland, relative to population size, had received by far the largest influx of east European immigrants as a consequence of the eastern enlargement of the EU. But full employment meant that immigration caused none of the resentment among Irish voters in 2008 that foreign workers evoked among French voters in 2005 – and indeed immigration scarcely featured as an issue in Ireland's Lisbon referendum campaign (here also there is a contrast with Dutch rejectionists of the EU constitution in 2005). In fact, opinion polls suggested that in the run-up to the Lisbon vote, the Irish electorate was not worried about or resentful towards any aspect of the EU but were quite relaxed, even positive, both about the EU and the Lisbon Treaty. Furthermore, the entire Irish political establishment – all the significant political parties, trade unions, business and farmer organisations – urged voters to say "yes" to Lisbon as it was both very much in Ireland's interest and important for the future of the EU.

In that context, then, it is important to take note of opinion poll evidence as to why Irish voters, in the end, clearly said "no" to Lisbon (the vote against was 53.4% of those who voted, though it is also significant that 47% did not vote at all). By far the biggest influence on both abstention and rejection was uncertainty about the issues involved. In the first opinion poll taken after the vote, "lack of understanding/lack of information" was identified as the main reason for abstention by 46% of non-voters and as the main reason for voting "no" by 46% of those who voted against. No other factors came close to having the same significance in people's minds. For those who did not vote at all, the second ranked reason for abstention ("on holiday/away from home") was mentioned by only 19%, while for those who voted against, the second ranked reason for saying no ("loss of sovereignty/ independence") was mentioned by only 18%.[7] Other issues often thought to be a major concern for Irish voters featured hardly at all: only 8% of rejectionists mentioned loss of military neutrality as a reason for voting no, while loss of the Irish commissioner on a rotating basis, loss of control over taxation policy and worries about abortion were mentioned by 4%, 3% and 2% respectively.

Thus, "lack of information/lack of understanding" was the over-riding problem. But what does this actually mean in this context? It is indeed possible that this phrase should be taken at face value and should be interpreted to refer to Irish people's difficulty in comprehending Lisbon's technical details. The Irish government circulated to every home a simple pamphlet about the treaty and the media made many efforts to provide a fool's guide to what it contained. But perhaps this was not sufficient. Ireland's comprehension problem may simply demonstrate that electorates should be consulted about the broad directions of policy but not about detailed and complex policy documents such as the Lisbon Treaty which only full-time legislators have the time and expertise to come to terms with. Perhaps, then, the underlying problem was the peculiar Irish legal requirement that parliamentary ratification of Lisbon was not enough but that it had to be put to a vote of the people.

However, the other possibility is that it was not the technicalities of the Lisbon proposals that befuddled Irish voters but their larger significance and meaning. In the grand scheme of things what factors make the Lisbon proposals make sense? There was much debate in the referendum campaign about details of the Lisbon Treaty and whether a "yes" vote would be good for Ireland, but there was no real communication with Irish voters on what the EU itself meant – on what it *is* in a fundamental

sense. For example, there was no compelling, easily accessible narrative which would account for that which had made the Lisbon Treaty necessary in the first place – the expansion of the EU from 15 to 27 member states between 2004 and 2007. What sense could voters make of the EU's constant expansion alongside the message propounded by the supporters of Lisbon that EU governance mechanisms, if unreformed, would collapse under the weight of the larger number of members? If effective governance was so important, why threaten what worked previously by adding so many new members so quickly?

The very form of the campaign mentioned earlier – the wholly national cast of the characters who engaged in it and the absence of European personalities who might have represented a larger perspective – was itself a contributor to the opacity of the EU in Irish people's minds. For the Irish government, it was a case of the spoke having to represent the wheel, and of the medium being inadequate to the message. And most significantly, it is just not helpful to say that the purpose of Lisbon is to enable the EU system to function better when people have such a limited image in the first place of what the EU system does or what its underlying philosophy or functions are.

Social identity and European integration

In order to appreciate the significance of the Irish "lack of understanding" of the Lisbon Treaty and to see how it might be interpreted as an identity problem with general European significance, it is worth recalling the analysis of social identity developed in social psychology, particularly in that body of work that goes under the label of social identity theory.[8] It proposes that our sense of self is based not only on personal identity – our view of who we are compared to other individuals – but also on our social identity, our sense of what groups we belong to and what characteristics and social values those groups have. The utility of this theory for present purposes is that it breaks social identity down into a number of components and enables us to begin to pick out the specifics of what might be missing in our present sense of European identity – and where the "understanding" problem mentioned above might fit in.

A central element of social identity highlighted in this body of work is our profound cognitive need for categorisation – our thinking minds cannot cope with a vast undifferentiated social landscape but must impose a structure on it by assigning things and people to categories. In this process of cognitive-imaginative structuration, we might perhaps use actual social features as cues for defining the boundaries between categories but, if

necessary, we will invent or project characteristics which serve that segmentation function, or take trivial distinctions and blow them up into powerful symbolic boundary markers. This process also entails maximum cognitive differentiation between categories – to lend force to the category boundaries, we play down social difference within categories, emphasising how much their members are alike, and play up social differences across categories, emphasising how different the categories are from each other, even if the actual similarities and differences are not pronounced. Thus we construct and impose discrete social identities on what might "objectively" be regarded as a continuous social landscape.

The next aspect of this process is self identification – we feel impelled to locate ourselves within these categories by picking one or more of them as our own, as constituting a "we" in which we can place ourselves, in distinction from all the rest which we regard as "other". That is accompanied by status enhancement: we not only want to have a "we" but also to feel good about it. To that end, we make social comparisons with other groups in order to identify aspects of our group which we can rate highly and use to boost our sense of our group's relative worth, that is, to make us proud of who we are. In sum, my self-esteem and sense of my identity comes to rest not only on how I view myself as an individual compared to others in my group, but also how I rate the group itself in comparison with the wide external world of other identity groups. Thus, social identity is a property of individuals which is socially constructed through a process of categorisation, differentiation, and self-identification and status enhancement through comparison with other groups.

In real life, these are highly complex processes, not least because we all have multiple social identities (based, for example, on the age, gender or occupational groups we belong to, on nationality, religion, language, and so on). Furthermore, no matter how strong any specific social identity might be, its salience and precise meaning may vary across individuals or across time or space. However, rather than dwell on the complexity of social identity, it is enough here to focus on the fundamental role of categorisation in identity formation and to note that the "understanding" problem referred to earlier in the Irish vote on the Lisbon Treaty is an indication of how weakly the EU fares on this front.

What national identities can teach the EU

Therefore the core problem is the emptiness of our image of the EU itself and its inability to add to our understanding of the world around us. We can map Europe quite effectively in our minds without reference to the EU

and it may even confuse matters to add the EU to the other categories we use for this purpose. Here of course the main operative categories are the individual countries, not in the sense that we can name them all but that the concept "country" is immediately familiar to us and we unambiguously know not only what our own country is but also what it means to say that any place (say, Slovakia or Finland or Portugal) is a country. "Europe" as a loose collection of countries that occupies a particular global region – that is, as a continent similar to Asia or Africa – may also mean something (we know what continents are) but the EU is not a continent – and indeed we have no general term for what it is.

This is not to say that we can cope cognitively only with entities that we can recognise as specific instances of well-understood categories (such as countries), nor that it is a sufficient cognitive basis for something as rich as a national identity to say merely that it has its foundation in the existence of a recognised country. We can also become cognitively comfortable with one-of-a-kind entities if they become sufficiently real and familiar to us.

The UK is one of the more complex cases in point – and is a particularly relevant one from an EU point of view since it can be regarded as an entity which in its capacity to bind a number of nations (England, Scotland, Wales plus the bi-national oddity that is Northern Ireland) into a single polity is both a one-off in Europe and might be regarded as a precedent for what some of the more enthusiastic European federalists might hope that the EU will eventually become. The strength and clarity of British identity is not compromised by the absence of any other similar multi-national polity in Europe (nor even by the disjunction between the term "Britain", which consists only of England, Wales and Scotland, and the polity it is often used to refer to, which as the UK also includes Northern Ireland). It rests rather on its citizens' sense of a long and rich British history and on a multiplicity of immediately recognised institutions – the royal family, the British government, the British army, the National Health Service, the BBC, warm beer, and so on – that are real in their minds and define their commonality.

In fact, the British case also reminds us that the common practice in discussions of Europeanness of contrasting strong national identities with weak European identity runs the risk of overstating the cohesive, monolithic character of the identity profiles of EU member states. Belgium, Spain, and Italy also immediately spring to mind as countries with sharp internal identity divides, not to speak of the increasingly widespread

identity challenges arising in many European states from immigration and new multiculturalism. Consequently, the collective identity that underpins a demos in democratic states does not have to be wholly unitary, but simply has to be cohesive enough to eliminate separatist sentiment or, where separatist movements do arise, has to win sufficient popular allegiance to hold separatism in check. An effective EU identity, therefore, should not be expected to be free of uncertainties, internal divides and shifting shades of meaning, nor even to dominate over or displace national identities (as some of the more hopeful proponents of internationalism seem to expect).[9] But it should be expected to have enormous *substance,* as is the case with all national identities in Europe, however contested those identities may be within the borders of the polities in which they exist.

A central lesson for the EU from the identity profiles of its member states is the richness it should seek to cultivate in familiar everyday institutions, historical narratives, past heroes and present day personalities, sporting events, cultural symbols, language and habits of speech, and collective dramas (fictional or real) that are played out in the media. These provide the cognitive-imaginative raw material from which the identity foundations of a demos can be formed and which therefore have to become part of the central thrust of the European project for the future.

Breaking the circle of incomprehension

To highlight the importance and nature of the EU's identity deficit is not to downplay the importance of other factors for the future of European integration. The EU will not prosper if it does not deliver real benefits in realms such as the economy, international relations and the environment. However, practical benefits for member states and for individual citizens are not enough, even if they are delivered. It is also necessary to take account of social identity, both as a component of individual welfare and as a foundation for the demos which the EU now needs to cultivate.

The identity deficit that the European project now faces does not arise because the EU is the only instance of regional integration of its kind: there are many examples of socio-political entities that, when looked at closely, also turn out to be singularities. Neither does it occur because people's primary collective identification with the national level somehow makes it impossible to create a transnational identity which can function alongside the national identities enclosed within it. Here too, as the examples mentioned above indicate, we have polities within Europe that have achieved precisely that kind of multi-level, multi-national union of peoples and have managed over long historical periods to cope with the

contradictions, instabilities and tensions in identities that arise as a result. What the EU needs, therefore, is not a dominant or fully cohesive social identity but a collective sense of the "we" among European peoples that is strong enough to underpin the limited integrated polity that the EU now seeks to become.

One obstacle to the fulfilment of that need is the invisibility of the EU as a polity in people's minds, manifested more than anything else by the invisibility of its leaders. If EU voters are asked to place their faith in an EU leadership class, as Irish voters are being asked to do in the vote on Lisbon, the least they can expect is to see who these leaders are and listen to them engage in debate in the Irish media on what their vision for Europe is. Such engagement between voters and leaders is what happens in domestic politics and is so much a part of the democratic process that one can hardly conceive of a democracy that seeks to do without it. Yet, no such process of engagement between leaders and voters seems possible in the present structures of the EU. The result is not just a democratic deficit but an even more fundamental identity deficit that makes it difficult for a European demos to come into being.

Finally, this problem is exacerbated by the lack of appreciation among Europe's leaders who do not even seem to acknowledge it; or at least their lack of comprehension as to what a response to the problem might entail. The major source of the Irish electorate's "no", as I have argued above, was bewilderment among Irish voters as to the larger significance and meaning of the Lisbon Treaty and indeed of the EU itself, which in turn reflected the unavailability to voters of an accessible and compelling imagery that might define the EU in their minds and give them something meaningful to vote about. Perhaps the core lesson to be drawn from this version of events derives not from this bewilderment in itself but rather from the response – or lack of it – among Irish and European political leaders.

In Ireland and in Brussels, the reaction to the Irish negative vote in 2008 was to focus primarily on technical aspects of the treaty, thus seeking to reassure Irish voters through special protocols – which were duly granted to the Irish government in June 2009. While these may have had some impact, ultimately they contribute very little in dealing with the bewilderment of the voters as to what the whole exercise was actually about – and the indications are that the EU's leaders are as lost and uncomprehending in the face of this bewilderment as those voters are about the underlying nature and direction of the EU. Until this circle of incomprehension is broken, it is difficult to believe that an "EU fit for purpose" is likely to come into being.

Chapter 4

European identity: a dangerous obsession

Edgar Grande

In the current debate over the EU's political crisis the concept of "European identity" has taken centre stage. By evoking a sentiment, backed by a common history, of "we the Europeans" the ties between EU institutions and the citizen are supposed to be strengthened and conflicts of interest among the member states overcome. From this vi ewpoint, the root cause of the crisis has nothing to do with the inadequate institutional design of the EU, or the shortcomings of its policies, but everything to do with a lack of identity and identification on behalf of its citizens. This lack of identity is partly attributed to territorial expansion and the deepening of functionality at EU level over the last two decades. To put it more bluntly, the creation of an internal market and the inclusion of twelve new member states are accused of alienating citizens from EU institutions whilst simultaneously weakening the "thick" identities of the "old" Community.

As Jacques Derrida and Jürgen Habermas stated exemplarily in their joint appeal to the European public in 2003, "the policy of further expanding the EU is running up against the limits of the existing administrative steering mechanisms. Until now, the functional imperatives of creating a common economic and currency zone have propelled reforms. However, these driving forces are now exhausted. An active policy that calls not just for the obstacles to competition but also for a common will on the part of

the members states is dependent on the *motives and convictions of the citizens themselves".*[1] For Derrida and Habermas, the European Constitution project was supposed to create a new political identity among European citizens while the Constitutional Treaty was to have transformed the EU from an obscure elite enterprise into a joint democratic project of European citizens, thus giving the integration process a new drive.

The failure of the Constitutional Treaty and the rejection of the Lisbon Treaty in the first Irish referendum have reinforced calls for the strengthening of European identity. Meanwhile, however, the debate has taken a somewhat different turn. The idea of a European identity is no longer linked to a political identity created by constitutional norms; rather it is connoted with common cultural norms and values. European identity ought to be "thickened" by reanimating the common "cultural heritage" of Europe.

This "cultural turn" in the public debate on European identity gives rise to a number of important questions – the most important of which are related to practical feasibility. Whereas it is possible to link the strengthening of political identity to a concrete, though contested, political project, the practical connotations of a culturally defined "European identity" seem to be vague and unclear. Even if it were possible to positively influence such an identity by means of (European) policies, the effects of such policies can only be expected to materialise in the long run. Therefore as a short term remedy for acute problems, efforts to strengthen a culturally defined "European identity" seem inappropriate.

Furthermore, the problem with the political debate on "European identity" is much more deep seeded than the observation that it might not deliver what it promises. As I will argue in this chapter, appeals to a culturally defined "European identity" are highly contentious in a political sense as they nurture exclusionary sentiments that have been, in recent years, successfully articulated and mobilised by nationalistic movements. Thus, they are counter-productive. It is precisely for this reason that the debate on "European identity" must be considered as a "dangerous obsession" which could seriously obstruct the integration process as a whole.

The restructuring of politics in western democracies

In essence, the concept of "European identity" is based on an inadequate diagnosis of the EU's current political crisis. So far, questions relating to the legitimacy challenge have only produced "euro-centric" explanations which attribute citizens' dissatisfaction with the EU almost exclusively to

its institutions, procedures and policies. Central to this assessment lies the remoteness and bureaucratic rigidity of the Commission, the non-transparent decision-making processes, the "neo-liberal" imbalances of the Single Market, the lack of information and engagement on behalf of the citizens, together with a host of other readily cited problems. While it is true that these factors might represent serious shortcomings in EU policy processes, and therefore difficult obstacles to any further integration, this diagnosis only scrapes the surface when it comes to the real causes of public dissatisfaction with the European project.

Rather, the EU political crisis that we are now witnessing must be interpreted in the context of the fundamental restructuring of politics in western democracies. In the last two decades, the process of globalisation – or, to be more precise, de-nationalisation – has been transforming the very basis of politics in western Europe, giving rise to a new "integration-demarcation" cleavage.[2] This is not to say that globalisation has added an entirely new conflict dimension to the existing national political space in west European countries; rather, it has transformed the existing cultural conflict dimension.

This new "integration-demarcation" cleavage has so far been embedded into the existing two-dimensional structure of political conflict. Whereas, the cultural dimension, up until the 1970s, was dominated by issues linked to cultural liberalism and religion, over the last two decades new issues such as immigration and European integration have played a much more prominent role in political spaces. Immigration has been the key player in this respect – a theme which was absent from debate before the 1980s – and has become a very polarising and salient issue. In addition to this, empirical evidence has increasingly drawn attention to the use of this cultural dimension as the predominant basis on which new parties of the populist right seek to mobilise their electorate against mainstream parties.[3] Over the last two decades the result has been the substantial polarisation of national party systems in most EU member states.

Winners and losers of globalisation

Why does globalisation have the potential to create such a new social cleavage? And how exactly is this new cleavage related to European integration? In short, the consequences of globalisation are not the same for all members of a national community – and among national communities. As a result, globalisation (and Europeanisation) tends to give rise to new disparities, new oppositions and new forms of competition. These new forms of economic, cultural and political competition create

new groups of "winners" and "losers", which in turn creates political potential for the articulation of conflicting interests as well as new demands by political parties, interest groups and social movements. Such new forms of opposition crosscut, not align with, traditional structural and political cleavages.[4]

The literature on globalisation and de-nationalisation has identified at least three types of conflict that contribute to the formation of globalisation "winners" and "losers": economic competition, cultural diversity and political integration. First of all, globalisation has resulted in an increase in transnational economic competition. In advanced west European welfare states, this has led to the dramatic erosion of protected property rights and of the streams of income linked to them. In the post-war decades, industrialised countries introduced a variety of measures to disconnect income streams (in the form of wages, employment or profits) from the outcome of the market. However, the increasing transnational mobility of capital has produced significant downward pressure on domestic regulation, tax rates, and wages.[5] Individuals and firms that previously operated in "sheltered" sectors, i.e. sectors that were protected from market pressures through (national!) public regulation, are now, as they increasingly become exposed to international competition, most directly affected by this erosion.

At the same time, globalisation should not be solely reduced to its economic dimension given that it has also led to a significant increase in diversity within our societies. Since the 1960s, west European countries have been faced with mass immigration of ethnic groups who are in many respects distinct from the indigenous European population. Of course, these migratory movements can have many different catalysts, e.g. the dissolution of colonial empires, civil wars and the decline of statehood, and scarcity of national resources or political persecution, but they all contribute to a strong increase in socio-cultural diversity in European societies.[6] One of the crucial questions then is how they cope with this new, culturally defined diversity. Cultural diversity might not only intensify economic competition for scarce jobs and shrinking welfare benefits, but it may also threaten the cultural identity of indigenous populations. As a result, cultural diversity has the potential to create new political conflicts which transcend the structure of those conflicts produced by the formation of the nation-state and of industrialisation in western Europe.

A third source of conflict is political integration and the transfer of political authority to institutions beyond the nation-state.[7] In particular, this refers

to those cases in which such a transfer jeopardises national sovereignty. The result is an increase in political competition between nation-states on the one hand, and supra-, trans- and international political authorities on the other – which equally creates winners and losers among their citizens. To begin with, a transfer of political authority can effectively lead to a downsizing of the public sector at the national level, thus creating material losers. More importantly, however, winners and losers emerge from differences in identification with national norms and institutions. Individuals who possess a strong identification with their national community and are attached to its exclusionary norms will perceive a weakening of the national institutions as a loss. Conversely, citizens with universalistic or cosmopolitan norms may perceive this weakening as a gain, if it implies a strengthening of a specific type of cosmopolitan political institutions, rather than a mere "retreat of the state". The attachment to national traditions, symbols and values plays a prominent role here, as does the integration into transnational networks.[8] Significantly, in each case the conflicts created by this political competition do not fit into the old cleavage categories.

The new groups of winners and losers of globalisation created by these three types of conflict are not ideologically predefined. Rather, they constitute new political potential, which can – and must – be articulated by political organisations. However, given the heterogeneous composition of these groups, we cannot expect that the preferences formed as a function of this new antagonism will be closely aligned with the political divisions on which domestic politics has traditionally been based. In fact, as we can observe from the development of national party systems in western Europe over the last two decades, it has become difficult for established national political actors to organise around and tap into this new political potential.

So far, this political potential has been exploited most successfully by right-wing populist parties who have been able to mobilise the "losers" of globalisation by articulating their fears and anxieties in relation to both immigration and European integration. Over the past two decades, they have succeeded in linking cultural diversity and economic competition in such a way as to turn ethnically different groups into symbols of potential threats not only to the collective identity, but also to the standards of living among indigenous populations. Consequently in the 1990s and early 2000s the new populist right has clearly constituted the driving force behind the transformation of west European party systems.

Hence, if we are to fully understand the restructuring of political conflict in western Europe, we must distinguish between the two different logics of political conflict: the economic and the cultural. Both logics, it can be said, articulate structural conflicts of globalisation, but they do so in different ways. A cultural logic of conflict emphasises the negative consequences of cultural diversity and political integration, and in doing so re-frames economic conflicts in cultural terms. An economic logic of conflict stresses the negative consequences of economic competition and re-frames cultural and political conflicts in such a way that they allow intensifying economic confrontation. While the cultural logic of conflict predominated in the 1990s and 2000s and strengthened the cultural conflict dimension of the political space, the possible resurgence of economic conflicts as a consequence of the global financial crisis could strengthen the economic conflict dimension in the political space.

Finally, the two logics of conflict allow different mobilisation strategies as well as benefiting different political actors. In recent years, the successes of the radical right in western Europe have been based on a cultural logic of political conflict, while the economic logic of political conflict has been articulated by new left-wing populist parties (in Germany and the Netherlands, for example). Both groups not only support protectionist and interventionist programmes, but also mobilise against the EU in its existing form and against an expansion of the integration process. Without doubt, the successes of right- and left-wing populist parties have put established political parties under pressure. This holds in particular for those social democratic parties that moved to the centre of the political space in the 1990s and early 2000s. They are now in danger of being simultaneously squeezed between new contenders on the left and on the right of the ideological spectrum.

European integration and the new social cleavages

What does this restructuring of political conflict mean for European integration and European identity? Three important implications come to the fore. First, in both logics of political conflict, Europe is perceived as being part of the problem and not part of the solution. Using the economic logic, "losers" of globalisation consider the EU not as a counter-weight to "neoliberal" globalisation, but as its intensification and acceleration. From their point of view, it is difficult, if not impossible, to distinguish between the benefits of an internal European market and the negative consequences of global economic integration. Meanwhile, using the cultural logic, the transfer of sovereignty to the EU is primarily perceived as an immediate threat to national identities, national institutions and national democratic

practices – and an enlargement process without limits and clear ends is seen as a threat to the cultural homogeneity, particularly of "old" Europe. At best, European integration seems to produce a delicate trade-off for its citizens: they have to accept a loss of sovereignty and national identity in exchange for new, and vaguely defined, economic and political powers. Unsurprisingly, the EU has therefore become an easy target for all kinds of populist parties and movements.

Second, the restructuring of political conflict has considerably politicised the process of European integration. Yet, the manifestations and consequences of this must frustrate those who debate the possibilities and opportunities of increased politicisation at EU level. Notwithstanding the remarkable successes of some anti-European parties at the last election to the European Parliament, we must acknowledge that the politicisation of Europe mostly takes place at the national level. Since the 1990s, Europe has become a salient and hotly contested issue in national election campaigns and, as a result, an issue of "mass politics" in most member states.[10] Moreover, the politicisation of Europe did not take place along the traditional "left-right" axis; rather, it is the product of anti-European parties and political movements. Thus, ironically, the mobilisation of European citizens on European issues has been achieved most successfully by the critics of the EU and by the defenders of national identity and sovereignty.

The third implication – which comes as a direct consequence of the second – is that appealing to a culturally defined European identity would be like pouring oil on a fire. It has to be said that broader political campaigns and debates on identity, outside of academia, would largely benefit the radical populist parties on the right and on the left, who have already successfully mobilised along the lines of identity, immigration and integration. It is true that the concept of "European identity" is in itself highly ambiguous, not least because most of its multiple varieties try to combine "unity" and "diversity" in some way.[11] However, one commonality that runs through all of the definitions is that by emphasising a European "we", the concept is based on constructions of some kind of "sameness". If we cast our minds back to the Copenhagen Declaration in 1973, it can be observed that it was precisely this idea of "sameness" that was highlighted. The declaration acknowledges the "diversity of cultures" within Europe and the importance of common interests, but puts particular emphasis on "the framework of common European civilisation", "the attachment to common values and principles" and "the increasing convergence of attitudes to life" which are supposed to give "the European identity its originality and its own

dynamism". While such an idea of European identity has become outdated in scientific discourses,[12] it still informs the majority of public debates, where the emphasis is on Europe as a distinctive cultural entity united by shared values, culture and identity.[13]

The dangers of European identity

Such an understanding of European identity will inevitably run into two difficulties. The first one is identifying the norms and values that constitute the common "cultural heritage" of Europe. Usually, "references are made to Europe's heritage of classical Greaco-Roman civilisation, christianity, and the ideas of enlightenment, science, reason, progress and democracy as the core elements of this proclaimed European legacy".[14] This approach is obviously "euro-centric" and completely neglects the importance of non-European cultures, global processes and dependencies for the emergence and transformation of "European" values. Therefore defining "sameness" without reference to "others" is not only incomplete but inadequate.[15] Moreover, as controversy over the reference to the Christian tradition in the European Convention in 2003-4 revealed, there is no agreement on the relative importance of the various different components of a "European civilisation". Consequently, any debate on "common values" will inevitably spark off conflicts within European societies and between member states.

There is then a second difficulty which is both highly significant politically and closely related to the current restructuring of political conflict in Europe. "The construction of a cultural boundary necessarily entails a process of inclusion and exclusion. It requires the designation of the differences between insiders and outsiders, members and non-members".[16] Indeed, the concept of cultural identity formation and the cultural logic of political conflict have much in common. They both employ symbolically defined codes of exclusion, and, as debates on immigration and EU membership for Turkey have demonstrated in recent years, these codes have already been defined largely by the political right.

The intense debate on EU "boundaries", provoked by the decision to start membership negotiations with Turkey, is certainly most instructive in this respect.[17] Here, the question of Turkey's EU membership was transformed into a question about the "cultural identity" of Europe. References to a "common geography", a "common history" and "common values" were made in order to permanently exclude Turkey from the EU. Turkey served as a symbolic code for the "Islamic east" which was sharply set apart from the "Christian west". This symbolic code was subsequently used to

establish a distinct culturally defined boundary between Europe and non-Europe. An empirical analysis of this debate in west European countries reveals "that the frames used are not only defending national identity, but also a nascent European identity that is exclusive (against Turkey) and inclusive (within Europe) at the same time".[18] As alluded to above, it is the populist right who have successfully exploited this argument with the help of identity-based arguments emphasising the threat of mass immigration and islamisation. The political dangers here are signified; not least due to the fact that Christian-Democratic and conservative parties, despite their more general pro-European commitment (with the notable exception of the British Conservative Party), are in firm opposition to further EU enlargement, in particular the accession of Turkey.

This debate reveals that it is just as difficult to determine the borders of Europe as it is to establish the identity of its citizens on the basis of cultural criteria. Many territorial borders in Europe were drawn and altered in the past with outright arbitrariness – Poland's history demonstrates this exemplarily; not to mention the fact that the historic and cultural ties of European countries extended well beyond Europe due to their imperialist and colonial pasts.[19] Moreover, we should not forget that in the age of globalisation borders have fundamentally changed in their significance and character. Borders, even territorial ones, are increasingly becoming unclear, permeable and in need of political definition and decision. That is not to say that Europe's borders cannot or should not be laid down, but that they cannot be found in a "common" history, culture or geography. Europe's borders must be defined politically. In other words, instead of cultural criteria, we need political criteria.

European integration as an open political project

Past debate and experience in Europe clearly show that it is conceptually inadequate and politically dangerous to construct a European identity on the basis of common cultural values. This does not do justice to the heterogeneity that the EU has already attained, nor to the internal pluralism of its societies. In particular the latter holds true in the case of the status of Islam within Europe. Moreover, the EU cannot be defined by a pre-established set of geographic borders. Any attempt to do so has faltered and will falter due to the dynamic character of the European integration process.

This does not mean that the EU can survive without its own identity and affective ties to its citizens, or that it is principally impossible to limit or finalise the European integration process. Rather that we should approach

these questions in an entirely different manner. The present recipes to resolve the political crises of the European project are based on a serious misunderstanding. Essentially, concepts from the history of nation-building in Europe are being transferred to the EU without qualifications. Instead, the EU and the European integration process must be understood and promoted as an open political project.[20] Doing so, primarily, means that European identity must be fixed to political criteria and not to historic or cultural attributes. Europe cannot be united in the long run by a cultural identity, no matter how it is defined. The European project must be accomplished through a common political identity. This political identity, in turn, cannot be imposed "top down" but needs to emerge from the European citizens' everyday experience with the norms, institutions, procedures and conflicts of the European political process. Nor can it be based on abstract principles. The European Union must develop its identity through daily practice as a community of political actions and communications.

This is where one of the EU's major deficits becomes most evident: Brussels seems incapable of offering European citizens sufficient opportunity to participate in the political process, something which would reinforce identification with the European project. The EU has struggled to create a positive and convincing tie between its politics and the living conditions and life chances of its citizens – and due to this lack of political identity, compensation by cultural means is insufficient. The circle can only be squared by the by strengthening the political identity itself. Therefore, it is essential that EU citizens are given greater opportunity to participate in European politics. Furthermore the EU needs to expand its competences in political areas where citizens expect a strong EU presence – most importantly in foreign and security policy.

Defining the European identity politically and not culturally does not imply that Europe can succeed entirely without a common normative foundation. Even the European project needs a normative foundation and this foundation requires a historic dimension. However, neither the Christian culture nor the universal values of the Enlightenment can be used to form the normative basis of Europe's political identity. In reality it is the "dialectic of Enlightenment"[21] – on the positive side, the commonly shared expectations of a social and political order based on reason and, on the negative side, the common experiences from the horrors of totalitarianism in the 20th century, the Holocaust, the Stalinist terror, the Armenian genocide in Turkey and the self-imposed dangers to humanity and civilisation posed by new technologies. Together – and only together

– do these attributes constitute a common horizon of experiences along which the European project has been promulgated in the past and through which its political identity must also be established normatively in the future.

Chapter 5

The nature of the EU legitimacy crisis and institutional constraints: defining the conditions for politicisation and partisanship

Stefano Bartolini

The very definition of political legitimacy has always been complex and contested. In its core, it refers to the principles and procedures through which collectivised and binding decisions must be accepted by those who have not participated in making them, or that while taking part, have seen their values or preferences unsatisfied. Consequently, legitimacy is clearly irrelevant when decisions are not collectivised; that is, when the actors concerned and affected are left with exit options, and with the choice of avoiding the application and consequences of decisions. Furthermore, legitimacy is equally irrelevant when decisions are based on the consent of all involved actors. In short, legitimacy problems will only exist in conditions of no exit or no unanimity.

In the context of European integration it was argued that the EU did not need any further political legitimacy beyond that indirectly offered by the voluntary consent of the member states and the ratification processes of their national parliaments. To the extent that the EU is based on the voluntary agreement of member states, leaves them an exit option, allows partial exits and opt outs and resorts to unanimity voting on key issues, sufficient intergovernmental legitimacy is generated. Indeed, this broad consensus held sway for a long time.

The nature of the EU legitimacy crisis

Over the past decade(s), however, things have gradually changed. The spread of qualified majority voting (QMV) in the Council(s), the transformation of the European Parliament from a consultative body composed of national delegations into a directly elected assembly with growing legislative powers, and the growing role of the ECJ have all expanded the area of decisions which are no longer unanimous among member states, and which stretch their binding effects on a growing number of private-public actors. In parallel to inter-governmental legitimation, the Commission has fostered new forms of governance focusing on affected interests participation, corporatist agreements, expertise and competence evaluation, epistemic communities, and policy networks. The motive underlying this was that of further legitimising EU legislative output – although it appears that such forms of bottom–up network building have proven insufficient in boosting overall legitimacy. As a result, distrust and mutual horizontal control among member states of classic intergovernmentalism; the competition between authorities in a composite polity; modern technology; and new forms of participatory (soft-) governance today appear inadequate when used to argue, rationally, about the legitimacy of the EU's growing political production.

This is further complicated by the complexity of the institutional architecture of the EU. In the European Union treaties the relationship between member states and the Union is grounded in the prerogatives of the Council. It is however accompanied by a weak and technically formulated "subsidiarity" clause which makes reference to "efficiency" in problem solving, more than it does to the autonomy and prerogatives of each level of government. Notwithstanding the increasing resort to the co-decision procedure and the growing role of the European Parliament as a legislator, there remains a blurred separation of powers among the central institutions (Council, Parliament, and Commission). In addition, the respective roles of these institutions (this time including the Court of Justice) changes dramatically from one policy area to the other. The procedures for the different decision-making areas and arenas are extremely complex, thereby making it impossible to gain a clear perception of political responsibilities. Therefore, as it is only a restricted set of experts who appear capable of interpreting such intricacies, any attempt to explain such rules to the broader public is bound to fail.

A third element that complicates the legitimacy issue pertains to the specific content of the treaties. National constitutions define basic rights and duties, the procedures for selecting those who are allowed to take

decisions, and the formal procedure for taking decisions, but are usually parsimonious as far as the substantive fields and goals of decision-making are concerned. Many of their provisions are devoted to defining that protected core where the freedom of political decision is constrained by higher principles. Outside these constraints, constitutions say little or nothing at all about the actual content of what has to be done. In other words, national constitutions tend to be procedurally oriented and goal independent.

EU treaties, on the contrary, define the institutions and procedures for decision making, but they too are largely devoted to a list of substantive and well-defined goals in specific policy areas aimed at the formation of a common market on a continental scale. There is no legal distinction between the two sets of norms. To "constitutionalise" the treaties via judicial review has therefore meant to constitutionalise certain specific goals, shielding them from any political pressure or redefinition that does not embody a treaty change and does not master the unanimity of nation states' executives (and populations). As a consequence, we have a constitutional court for a non constitutional text that is atypical with respect to all known constitutions.

More recently, the spreading of the referendum practice (Denmark, France, the Netherlands and Ireland) for adopting treaty reforms has added a further dimension to the legitimacy problem. Inter-governmental legitimacy is based on the assumption that national governments represent their countries. Post-negotiation ratification referenda (constitutionally prescribed or politically decided) offer those countries that resort to them a second veto power point in addition to that of the Inter-Governmental Conference (IGC). De facto, these countries negotiate on equal footing with the other member states during the IGC and can then extract better terms and additional conditions via the threat or the actual holding of a ratification referendum. These referenda are invoked in the name of national political legitimacy, but in actuality they increasingly undermine European inter-governmental legitimacy.

To put it bluntly, twenty-six member states may be held captive while waiting for a single referendum. Ultimately, this can only serve to stoke up anti-EU public opinion in the countries that do not hold referenda. It makes it difficult for national executives to convince their electorate, particularly those already reluctant about the EU, to accept changes and modifications that other countries are submitting to popular approval. If concessions are eventually made to win over sceptical public opinion in

the country holding a referendum, then it may become "rational" for all member states to announce and eventually hold such referendums. Logically the continuation of this practice will lead to the entire paralysis of treaty reform. De facto, the unanimity of national governments plus the unanimity of the national electorates will be unattainable.

In summary, the EU's legitimacy crisis results from a combination of the inadequacy of pure intergovernmental and governance legitimation, together with an overly complex division of powers which is arcane to citizens and therefore, in their eyes, unable to contribute to the normative construction of political responsibility. Added to this there is a fixed, difficult to change, and ECJ protected core of specific policies. This is indeed a rather explosive mixture. From the point of view of citizens and political groupings such a mixture makes it impossible to foster the normative *construction of political responsibility* – who is responsible for decisions – *the identification of the target of positive and negative orientations* – who should be praised or blamed for those decisions – and, closing the circle, *the positive and negative sanctions associated with perceived misbehaviour*. In the absence of all of these factors, legitimation of decisions certainly remains problematic.

Politicisation and growing partisanship as a solution?

In light of this situation, a number of experts and politicians have argued for a solution that is, in addition to being necessary, unavoidable: legitimacy problems can only be solved by politicising the EU, primarily via a strong injection of political electoral responsibility for those who take decisions. From this standpoint, it is claimed that political elites must commit to open the door for the politicisation of the EU agenda.

In fact, the "politicisation" argument transcends the "old" democratic deficit school. It emphasises the political dimension of the deficit, rather than the institutional one; it argues that more political competition can be achieved with minor institutional reform, and it shifts attention from the "policies" and the "institutions" of the EU to its "politics" – meaning, in a more lofty sense, structures of representation, political agenda formation, political competition, party system formation, and so on. Politicisation is therefore identified with an injection of political contentiousness, contestation, and competition over the EU political agenda and top leadership positions. Finally, it is claimed that such results can be achieved by piecemeal changes which do not require reform of the basic institutional architecture of the Union – for which, at present, there is no unanimous consent anyway.

Underpinning this argument is the assumption that a democratic polity requires contestation for political leadership and arguments over the direction of the policy agenda – essential elements of even the "thinnest" theories of democracy. Without electoral competition and public contestation there are few incentives for the Commission or governments to change these policies in response to changes in citizens' preferences. Moreover, political competition is also an essential vehicle for opinion formation.

Supporters of this view also argue that elements of left-right partisanship have already penetrated the European Parliament (EP) as well as the Council and the Commission – although their opaque procedures do not allow the public to see, evaluate, and eventually punish or reward different positions. Over time the Council is expected to become more like the European Parliament, operating as a more open and conflictual legislature, with shifting left-right divisions and coalitions. As far as the Commission is concerned, the changes to the Nice Treaty already ensure that its composition mirrors that of the Council and that its orientation matches the Parliament at the time of its appointment. As for Parliament, the development of euro-parties (parliamentary groups and federations) means that legislative cohesion and left-right alignment is underlined.

These growing left-right battles are seen as "inevitable" because the agenda has shifted from the creation of the market to its regulation. De facto, EU politics is becoming increasingly ideological while on the verge of embracing democratic politics. Moreover, politicisation is even "desirable" because amplifying the political stakes, by allowing the Parliament to set the agenda, makes political alignment in the Council more open, and the election of the Commission President more competitive. Not only will this produce a clearer mandate for reform, but the latter will also help to "coordinate policy positions and alliances across the three EU institutions", overcome institutional gridlocks, foster policy change, and link the emerging pattern of EU politics to citizens' interests and preferences. This, in turn would enable citizens to identify policy options, take sides in a debate, and ultimately accept a place on the losing side in one period/case in the expectation that they will be on the winning side in the near future.

Finally, these changes in partisanship and politicisation do not require massive constitutional overhaul but can be achieved by progressively injecting a bit of "majoritarianism" into the consensual architecture of the EU. The list of concrete proposals to this effect include a more open

contestation and "majoritarian" selection for the office of the Commission President; allowing alternative candidates to declare their programme before EP elections; issuing manifestos for their term of office; forcing parties to declare their support for one candidate; electing the President of the EP for a legislature and making the appointment of committee chairs in the EP more partisan; recording and making more transparent and open to public viewing the Council and Commission deliberations; and separating independent agencies and giving them the purely "Pareto improving" functions of the Commission (e.g. the merger control authority). Eventually, this set of mini reforms will transform the basic political architecture of the EU from a hyper-consensual system to a slightly more majoritarian form of government.

Defining the conditions for politicisation and partisanship

Politicisation and partisanship are mechanisms based on high requirements and difficult preconditions. In principle, partisanship, the politicisation of issues, and the open and public contestation of such issues, are *behavioural* attitudes that rest on an individual's natural orientation to *amicus-nemicus* groupings. However, the question here is the capacity of these partisan orientations to turn into effective conflict management and conflict resolution devices. That is, their capacity to deliver stable outcomes which are perceived to be legitimate. Behavioural orientations are not sufficient enough for this to occur, as they need to be framed within quite demanding cultural and institutional preconditions. Politicisation and partisanship evoke and are associated with the cultural acceptance and the institutional feasibility of the "majoritarian" principle.

In this chapter, I will not dwell on the cultural preconditions for politicisation, partisanship alignments and the "majoritarian" logic required to deliver effective means of conflict management and resolution. This would require discussing whether the EU is, or can become, an area of cultural homogeneity and a risk community sufficient for the normative acceptance of the majoritarian principle. Instead, the following analysis will focus on those political and institutional *conditions* that make politicisation and partisanship a viable political conflict management and resolution device. More precisely, I will firstly discuss *two background assumptions* implicit in the politicisation thesis (that politicisation concerns only left-right issues and that euro-parties are capable of managing this left-right competition). I will then move to consider *two institutional hypotheses* of the argument (that "political mandates" are compatible with treaty constraints and that they can coordinate policy

positions across EU institutions). And finally, I will discuss *two expectations* of the politicisation argument (that left-right politicisation will link citizens' interests and preferences to EU "politics" and that it will not generate a gap between normative expectations and reality).

Two background assumptions…

Politicisation and partisanship within the EU institution must avoid the "constitutional" or "constitutive" issues of the EU ("membership", "competences", and "decision making rules") and should focus only, or mainly, on left-right issues similar to the political landscape at national level (levels and types of market regulation, welfare reform, citizenship rights, immigration policy, law and order issues, etc.). If constitutive issues were to be politicised, it must be said that none of the Euro parties have yet reached the levels of internal coherence required to handle the outcomes. On the contrary, if issues get politicised which are of similar nature to national ones, then European politics can be structured along lines that are similar and compatible with those contested at the national level.

As a matter of fact, national parties and electorates divide more often on European constitutive issues than on national isomorphic issues. Moreover, they divide more often on constitutive issues in European parliamentary elections than in national elections, although the EP has no power on such constitutive issues. In the 36 referendums held between 1972 and 2003 in the member and candidate countries, the profound splits among party leaders and between party leaders and their electorates have affected both right and left wing parties, and have all resulted from the politicisation of the constitutive issues of membership and new treaty ratification.

The defenders of the politicisation thesis argue that there is opposition to constitutive issues because left-right issues are not adequately and sufficiently politicised in the EU arena. In the absence of left-right politics, the only politicisation available takes the form of opposition "to" the EU rather than to any specific policy. If a growing left-right partisanship were to emerge, this could be avoided or reduced. But if we accept that the politicisation of constitutive issues is destructive, then a stronger assurance – than this speculative "if" – that such a partisanship will emerge is certainly needed. If an injection of politics, contestation, and competition is proposed, then we should at least ask who, and how strong, are the actors and agencies that have to channel this new politics *cum* contestation *cum* competition, making sure that politicisation will concern the benign left-right issues rather than the threatening constitutive issues. Euro-parties are of course the obvious candidates for this job.

The second assumption of this school of thought is therefore that euro-parties are capable of offering a coherent and significant left-right alignment and that they can handle the delicate gatekeeper task that the politicisation thesis attributes to them. There is positive evidence available regarding euro-parties capacity to coalesce in the EU parliament in a number of party groups that are less fragmented than national party systems; their growing degree of voting cohesiveness along left-right lines; and their capacity to absorb new member state parties and even to overcome long standing ideological cleavages across both the left and the right spectrum (the European People's group incorporating northern conservative and protestant parties; the Socialist party overcoming the socialist-communist divide).

This evidence is difficult to interpret and open to debate. Party alliances and cohesion often prove difficult at the domestic level and in electoral and parliamentary institutions which offer an attractive prize to electoral size (control of the executive and legislative process). It is baffling that this proves easier in the EU parliament where such incentives are absent. When reading into these developments one could also point to the fact that the EP activities are so invisible to public opinion, inconsequential for domestic alignments, irrelevant for electoral rewards and punishments, and unconstrained by partisan and ideological politics, to the extent that aggregations and experimentations are possible which generate no political and/or electoral costs "back home". If this were true, then a "politicisation" trend would make the life of euro-parties far more problematic, rather than strengthening them. It is doubtful, at the very least, that their delicate internal equilibriums would sustain and survive a strong politicisation of the EU agenda.

Lastly, the politicisation thesis suggests that if a stronger "majoritarian logic", alongside more politicisation and partisanship, was to prevail, then European parties would be further strengthened. This is a "reasonable" expectation, but nothing more than that. We need to remain at least doubtful that the euro-parties are, or will soon be, strong enough to handle the delicate gatekeeper task that the politicisation thesis attributes to them.

Two institutional hypotheses...

So far, we have accumulated two "if" preconditions. Granted, for argument's sake, that these preconditions are met, we need to investigate whether new partisan politicisation and majority logic are compatible with the institutional architecture of the EU. The two decisive hypotheses advanced are, firstly, that the political mandates for reform generated by

politicisation will remain within the narrow policy boundaries of the treaties; and secondly, that these political mandates will coordinate policy positions across EU institutions so as to overcome institutional gridlock.

If the more open and contentious exposition of different platforms and agendas generates the sense of a political mandate for the electoral winner(s), and such a mandate legitimates policy change, this should then be reconciled with the narrow policy boundaries of the treaties and with the pre-defined goals of the EU. Yet political mandates speak in sweet melodies of democratic theory. A mandate substantiates political accountability and the responsiveness of the elite between elections; it presupposes that the losers expect to be on the winning side in the future. In the case of politicisation, would it be possible to pursue a mandate at the top of the EU institutions if alternative candidates were publicly advocating different programmes and policy packages?

The peculiarities of the EU treaties, mentioned in the first part of this chapter, have profound consequences for this perspective. How can we combine a political mandate emerging out of the public and contentious exposition of different platforms and agendas with the pre-defined goals of the EU? If a political mandate were to emerge – involving, for example, expansionary monetary policies, social welfare minima, reform of the agricultural policy, active employment and fiscal policies – could it be implemented? The honest answer is "no". Such a political mandate would be hindered by the autonomy of the European Central Bank, by the case-law of the ECJ, and by the blocking vetoes in the Council. Generating intense political frustration, these obstacles would immediately spill over into the institutional constraints that make it impossible to implement the politically defined mandate. Thus the conflict between "politics" and "institutions" would become more intense, generating tensions that would prove very hard to handle. The argument that the political mandate, so defined, will be accepted by those on the losing side in the expectation that in the future they may be on the winning side is therefore visionary abstract – at best.

As a consequence, the supporters of politicisation should specify their thesis by making clear that the "mandates" they speak of refer to marginal adaptations that remain within the narrow boundaries of the predefined set of EU goals. It remains unclear, however, how public debates, political competition, and partisan alignments can eventually, by some miraculous mechanism, lead public opinion and political forces to agree on exact terms compatible with the treaties.

There is one way of limiting such risks, but it cannot be achieved without reform of the institutional framework of the EU. In order to allow for a strengthened politicisation of the EU legislative agenda we should "de-constitutionalise" some of the more "normal" policies of the EU. Essentially, this means making them less subject to the predefined goals of independent agencies (such as Central Bank and the Court of Justice) and the veto of the Council and, therefore, more amenable to political adjustments stemming from partisan preferences. In other words, the narrow path that the existing treaties leave open to political preferences in the determination of legislation should be broadened by introducing a mechanism for differentiation between treaty reforms and competence expansions, organic law reserved for the organisation and functioning of the Union's institutions, and the normal legislation referring to specific sector policies. Following these changes, increasing politicisation and partisanship will have space – of less constrained manifestation – in a number of policy fields and could therefore achieve some of the expected positive outcomes.

The second institutional hypothesis is that political mandates may coordinate policy positions across EU institutions – the Council, Commission, and Parliament – and help to overcome the institutional gridlocks that exist among them. If left-right partisan alignments were to predominate in the Council, Commission and Parliament, they would represent an organising principle capable of coordinating their activities, and would allow citizens to identify who stands for what. This thesis advocates nothing less than the transformation of EU territorial conflicts into partisan and cross-territorial conflicts.

Partisan alignments offer the beneficial effect of facilitating the coordination of policy positions across different political institutions when these institutions are linked in a common electoral-political cycle. However, this is not the case in the EU. For one, there is the disturbing element of having Commissioners who were appointed by governments no longer in office, and of Councils changing political orientation during the life of a European Commission and Parliament. The different timing of formation and composition of these bodies will generate permanent and unstable "divided government" (different political orientations of the Council versus Commission/Parliament), lead to frequently changing direction and levels of intensity (following national elections) in an unpredictable and relatively random way. The possibility of having a Commission-Parliament-Council of the same political colour for a sustained period is simply not there.

Of course, "divided government" experiences exist and have proven viable in several cases. In the US, for instance, the presence of different partisan orientations between the President and the Congress is not infrequent. Again in the US, and also in Germany, different majorities occur in the two legislative branches (the Senate versus the House of Representatives; the Bunderstag versus the Bundesrat). In France, we have witnessed the occurrence of different political orientations in the two executive branches (the cohabitation). These experiences usually result in a search for inter-institutional compromises and in relative policy immobilism. In principle, in the EU case there could be confrontation between the Commission/ Parliament, on the one hand, and the Council on the other hand, if they were to hold two clearly perceived political majorities at any given moment. But it is more likely that clear-cut partisan alignments will not solve problems of cross-institution coordination, rather they will cause greater difficulties for political and partisan coordination, adding to the already existing EU problems of institutional coordination. Even in this case, a precondition for facing this likely situation is the need to define policy fields in which actors will be free to form their policy preferences in a political mood unencumbered by, or less encumbered by, stringent treaty provisions.

Two expectations...

As discussed above, we have added to the two big "ifs" concerning political preconditions two much bigger questions concerning the compatibility of politicisation with the EU's peculiar institutional architecture. Finally, two expectations associated with the politicisation/partisanship thesis have to be addressed. First, that the emerging pattern of left-right politicisation will link citizens' interests and preferences to EU "politics"; and second, that politicisation does not generate hope which, if unfulfilled, will ultimately widen the gap between normative expectations and reality.

If these expectations were to be true, they alone would probably justify some of the risks implicit in the "politicisation" project. However, to draw this conclusion we need solid empirical evidence on whether the preferences of the voters on European issues (market and competition, mobility and migration, currency, social policy, etc.) are actually congruent with – or do they diverge from – those of their traditionally preferred party and politicians. The evidence accumulated so far is non-systematic, somehow elusive, and controversial.

In the late 1980s and early 1990s, survey studies concluded that parties and voters showed quite similar positions. Ten years later, research

documented that a considerable proportion of the European electorate had preferences on mainstream European issues that are not represented by the positioning of their respective parties. Other studies document that mass elite agreement is high on a broad ideological left-right dimension, while on specific EU policies (such as border control and common currency) the discrepancy between voters and representatives of the same party are considerable. Additionally, it seems that everywhere – and increasingly so – parties are more supportive of integration than voters are. It is difficult to recognise, in citizens' attitudes towards the EU, a resemblance with the historical combination of class and religious alignments typical of the left-right dimension. Although, we have to admit that on this problem evidence is hard to assemble and remains highly controversial. This situation may even point to a more general problem of representation, therefore issue politicisation may well increase, rather than reduce, the gap between elites, parties and voters.

Another important claim put forward by the supporters of politicisation is that open debate, political competition and politicisation will facilitate information sharing and change the perceptions and the preferences of the people and actors involved in the process. Without open political debates, citizens' views are more easily manipulated by political entrepreneurs, such as newspaper editors, leaders of minority parties, activists or single issue lobby groups, etc. This position betrays the benevolent view of debate, discussion, competition, etc., and their potential to overcome undue or instrumental oppositions, eliminate "manipulation", prevail over negative orientation of small interest groups, and eventually to generate more support for the EU.

In fact, this is a very "enlightened" view. Quite often both EU officials and supporters of integration *cum* democratisation hold the firm belief that if people participated more, knew more and were more competent and informed, then they would eventually realise that the work carried out by the EU is good and in their interest. At the same time more disenchanted observers may point to the "dark-side" of open contestation: the hypothesis that if what you learn is not in line with your original preferences and expectations, then the politicisation process may also cause indifference or passive support to evolve into informed and qualified opposition.

Should we risk politicisation?

Considerable uncertainties surround the political preconditions of politicisation. No adequate analysis exists of the compatibility between partisan politicisation and EU institutional design. Moreover, expectations

around the eventual political outcomes of politicisation are overly optimistic. The supporters of politicisation believe that the conditions for the successful application of a stronger majoritarian logic will actually be strengthened by politicisation itself. Politicisation thus becomes a self-fulfilling prophecy: once introduced it will turn out to foster its own preconditions.

In every process of "legitimation" the construction of normative responsibility and the imposition of a system of sanctions are necessary. In the EU, the difficulty of identifying the rationality criteria of a complex system, the crumbling image of those who hold hierarchically ordered competences, and the vagueness of the relationships of interdependence make it very hard, if not impossible, for the constitution of any element of negative or positive political identification. Politicisation may seem like a good short-cut for the construction of these elements of normative responsibility and of positive or negative identification, for it promises to strengthen political structures of intermediary representation. But representation structures are vehicles for different ideas, interests and identities, and their specific content cannot be engineered too much prior to their coming into being. Ultimately, we need to recognise that the EU is deprived of those institutional structures that can guarantee that politicisation will be channelled in such a way as to avoid generating unmanageable tensions and conflicts.

Hence, we should not consider politicisation and majoritarianism as a short-cut that might lead us out of the current institutional stalemate. Instead, we need to identify the institutional adaptations that can advance the chances of moderate politicisation in its quest to achieve the desirable goals and to avoid the undesirable ones. Ambitious institutional reforms fostering "political" integration (clear separation between two legislative chambers voting by majority (the Parliament) and by weighted majority (the Council) and an executive (the Commission); the political responsibility of the Commission in front of the Parliament; and treaty ratification by a majority of countries representing a proportion of the Union's population are clearly out of sight for the foreseeable future. But the difficulty of reforming the institutional architecture does not make the politicisation of EU political processes easier or more viable.

For the EU to harbour even mild politicisation, and for this to serve as a source for the strengthening of its legitimacy, institutional reform, is here, regarded as a minimal pre-condition: the definition of a field of normal policy legislation as opposed to treaty reforms, competence definitions,

and the organisation and functioning of the Union's institutions. For this restricted set of "normal policies", political preferences should be freed from the current constraints. This requires what I have called a "de-constitutionalisation" of at least some of the more "normal" policies of the EU – this means that these policies should not be specified and pre-defined in treaty articles and "defended" by the Court of Justice case-law; actions that can sharply limit the latitude of political action.

This will ensure that measures for increasing politicisation and partisanship are channelled into policy fields where they can make a real difference in terms of legislative output. In the field of normal policies – restricted perhaps at the beginning to a few policies areas – European parties will be able to differentiate and compete to a greater extent, link better with their traditional support base, find it easier to avoid being drawn into divisive constitutional issues, and thus seek stronger political mandates. Keeping "politicisation" within such clear limits might in turn give rise to a new set of expectations and optimism that institutional gridlocks will be eased out and that policy coordination can improve citizens' intelligence of specific sectors. As a consequence, a new clarity with regard to decision making processes together with open and clear political confrontation might foster greater appreciation of the EU's activities and of their legitimacy.

Chapter 6

The limits of the functionalist method: politicisation as an indispensable means to settle the EU's legitimacy deficit

Thierry Chopin

Following the trend started by the French and Dutch referenda on the EU's Constitutional Treaty in spring 2005, the Irish government's decision to follow suit in 2008, this time on the Lisbon Treaty, is representative of an approach to EU governance which relies heavily on "output legitimacy" as opposed to more political methods. The very logic that underpins this method of legitimisation has a significant affect on the ability of the EU's political system to persuade citizens that the decisions made on their behalf are fully justified and sound. Although these "functionalist" forms of legitimisation were justifiable at the outset of the European project, changes in the nature of the Union overtime dictate that we revert to the forgotten formula of democratic legitimacy.[1] Providing an answer to the EU legitimacy crisis means creating conditions that can facilitate meaningful political debate on the future direction of the EU – crucial to this is that citizens must feel they have a voice which can influence debate and direction.

One of the lessons to be drawn from the institutional reform undertaken over the last few years lies in the need to politicise the European Union's system in order for it to adapt to the changes that have occurred since the start of the 1990's, i.e. the dual effect of enlargement to include new members and the emergence of new objectives that, since the Maastricht

Treaty at least, have become increasingly political in nature. Here we can define the politicisation of the European Union as a development that gives political processes greater scope; something that creates a system in which the idea of open choices that develop over time have precedence over that of an inevitable consensus; creates conditions in which political debate – arbitrated by the electorate – takes precedence over the technocratic management driven and legitimised by experts; and a system in which there is a direct link between Union policy and the will of the electorate expressed during the European elections.[2]

The limits of the functionalist method

Jean Monnet's famous phrase taken from his Mémoires serves as a useful starting point in this debate: *"I never believed that Europe would one day be born of a major political change and I never believed that we would have to start by consulting the people on the shape of a Community of which they had no real experience."* The beginning of Europe as we know it was indeed typified by the assertion of a "Monnet type method", an approach comprising technocracy and functionalism – the latter relying on the implementation of sectoral co-operation projects between a limited number of states, and the progressive integration that occurs when states develop interdependencies, and eventually come to share common interests. Emerging from these developments came an assertion of output justification and legitimisation; something that is repeatedly mirrored in present keynotes on "a Europe of results" or concrete projects. Although this functionalist creed seemed to hold a certain amount of justification at the outset of the European project it now looks as if its logic has reached its limits, not least because European construction – certainly in the 1990's – has changed greatly in nature.

Central to this change in nature was the advent of the Maastricht Treaty. With this treaty the objectives of an integration policy – in the minds of the "founding fathers"[3] – were energetically confirmed via three new elements: the establishment of European citizenship, the conception of a common foreign and security policy and the launch of the project for monetary union.

The concepts of citizenship, foreign and defence policies and currency are closely linked to the notion of sovereignty and are therefore, by definition, essentially political. In other words, considering the implementation of a single market or a common agricultural policy as technical matters which should be left in the hands of experts is one issue – though a questionable and contentious one. But one cannot possibly assume that the three

fundamental pillars of the Maastricht Treaty should be dealt with correspondingly and left to technocratic management. In this sense the people were not mistaken at the time of Maastricht, for this was the historical moment when political debate on the issues at stake in Europe broke into many national public arenas.

Two important reasons lie behind this change in nature. The first is related to symbolism: by extending European integration to these aforementioned areas, symbols which are easily identifiable and important in the eyes of the citizens are affected. Telling Germans, Britons, French, Greeks, Czechs and the Portuguese that they are all EU citizens who together share a milk quota does not have much symbolic value or motivating force. Yet, making clear that the aim is to establish a European foreign policy is more likely to stimulate interest among most Europeans than a debate on the harmonisation of technical standards. For example, we do not need to prove the symbolic influence of currency and its omnipresence in daily life.

The problem is that these subjects lead the Union into extremely political and therefore conflictual areas. The very essence of politics lies in permanent and open competition between different choices, based on various value systems. There are no final or unique answers. Hence from this point of view Europe has been constructed, essentially, as an apolitical entity. The culture of consensus, the Commission's – whose members find their legitimacy mainly in their expertise and their European stature – key role, the intergovernmental dimension and the irreversible logic of progress, so well coined by the term "community acquis", distinguish community processes from the way politics are undertaken in member states – something which is characterised by a democratic culture. We might think that a few member states might adopt long standing positions with regard to a relatively technical issue, such as standards governing an industrial product, but can the same supposition be made in regard to foreign policy where *in fine* at issue might be the choice between war and peace? Can we give Europeans the title of "citizens of the Union" without involving them in the choices made? Leading on from this, what are the political means for operation? With these questions in mind it is inevitable that the issue of democratic legitimacy is raised.

Secondly, and running parallel to the extension of European integration into extremely political areas, another process has made institutional reform necessary: enlargement to the countries of central and eastern Europe. Asides from the problems of decision making efficiency in a much bigger and less homogeneous European Union,[4] this increases the need

for effective democratic legitimacy. The differences in political cultures between western countries' collective memories and those of the "post-Communist" states raise new political challenges for the Union. Technical compromise is not enough: primarily it is necessary to find new political compromises. The present debate on energy issues and relations with Russia demonstrate the need for such change.

Hence, the changing nature of European integration during the 1990's and 2000 is the consequence of both the deepening of the integration itself and of enlargement. It is therefore both revealing and regrettable that these two developments were not carefully thought through with equal measures of intensity and lucidity. The importance of an effective system found a number of supporters and comprised the leitmotiv of the Inter-Governmental Conferences (IGC) of 1996, 2000, 2004 and even in 2007. However the imperative of legitimacy and the adaptation of methods (apolitical) and issues at stake (increasingly political) has generally been avoided or dealt with in a subsidiary manner. Our argument is that the EU's lack of legitimacy finds its roots in the gulf that separates the EU's change in nature from the lack of change in how it is run.

Why output legitimacy is insufficient: the Irish example

The new political stakes in the European Union affect well established national consensuses and therefore it would seem impossible to take decisions in these areas independently of public debate. In this context output legitimacy is no longer sufficient if we accept the idea that popular support implies that the decisions that are taken have been previously discussed and debated in public *(input legitimacy)*.[5] The Irish "no" in the first referendum on the Lisbon Treaty represented a new expression of the limits to this justification of European Union decision making. We have all heard the argument that is so often put forward against the Irish: how could they vote "no" given all the advantages they have drawn from their accession to the European Community? This argument is clearly limited. On the one hand, from a strictly factual point of view it can be said that financial transfers from an enlarged Europe to Ireland are bound to decline and that in the context of the financial crisis, which has deeply affected Ireland, such advantages are quickly forgotten. On the other hand, it bears witness to a singular idea of democracy which evidently does not consist of "buying" votes.

More significantly, the arguments about a "Europe of projects" and "of results" do not take into account the depth of the growing gulf between the

elites and public opinion with regard to European subjects. As we live in democracies were opinion is widely encouraged and were citizens want real results which can respond to their specific concerns, it is true that output legitimacy is necessary. But the Union's policies and actions cannot be exclusively justified *a posteriori* and independent of any debate on the justification of different policies and projects.

Output legitimacy looks even more inadequate when one considers that there is no longer a need, as there was at the conception of the EU, to establish a lasting peace. Today the issue is about making tough decisions which, due to there very nature, must be subject to debate. Here lies the blind spot in the widely spread idea of a European "democratic deficit"[6] : the failure to realise that citizens' feel "dominated" by an institutional system that's functioning is mostly misunderstood and which doesn't do enough to fulfil the political function of justifying community standards and decisions. At this stage a link can be drawn between the "legitimacy crisis" and the famous "democratic deficit", since the "legitimacy crisis" also, above all, means a "political deficit". One could say that the European Union is suffering because it is "an impolitical democracy"[7]. It follows that the Union's legitimacy has to be political.

Politicisation: an indispensable means to settle the EU's legitimacy deficit

Settling the democratic crisis relies on creating the conditions (whether they are institutional or not) for a real, Europe-wide political debate on the Union's future direction, over which citizens must feel they have influence. One of the lessons we must learn from institutional reforms over the last few years is that the EU's system needs to be politicised in order for it to adapt to the change in nature that it has undergone since the start of the 1990's.

To begin with the term "politicisation" has to be linked to that of "democratisation". Even though these two ideas are distinct they overlap to a great extent. Of course community institutions enjoy institutional legitimacy of a democratic type albeit in varying forms,[8] but this legitimacy has revealed itself to be insufficient. It is insufficient primarily because of the obvious disproportion between the eminently political choices which the community institutions have to make and the weakness of the link between said institutions and electoral choice on the part of the citizens. Crucially, the community institutions are not obliged to answer directly to the citizens via the democratic mechanism par excellence – the election. Moreover, a very major factor in the running of modern democracies is the

ability of citizens to push for political change and directly punish the ruling powers during elections. This mechanism barely exists at Community level due to the indirect nature of the Commission's democratic legitimacy and the weight of the Council.

This disproportion also implies a lack of efficiency. Can a ruling power which doubts its legitimacy be efficient? The EU's work is constantly undermined by growing mistrust on the part of citizens who have grown accustomed to an approach, also adopted by some national elites, whereby they blame the European Union for all measure of problems. The inability of those who represent the Community – notably the European Commission – to defend it in the face of this widespread phenomenon is mainly due to the inequality that exists between national political elites, who are confident of their legitimacy, and EU representatives who are not so sure. Indeed their legitimacy is mainly deducted from that of the national elites – therefore there is a certain logic of subordination which does not exist in the member states; for example between a member of parliament and a mayor who are both granted direct democratic legitimacy.

Therefore, the politicisation of the European Union must be seen as a development towards an operational method in which political processes are vital and even dominant. This means we have to gradually abandon the logic of consensus in order to accept that of various alternative ideological ideas and unceasingly renewed choices, put forward and decided upon after a democratic debate. Thus the expression of what the majority wants will be achieved via elections and work undertaken in parliament.

Some necessary precautions

In light of the controversial political and academic debate about politicisation, a number of caveats have to be spelt out. Firstly, we must be aware that the word "politicisation" itself can often have a pejorative connotation. It recalls a series of phenomena which may support the rejection of "politics" in the "politicking" sense of the term: sectarian confrontation, conflicts of interest, bargaining, and manipulation by political organisations, and *in fine* corruption. All of this nurtures a negative view of politics and detracts from its value. In this case "politics" is defined as a means *par excellence* for sectarian manoeuvres together with personal and self-interested calculations which, naturally, leads to an aversion to politics on the citizens' part.

In this context, some authors have called for the "depoliticisation of democracy,"[9] whilst in fact we should be "repoliticising" it. This is a damaging mistake and therefore it would be wise to correct it in order to restore the contest between competing programmes and political options, on which citizens have to decide by means of a majority choice. Politics implies open choices that develop over time, choices which cannot be reduced to the simple logic of the consensus. Beyond the wider definition, where politics is the means to organise the life of a group of individuals, it is also, and maybe above all, a set of restrictive rules for a given community – rules that are chosen in the wake of an informed debate – which in a democracy supposes participation on the part of the greatest number. In this sense "politics" is an activity which covers all of the decision-making processes after joint discussion. This is why it has to be a competitive and confrontational activity over issues that the community shares together. Naturally this leads to a conflict of interests and the healthy emergence of various, and potentially opposite, arguments, all put forward by political forces and sympathetic organisations in a modern democracy within a political community.[10]

Secondly, however, the legitimacy of conflict – which is a key element in the notion of "politics" – should not lead to the negation of the legitimacy of consensus on which the European Union is mainly based. Indeed we must distinguish between what we might call "institutions of conflict" (Council of Ministers, for example) from the "institutions of consensus" (regulatory organisations such as the ECB, Commission for Competition Policy and the CJEC) . It is not a question of maintaining the need to politicise all of the organisations, including the independent institutions in the Community's institutional system. Today we know that the institutions with electoral legitimacy do not have a monopoly over the public good. Indeed if we submitted everything to electoral sanction, governments and parliamentarians might be led, under popular pressure, to the adoption of short term decisions that are contrary to general interest. For example, in line with these principles it would be preferable to grant the management of monetary policy to independent institutions, which might in turn translate into increased confidence on the part of the financial markets. These principles also justify, for example, the independence of the ECB.

Hence, the problem does not lie in the fact that the EU is typified by the exercise of regulatory powers whose dependency with regard to democratically elected institutions deprives them of the vital legitimacy

they require to act democratically. Rather the problem lies in the fact that within our democracies the EU embodies the difficulty of "bringing life" to the inevitable political aspect of certain issues which are strictly political in nature and which are subjects of "choice" rather than of "rule"[12]. The clear contradiction between the two kinds of legitimacy – electoral on the one hand and regulatory or of "impartiality"[13] on the other – can be overcome if the two types of institution are made to co-exist within European democracy by means of acknowledging the specific nature of each rather than privileging the latter at the expense of the former. This implies a "limited politicisation" as part of a "democratic dualism" by which the EU has to be defined.

Thirdly, we should distinguish between politicisation and an approach whereby we consider politicisation necessary and were it must be undertaken via the enhancement of the intergovernmental dimension. This view, famously held by General de Gaulle with regard to the construction of Europe, is based on the supposition that only the states and the national political elites produce politics". The politicisation of European integration could therefore be achieved by enhancing the intergovernmental aspect, since by definition the community institutions are necessarily technocratic. But this approach is intrinsically contradictory: because instead of leading to the establishment of European politics, it actually prevents it because it maintains the monopoly of national politics over the formulation of European policies. Instead, the question here is how we can bring about the emergence of European politics on a truly European political level, a politics which allows us to formulate community policies.

Fourthly, politicisation does not necessarily mean the federalisation of the European Union – which might be desirable but certainly not foreseeable either in the short or mid-term. Yet it is still possible to picture European politics without implying that we move towards a European State. A simple analogy can help develop this point: it is not because France has accepted politicisation on a regional scale that it has become a federal state. No one would try to deny that there is scope for regional politics in France; but, for example, French regions have a long way to go before they enjoy the status of the German *Länder*. Hence the politicisation of the EU may be similar to the transformational process required to become a federal state, but it can also be something very different. It is, therefore, essential to avoid confusion between federalisation and politicisation. Although the union has to undergo a greater degree of the latter, together with autonomous political representation, this development will remain,

in the mid-term at least, far from the federal model, notably because of the present definition of the Union's competences, the relative weakness of its budget and the continued existence of a strong intergovernmental dimension in the decision making process.

Fifthly, academic debate tends mostly to present the politicisation of the EU as incompatible with the "community method",[14] because politicisation would *ipso facto* imply the involvement of a majoritarian system. From this angle the Commission would be "politicised" and have the support of a parliamentary majority; but how then could it continue to embody the Union's general interest and fulfil its function of "guardian of the treaties"? The problem with this theoretical argument is that it does not stand up well in the real world. First and foremost, the European Parliament's power of appointment of the Commission, as planned in the Lisbon Treaty – which confirms a change that has been obvious for the last few years – opens the way to the politicisation of the European elections. Yes, we might be happy, or indeed sorry, about this development, but it is a fact that cannot be denied and given its implications it would lead to the re-examination of the European Commission's future role.

In addition to this, it must also be pointed out that the Commission must try to represent European general interest, which is beyond and even sublimates national interests. Furthermore there is a lot more than one view about what "general interest" is, and politicisation means bringing all of these views into competition with one another. Enhancement of the Commission's democratic legitimacy will provide it with greater efficiency in its defence of European interest in the face of national political elites. So on the contrary, from this point of view, the politicisation of the Commission does not mean relinquishing the goal of embodying the Union's general interest. And, the assumption whereby politicisation would necessarily imply the use of the majority system is also questionable, as eloquently shown in the example of the Union countries who have political systems that are run according to consensus and government coalitions (Germany, Belgium, the Netherlands and the Scandinavian countries in particular) and who have as rich and democratic a political life as countries who employ the majority system (France and the UK in particular).

Finally, one of the main issues raised when it comes to the politicisation of the Union is: should all European issues be politicised or should a distinction be made between "ordinary" stakes linked to community legislative decision making, and the fundamental or "constitutional"

stakes?[15] In this case ordinary stakes should be the subject of greater politicisation, whereas the constitutional stakes should not be politicised at all. If "constitutional" stakes were to be politicised there would be serious dangers of division linked for instance to enlargement, Union borders, transfers of powers, etc. More precisely, such a move underlines firstly that national parties and electorates are more likely to be divided on "constitutive" issues than on "isomorphic" ones; that anti-EU movements are more critical on identity, sovereignty and democratic issues than they are on ordinary legislative stakes; and finally that such divisions on the problematic constituents of membership and on the Union's powers, can cause public opinion in some member states to be torn apart – as proven by the ratification process and especially by referenda on new treaties. From this point of view, the politicisation of the EU would be, quoting Bartolini, "disastrous".[16]

Moving beyond the fact that the opposition at the heart of this argument between "constitutive" and "isomorphic" issues may seem fragile in some cases (the community legislation dealing with the deepening of the internal market and the liberalisation/regulation of one economic sector or another, or with the asylum and immigration policy being not any less fundamental), the empirical reality of the great difficulties encountered in reforming the political and institutional system of the Union should be enough to contradict this thesis. In fact, we support the idea that "constitutional" issues have to be politicised, precisely because today they are the issues which help convey the sense of the European project to its citizens. But the negative referenda on the Constitutional treaty as well as on the Lisbon Treaty (without neglecting the differences between them) have revealed that the sense of the project – its meaning as well as its orientation – is not understood by many citizens. As a result, anxiety and great distress are the overwhelming feelings created by the failure to regularly and continuously debate the fundamental constitutional stakes.

The enlargement process and the issue of EU limits serve as a very clear example of this point. It is precisely because the central and eastern Europe enlargement process was neither the subject of political narrative nor of continuous public debate that this issue has come boomeranging back in a very negative form. In fact, it has weighed heavily on the referenda's results in the past, especially in France and the Netherlands in 2005. For these reasons it is relevant to "politicise" constitutional issues: first and foremost in order to provide the structures for regular debate – not just episodically as is the case for referenda – on fundamental stakes.

This is the least we should do in a democracy, especially when the collective aims of Europeans are at stake. It is also crucial, and even more fundamental, in order to give (back) some meaning to the European project, for this is the task of politics.

How can the EU be politicised constructively?

In fostering the greater politicisation of the Union there is no need for a new European treaty. Instead, a number of significant democratic initiatives can advance this cause. These include: the establishment of a means of voting during the European election that will enable the creation of a more direct link between MEPs and their electorate; the attribution of real control power to national MPs with regard to their government when the latter negotiate with Brussels; the enhancement of political and financial support granted to European parties so that they can provide the public debate on Europe with a transnational dimension; the ability on the part of the European Parliament to assert itself as a true Parliament, confident of its democratic legitimacy, by making its voice heard in the debate with member states on issues as vital and symbolic as the choice of the President of the Commission (if the European Council tries to impose a politically incompatible candidate with the political majority in Parliament) or of its own headquarters.

Admittedly, the European elections of 2009 and the political aftermath fell way below the expectations of those who saw them as a real opportunity to advance politicisation in the EU. Transforming the EP elections into a "real political moment" thus remains an enduring mission. At least three suggestions which could make a considerable difference in favour of politicisation deserve closer attention.

Firstly, European elections should be held uniformly across all member states. The implementation of a uniform electoral procedure is an ever-recurring issue, always present in treaties but never achieved.[17] Previously, the aim has not been to harmonise the national electoral systems but to create a proper regime for the European Parliament. Instead, a unique electoral system for a unique assembly should be the first feature of a democratic regime. A single electoral system would represent all citizens identically, as well as creating a majority faithful to their choices. It also raises awareness among citizens that they belong to the same European society, therefore generating real transnational parties, and providing the European Parliament and its members with independence from national political systems.

Secondly, there is a pressing need to speed up the formation of real European political parties. An election could not be European without truly European movements and political parties. The recognition of their role in the EU political system[18] and the institutionalisation of their status and financing[19] have recently been permitted, removing the juridical obstruction. Their increasing strength and status should give them a predominant role in relaying opinions between citizens and the EU – this role is today assigned to national parties. It should also enable them to take part, more actively, in the definition of national lists, which will in turn boost the profiles and recognition of their European political faces. It can also help to establish supranational programmes which will be unique in their delivery of community mandates, something which is essential in terms of accountability. Finally, it may give them a much more prominent place in the media, which to date lacks competent political interlocutors on European topics.

Many observers have drawn attention to the obstacles which constrain the ability of European political parties to act, especially when compared to that of their national counterparts. In particular, this focuses on their members heterogeneity, the predominance of national cultures', and that the Union's political strategy tends to fall more within the ambit of the Commission (initiative monopoly) and the Council (impulse role) rather than within that of the European Parliament. For this reason it seems essential that European political parties use their power of approval for the Commission's President and the college of commissioners' investiture so that, in supporting one candidate or another for the European elections, they can personalise their political offer. Political parties should also campaign for the right to share initiatives on a level parity with the Commission, as well as take stands on subjects dealt with during European Councils, in turn helping to exert the necessary pressure on member states.

Third, increase the politicisation of European stakes. To draw the attention of voters an election has to offer clear alternatives. Consequently, politicisation highlights political stakes while enabling voters to judge. Making political choices implies winners and losers, but the voters buy into the political game safe in the knowledge that the return of the electoral cycle offers them another chance to be on the winning side, unlike referenda. The European elections are unexciting because of the lack of democratic protest concerning European policies. Losers are left feeling fatally hindered, not because of the way policies are oriented, but because of the sense of irreversibility which is strongly present in the community

system.[20] Politicised European elections therefore have several advantages. They would enable changes in voter preferences; favour political innovation as parties compete more; facilitate the kind of open and public debates that are needed for issuing a clear mandate; and encourage the media to report European policies to citizens in a clearer and more meaningful way. What is at stake is the building and promotion of a European political legitimacy, starting from the orientation and delivery of choice to citizens.

New horizons: the significance of the Lisbon Treaty for EU politicisation

The Lisbon Treaty, depending of course on its ratification, paves the way for a more politicised means of running the community's institutional system.[21] One of the main reasons for this is that the treaty will introduce new procedures, most notable of which is the enhancement of the European Parliament's prerogatives from a legislative and budgetary point of view and also – as alluded to above – its new power to appoint the European Commission on a majority basis after voting in the European elections. In addition, the public nature of Council of Ministers' meetings, especially when they meet to take legislative measures, means that journalists will be much better equipped to inform citizens about the subjects and texts being debated. To a certain degree, this will eradicate the "information deficit" which is often highlighted, and consequently bring the political debates that take place in Brussels to the attention of the public.

The Lisbon Treaty aims to foster citizen participation in community political life by introducing the right to popular initiative; of course citizens' mobilisation will only have the effect of "inviting the Commission to submit an appropriate proposal" to the Council of Ministers and to the European Parliament – therefore we are still far from a referendum on popular initiative. Yet, it can be said that in its intention this institutional innovation facilitates, for the first time ever, citizen access to the heart of the community decision making process. It provides a strong incentive for the various actors of European public life to undertake political action across Europe. Yet, one important caveat that must be highlighted is that modifications made to the way the institutions are run are not, alone, sufficient to achieve greater politicisation. Rather, what is required to shift the politicisation process along is the personal appeal of politicians. The "faces" we give to a political system count, and so politicisation also requires the establishment of new positions with high political profiles. The Lisbon Treaty delivers this. It provides the Union with a new face by

including the appointment of a President of the European Council who might embody "Europe" in the eyes of the people.

Today, the European Council rallies the heads of state and government of the Union countries twice to four times a year. This sporadic rhythm prevents citizens from becoming familiar with one of the most important venues of European power. The appointment of a permanent full time president who would not be allowed to assume a national mandate would make the European Council a reality. In this way a third key European political personality is created, along with the President of the Commission and that of the European Parliament. To date, since the president of the European Council has by definition also been a head of State or government of a member state it has been the national political identity that took precedence over that relating to the community. An experienced political personality (it is hard to see that it could be someone who had not previously undertaken the function of head of state or government in his/her own country) will therefore be appointed to undertake a function in which he/she will have to think from a European perspective and in which he/she will have to "undertake" European politics. The president of the European Council will no longer be submitted to the electoral deadlines of his own country; he/she will have to seek to build a qualified majority within the European Council himself and to assert himself alongside an enhanced European Parliament and a more politicised European Commission.

The Lisbon Treaty also includes the creation of a high representative for foreign affairs and security policy who will represent the Union on an international level. Working in an area that has so far been the realm of the high representative of the Council for the Common Foreign and Security Policy and of the European commissioner for external relations, this new position will create significant added value. Primarily, this pooling of responsibilities will enhance the coherence of Europe's external policy. But it will also allow the high representative for foreign affairs and security policy to provide the Union with a "face" and a "phone number" in the international arena and to personify "Europe" in everyone's eyes.

Hence a similar logic can be applied here as for the President of the European Council. On the one hand politicisation means that citizens will be able to identify with or reject "real" people who embody political options on one level or another – even if the high representative does not have the title of "minister" he/she will embody the Union's CFSP. On the other hand this will be an influential political post (notably because he/she will

chair the Council of Ministers relative to the CFSP) where, like the President of the European Council, the individual will be "disconnected" from national political life, thus obliging he/she to assert him/herself in European political life. Today the minister who chairs the CFSP Council (i.e. the Foreign Minister of the country who holds the Presidency of the Union) mainly focuses on the political life of his own country. Indeed, his future mainly rests on the outcome of national elections. This is not the case for the Union's high representative. His future will depend on the political scene within the European Council. Therefore by creating this position the reform treaty will also generate another important incentive; it is another mechanism to connect political life with European life.

The Lisbon treaty opens up new horizons for the European Union. The extent to which this solves the legitimacy crisis depends on the Unions actors' determination to make the most of this opportunity. To do so they need to politicise the way in which it is run, making it more democratic and transparent for its citizens. As one has to expect there will inevitably be barriers to overcome and progress will be at times painstaking and gradual – not withstanding the fact that several of the pre-conditions for greater politicisation are already in place. But, it can be said that citizens, at last, should feel they can influence the political direction and have a stake in the EU decision-making process. *In fine,* bringing the Union out of its "sense of crisis" requires a renewed focus on the politicisation of the European democracy.

Chapter 7

Legitimacy through output: the quest for leadership and a big new idea

Kevin Featherstone

To say that the EU has marketing problems in the current climate is a statement of the obvious, yet nevertheless this assertion has to serve as the starting point for future progress. For too long now, the EU has looked tired, remote and irrelevant. It needs a new "big idea" and it needs it very soon. To reinvent the logic of Jean Monnet, the European Union needs to choose a problem and show it can be the solution. Institutional reform or, in contrast, innovation must only be seen as a means of facilitating this new policy objective: a practical requirement in order to satisfy the economic and social interests that are mired in an issue of major public concern. The problem recently is that to many voters, the EU Constitution or the Treaty of Lisbon have been providing solutions to problems they do not understand or care much about.

With lower levels of public endorsement, the EU's legitimacy has even become an issue in itself. In 2008, the Eurobarometer surveys of the EU Commission twice found only a fraction more than half of all voters across the EU27 thought that their country's membership of the EU was a "good thing" – a worryingly low proportion on which to build.[1] Less than half (45%) in autumn 2008 had a "positive image" of the EU. Further, less than half of those surveyed in autumn 2008 expressed "trust" in the Brussels institution.[2] There were major falls of such support in France,

Romania, Austria and Greece – cases that are all the more important as together they cover different lengths of EU experience. Earlier, an FT/Harris Poll in 2007 had found that the most important feature associated with the EU in France, Germany and the UK was "bureaucracy".[3] Only Italy and Spain seemed less upset by it.

With such public sentiment, it seems perverse to see the immediate solution in terms of adding to the supranational edifice. Indeed, the current crisis in the EU is largely self-inflicted. For most of this new century, the EU has been turned-in on itself, concerned with refining its own institutional architecture. The "democratic deficit" was – and remains – an important agenda to tackle. Yet, how many voters across Europe have any opinion about "Qualified Majority Voting" or the presidency of the Council of Ministers? When issues like these are raised they inevitably create a detachment between the *cognoscenti* and the mass public. So, when asked about constitutional arrangements, many voters simply respond with, "get a life…!", or are swayed by populist "anti-" campaigns that offer easier and more interesting explanations.

The logic of European integration

This prolonged introspection is historically exceptional. Each of the previous major steps forward in European integration have combined institutional changes with a big new idea or ideas. Jean Monnet started with a common market for coal and steel; the institutions were a means not just an end in themselves. The same logic was repeated with the Treaty of Rome. Institutional reform was barely touched before the Single Act in the 1980s. The latter extended majority voting in the Council like never before or since, but it was sold publicly as the means to completing the internal market. The Maastricht Treaty created the "euro", CFSP and Justice and Home Affairs and justified the three "pillar" institutional structure, as well as the ECB. The Amsterdam Treaty strengthened the social and employment dimensions, while tidying-up procedural matters. At each stage, the campaign strategy was to argue for new economic projects which, in order to be made feasible, required institutional reform.

The logic accepted that European integration had to be seen to be *doing*, rather than just being. The legitimisation of the European endeavour would come primarily from the results of policy initiatives – an "output legitimacy" – as the public would witness the economic and social gains, equating "Europe" with growth and success. Building "Europe" appealed to the rational interests of businesses seeking new markets, workers seeking more and better jobs and consumers wanting more efficient

markets. The Common Agricultural Policy (CAP) was an exception to the rule: here social protection trumped market efficiency, but again the interests of key sectors were the basis of the appeal.

Moreover, "Europe" had to be created outwith the nation-states: an antidote to failed nationalisms and ideologies, it offered a new politics of modernity. Economic management was de-politicised, seen as free from domestic corruption, and led by technocratic understanding. The new economic growth would also be a bulwark against the Communist threat, both at home and abroad, adding an additional strand of legitimation. Later, when the number of southern European member states was expanded, "Europe" had an additional discourse of action: solidifying the transition to democracy, whilst confirming a shared "family" identity (features taken up again with the central European enlargement, but with its impact diluted in the west by the recent institutional agenda). Throughout, "Europe" was the challenge to the status quo and the old establishment, with a clear purpose. Federalists were among the devout, but they could not be the core constituency.

Certainly, the EU has now lost its *avante-garde* quality, overtaken by new issues and public moods. The recent referenda in France, the Netherlands, and Ireland have left the EU looking scared by events, behind a momentum of public rejection. The practice of holding second referendums (Denmark, Ireland) when voters give the "wrong" result the first time round makes the EU look defensive, if not fearful. The EU does not look as if it feels it is part of the future.

Where is "Europe" on the new issues that dominate our news? How many European voters can tell you the EU's policy on climate change or energy supply? Or what the EU is doing about international terrorism? Even on the core economic issues, what direct competence does the EU actually have to tackle unemployment? Or the skills economy? The public will not be fooled: the EU has often tried to talk "big", but its actual competences to act have remained limited. The Lisbon Agenda, initiated in 2000 and updated in 2005, proclaimed a package of reforms to the European economic and social model, but its policy mechanisms (the "Open Method of Communication") were a testament to the restrictions placed on the EU's ability to act. "Soft" processes left the EU merely with the capacity to plead.

Tellingly, when the global banking crisis erupted in 2008, the EU was left looking over the shoulders of the key national governments, rather than

being seen as leading the way to "solutions". It was President Nicolas Sarkozy who called the leaders of Germany, Italy, the UK, the Commission, and the ECB to a private summit at the Elysée at an early stage. The crisis was so serious it required the concentrated attention of the EU's "big 4", but the absence of the other 23 member governments indicated that the "EU" as such was not in the driving seat. As it was, the mini-summit agreed that there would be no EU-wide bail out of Europe's banks; rather, the remedy was a matter of national choice. The Irish government had already gone out on a limb by guaranteeing deposits on its banks, without any reference to the EU dimension. Only much later did the EU announce that it would relax its rules to allow governments to bail out and inject cash into their banks. Put to the test, the EU was divided and slow to establish its role. All of this, places the EU disappointing its advocates and failing expectations.

Rediscovering a shared purpose

How can the EU find a new sense of purpose? Writers like Timothy Garton Ash conclude that the EU has lost its way with the end of the cold war, which gave it its defining "narrative".[4] Of course, European unity began with Franco-German reconciliation in the context of Europe split in two. But it only progressed because it was able to ally many distinct sectoral and local stories behind the new agenda. The consolidation of democracy in southern Europe, the reform of the domestic state in Italy and elsewhere with the single market, the desire for market access on the part of the Scandinavians, the need to "import" monetary discipline via the "euro-zone" – none of these were meaningfully-linked to a cold war narrative obligating unity. British and Irish entry in 1973 similarly had little to do with motivations stemming from the cold war. In short, the cold war was never the only narrative and it has long been superseded by others.

Today there are 27 local debates on the future of Europe, with many different mixes of narrative. It is wrong to assume that the whole of Europe shares some basic consensus and that just one, two, three or more states do not. Virtue is spread around. Looking across the agenda, there are different dividing lines and shifting majorities, depending on whether the focus is the Lisbon Agenda, the Constitutional Treaty and its successor texts, the Services Directive, the "euro", etc. Or we can think of how west Europeans see migrant labour from the east very differently – contrast the image of the "Polish plumber" in Britain and France, for example, and then ask who is supporting a "European" identity here?

The reality is that in the future, as in the past, the EU has to weave varied narratives into a shared purpose. This is almost certainly the only feasible

way of establishing the necessary coalition of support. The task is to focus on a common problem (as with the single market programme) and sustain a shared purpose. A big idea is likely to need a package of measures behind it: offering side-payments to broaden the appeal, as with the Single Act agreed in 1985 which sanctified the internal market but also signalled aid to southern Europe. The central project may accommodate a spread of interests, as has often been the case since the European Coal and Steel Community was created. A too narrowly-defined project, as with a singular narrative, risks division.

The quest for leadership

A renewed focus on output legitimacy will require political leadership. Again, history teaches us that major steps forward have required a Commission President with a strong profile alongside an assertive Franco-German axis. Judging on his first term, President Barroso does not meet this standard and it is therefore disappointing that his mandate has just been renewed. The other part of the equation also needs revising. Paris and Bonn could steer an EU of 12, but recent years show that it does not have the same reach in an EU of 27 members. The central Europeans do not necessarily share their perspective and they are not pliant.

The plea for one or two new leaders to emerge and heroically drag Europe out of its malaise is almost certainly an illusion. In reality, an EU of 27 or more represents a very different space for leadership. It is very unlikely that something akin to the type of hegemonic leadership wielded by Paris and Bonn in the past can be repeated. Leadership is likely to be more fluid and sector-specific, with shifting coalitions as a result. With more players, an expanded set of policies, and 27 electoral cycles, stable leadership may well be a chimera. France and Germany alone probably command insufficient support. President Nicolas Sarkozy finds it harder than his predecessors to be the median player in the spectrum of national positions, whilst Chancellor Angela Merkel has recently seemed to be retreating from the task of forging a new consensus. In other circumstances, this might have created an opportunity for a British PM to muscle in – an act that would raise the potential for progress at the EU level. However, the short to medium-term prospects in London are dire. Gordon Brown has been irreparably damaged and the likely next prime minister, David Cameron, appears disinterested but also hidebound by a deeply Euro-sceptic party and press. Thus, across the major member states, the "quick fix" of new heroic leaders does not seem likely.

Leadership and legitimacy are tied together. Both can be facilitated by a new big policy idea. Again, history offers a parallel. In the early 1980s, Europe had lost Giscard and Schmidt and the widespread perception was of the distraction of Mitterrand and Kohl and the opposition of Thatcher. None of these three could lay claim to initiating the single market programme. Instead, a coalition of interests underpinned a new policy idea and set an agenda. A series of bargains then created the profile of "European" leaders.

Today, the Commission is led by a "Gaston Thorn" rather than a 'Jacques Delors'. Again, there is a backlash against the Commission and its seemingly unattractive bureaucracy. It is a scapegoat in France, Britain and Denmark, if not others. Writers like Yves Meny of the European University Institute have identified the need for a new "purposive leadership" in the EU and claim that only the Commission can provide it. Yet, many Europeans are unlikely to see the Commission as a central part of a big idea – to them it is part of the problem, not the solution, as the earlier poll evidence suggests. A new re-launch does not start with giving more powers to the Commission.

At the same time, the experience of direct elections to the European Parliament can hardly be described as an unqualified success. The elected Parliament may have deflected some of the criticism from the technocratic Commission, but it has not produced many additional gains. It has made little impact on the public portrayal of the EU in the media across Europe. Its own lack of visibility is in itself a contributing factor to the legitimacy problem of the EU as a whole. The 2009 elections to the European Parliament did little to advance the cause of "building Europe". Indeed, they were often a distasteful joke – celebrities, mavericks and neo-fascists encroaching on a space intended as a platform for legitimising further unity.

Of course, "Europe" will have to develop as a political system, with the politicisation that comes with it, if it is to establish deeper roots of legitimacy. But politicisation does not meet the immediate needs of the present and risks "throwing the baby out with the bath water", sacrificing past gains without realising new ones. Institutional introspection has got Europe into the current mess; it is not the best strategy out of it. With global crises in banking, energy and climate change, the political design of the EU seems a distraction at the same level of general interest as train-spotting. I concur with Stefano Bartolini that a greater politicisation presupposes significant

institutional reforms being made first – otherwise it could prove too disruptive - but institutional reform is not where we begin.

Instead, political reform must be determined by the nature of the big new policy idea – to be couched as a logical means to a desired policy solution. Placing the European Parliament centre stage cannot easily be presented as a core implementation requirement of a new policy initiative. Moreover, adding to the powers of the Commission may not satisfy those publics sceptical of its values and purpose.

The last big success of the EU was the introduction of the "euro" managed by the ECB. In the present climate – squeezed between the antipathy towards the Commission and the dangers of politicisation via the Parliament – the best compromise may be again to create a separate institutional body dedicated to the realisation of the big new European policy idea. This can be sold as a pragmatic response, utilising the logic of European unity, without inflaming agendas of the powers of "Brussels". It follows the model of 1957 in creating EURATOM. A separate institution with a new agenda and leadership, located elsewhere than Brussels, provides an agency to deliver on a big new idea.

Opting for a big new idea

This returns us to the prime focus: the policy package. A big new idea can grab public attention with the discussion of its positive impact. It has the benefit of a simple focus – a crucial requirement for raising the EU's visibility and legitimacy. Such a strategy avoids the puzzling complications of revising the institutional architecture. The big new idea needs careful selection and design – rather like Jacques Delors assessing his future options in 1984 prior to becoming Commission president - in order to reflect well on the relevance of the EU "brand".

There appear to be two main options. The first is to respond to the economic crisis by building-up the EU's role. Here there are two strands. One is to strengthen the *gouvernement economique* of the EU: a complement to the monetary union headed by the ECB. This has been an aspiration of French governments since the Maastricht negotiations. Moreover, public opinion surveys indicate some support for the EU taking such action: 71% across the EU of 27 in April 2009.[5] However, such action is unlikely to incorporate the UK or the other states outside the "euro-area". Its potential is also undermined by the recent wrangling between EU leaders and the divergent strategies adopted nationally to deal with

the recession. Indeed, in April 2009 only 17% of Europe's voters actually thought that the EU was best placed to tackle the economic crisis. Thus, top of the public's concern may well be "it's the economy, stupid", but the EU at present seems hamstrung in this area. Another strand is to build-up the EU's role in supervising the financial services sector, the problems in which led to the wider crisis. Again, Eurobarometer in April 2009 indicated strong public support for such a role (67%). Yet, the EU agreement in June 2009 to create a European risk-monitoring board and a system of financial supervisors is probably the maximum that can be agreed in the medium-term. Moreover, the opacity of such a policy area means that it is unlikely to have much wider public impact.

Instead, the second option is to develop an initiative that combines concerns on energy supply and climate change. These link the new politics of the "green" agenda with matters of economic security. Part of this agenda – climate change and curtailing gas emissions – was the focus of UN conferences in Poznan in December 2008 and will be again in Copenhagen in 2009. The election in the US of President Barack Obama has created much more scope for stronger international action. Yet, whilst such issues are globally relevant, Europe has its own interests to advance. It has not, however, given the EU much collective competence; instead, the outside world sees inter-governmentalism not supranational leadership.

Packing a legitimate punch

Thus, Europe has the opportunity to act internationally, exerting a moral leadership, whilst creating a real energy community at home addressing environmental concerns, fostering appropriate research and securing energy supply. As a means to such ends, the EU should create a new agency with appropriate expertise and competences. A "European Sustainable Development Agency" would strike a chord with Europe's voters. The agency should have a similar relationship to the Council as that currently possessed by the EU Commission, involved in policy initiation and with Council majority voting. It should be headed by an energetic new leader, have appropriate resources, and be able to "pack a punch". It must not be just another European committee or body, sustained by declaratory politics instead of real power and purpose.

Public opinion surveys underscore such an initiative (see table opposite). The Eurobarometer public opinion surveys have found 69%-71% of people across the EU27 believing that the EU should have a role in environmental protection, 70-72% wanting the EU to coordinate research, and some 61-

68% supporting an EU energy policy.[6] Indeed, all three have been among the top five policy areas advocated as priorities for EU action.[7] The other two – fighting terrorism and a more active defence and security policy – appear less attractive options for "re-launching" the EU. Matters of surveillance and exchange of information would likely unite civil libertarians and Euro-sceptics. Similarly, public support for an EU defence and security policy may well amount to nothing more than a superficial vote for "apple pie": a yearning for international consensus, without a willingness to give up on national interests and prerogatives. By contrast, energy, the environment and scientific research each loom large in debates on the future and they can help to shift the public's perception of the relevance of European unity.

Table 1: Public support for EU action in selected policy areas

Question: For each of the following areas, do you think that decisions should be made by the (nationality) Government, or made jointly within the European Union?

% supporting joint action by the EU (for EU27):			
	Autumn 2007	**Spring 2008**	**Autumn 2008**
Fighting Terrorism	81	79	79
Scientific research	72	70	72
Environment	73	71	67
Defence & foreign policy	67	64	64
Energy	68	61	63
Support for regions facing Economic difficulty	64	62	62
Immigration	63	58	60

Source: Eurobarometer surveys, 68-70.

The new policy agenda would also legitimate a new agency. And to some extent there is even a parallel here: despite the criticisms in the early 1980s of being a meddling bureaucracy, the Commission found a new role and favour once it was given the task of creating the single European market. Thus, acceptance is tied to the task. Yet, the project advocated here avoids the risks of giving new powers to the Commission and, instead, involves a new agency in a different city. The reason being that every project needs a delivery mechanism and in the foreseeable future that cannot be the European Parliament. Likewise leaving the agenda solely with the Council would sustain inaction; and it appears best to avoid the Commission. By default, a new agency is the least troublesome option – as was recognised with the ECB – and it has the advantage of clarity of purpose.

The disappointment left by the EU's inaction and wranglings over the current economic crisis should not distort strategic planning. The agenda of overcoming the recession and re-creating long-term growth remains of fundamental importance. Progress on this front should be made as and when is possible – yet realistically the political divisions of the recent past show that a bold initiative in this area is unlikely to get very far. It would almost certainly entail too big a step beyond national sovereignty. At best, it would probably only include a small core of member states. The immediate strategy needs to be less sensitive, more inclusive and more original.

Monnet himself had seen energy as the key focus for reviving the European integration process after the debacle of the French rejection of the European Defence Community in 1954. The Messina conference thereafter did not dwell on a new institutional architecture, but on major new policy projects. After all the recent turbulence, it seems that in this respect Monnet has something to teach Europe again. I have never accepted that Monnet was the "saint" that some have identified, but on moving ahead via policy projects his strategic sense seems more sound than what we have endured recently and more realisable than a big constitutional moment that must wait for the future.

Chapter 8

The case for differentiated integration in the EU: making the right choices

Janis A. Emmanouilidis

More than ever before the EU needs to operate at different speeds – and there are numerous reasons why this is so. The enlarged Union is characterised by a growing diversity of interests, an increase in economic, financial, social and geopolitical heterogeneity and diverging objectives and expectations concerning the future path of integration prevent consensus about Europe's *finalité*. Additionally, there is the need to respond to pressure from neighbouring countries aiming to join the European club despite the now widespread phenomenon of enlargement fatigue. Together all these factors represent a pressing call for a higher degree of differentiation.[1]

This being said, differentiated integration is not a magic potion – it is not an end in itself, but rather a functional imperative. In other words, a higher degree of flexible integration is a necessity if the EU27+ wants to remain effective. As was the case in the past with the common currency, the Schengen accords, social policy, or more recently with the Treaty of Prüm, closer cooperation between a limited number of EU countries can help to overcome stalemate, improve the functioning of the Union and reduce tensions between those who want to deepen collaboration and those who are not (yet) ready or willing to do so.

Different levels of integration are already a fact in today's European Union. Some members have introduced the euro while others have not; some attempt to develop the Union as an Area of Freedom, Security and Justice, others not; most EU countries take part in the European Security and Defence Policy (ESDP) or in the Schengen area, others not. As a consequence, the EU already walks the path of differentiation. This degree of flexibility is likely to increase in the future. The core question is therefore not whether we will witness a more differentiated Europe, but rather how it will, or how it should, look.

Confronting the options: six types of flexible integration

When it comes to differentiated integration, there is no silver bullet. On the contrary, one can distinguish between six principle forms of flexible integration:[2] (1) creation of a new supranational union; (2) differentiation via established instruments and procedures; (3) intergovernmental cooperation outside the EU; (4) differentiation through opt-outs; (5) affiliation beneath full membership; (6) negative differentiation through withdrawal.[3]

Creation of a new supranational union

A group of countries creates a new separate union. The participating states contend that they cannot deepen integration any further within the framework of the existing EU due to contradictory and irreconcilable views about the future progress of European integration. The new union aims at a higher level of supranational cooperation and thus includes the immediate transfer of competences and the pooling of sovereignty beyond the level inside the "old EU". In the long-term, the new entity seeks to foster progress towards some sort of federally organised political union. The legal basis of the new union is laid down in a separate treaty or constitution worked out, approved, ratified and implemented by the participating states.

The vast majority of members of the "old EU" would be keen to enter the new entity in order not to be pushed to the political periphery of Europe – and no group of states would ultimately deny others the right to join the new club. The establishment of this new supranational union would also entail the creation of novel institutions. Meanwhile the "old EU" would not be in a position to "lend" organs to the new union as institutions cannot operate on the basis of two separate sets of primary law. At the same time, it would not be enough to merely establish a coordinating

secretariat. The new supranational union would instead require a powerful executive, a strong parliamentary dimension securing democratic legitimacy and a separate judicative for settling legal disputes within its new boundaries.

Differentiation via established instruments and procedures

A group of EU members raise the level of cooperation inside the EU framework by applying either general instruments of differentiation (i.e. enhanced cooperation) or predetermined procedures for specific policy areas (e.g. Economic and Monetary Union, permanent structured cooperation[4] in ESDP), which are laid down in the EU Treaties. Differentiation via established instruments and procedures is characterised by a high degree of openness, as participation must be open to every member state. However, the definition of participation criteria, which all EU countries have to consensually agree on, or the specification of a minimum number of participants (as in the case of enhanced cooperation)[5] may limit or predetermine the number of participants. Yet, the convergence criteria in EMU and the criteria established for permanent structured cooperation exemplify that member states tend to define conditions, which allows the (gradual) participation of a majority of EU countries willing to cooperate. From an institutional perspective, differentiation within the EU framework does not undermine the role and functions of EU organs as the European Commission, the European Parliament or the European courts are not deprived of their original rights and obligations.

In the context of this type of differentiation, there are also two recognisable sub-forms which differ mainly in relation to their final objective. Firstly, there is differentiation aimed at the creation of a federal union. This sub-form is guided by the idea that the employment of the instruments and procedures of differentiation, laid down in the EU Treaties, should ultimately lead to the establishment of a federal union. The most prominent example is that of the former Belgian Prime Minister Guy Verhofstadt, who advocates the creation of a "United States of Europe" by applying the means of differentiated integration.[6] Secondly, there is a functional-pragmatic differentiation. This sub-form follows a case-by-case approach without a pre-defined *finalité*. Differentiation is not guided by an explicit master plan, but rather aims to overcome specific blockades of certain member states, which are either not willing or not able to engage in a higher level of cooperation.

Intergovernmental cooperation outside the EU

A group of member states intensifies cooperation on the basis of intergovernmental mechanisms and procedures outside the EU framework. Collaboration is limited to governments and includes no transfer of sovereignty rights to supranational authorities. The existing EU institutions have no direct executive, legislative or judicative role. However, the participating states must adhere to the principle of loyalty and thus respect the supremacy of the EU's acquis so as not to undermine the functioning of the Union. Here again, various sub-forms can be distinguished.

Firstly, there is the intergovernmental avant-garde. In this case the participating states hold that further progress in a specific policy field is only possible if a smaller group of EU countries takes the lead by cooperating outside the Union's framework. Collaboration within an intergovernmental avant-garde functions as a sort of laboratory and there is a clear goal to integrate cooperation into the Union's framework at the soonest possible moment – as was the case most recently with the Treaty of Prüm and in the 1990s with the Schengen Agreement. The countries taking part in an intergovernmental avant-garde work out a treaty or agreement laying down the objectives as well as the organisational and legal details of cooperation. The number of involved states is largely determined by functional imperatives. However, participation is in principle open to every EU member state able and willing to join. The late participation of other countries is encouraged as the treaty or agreement laying down the rules of cooperation includes a provision that every state is eligible to join an intergovernmental avant-garde.

Secondly, there is a Europe of Nations sub-form. The participating countries assume that further progress in a certain policy area cannot be achieved within the framework of the EU or on the basis of supranational instruments and procedures. Cooperation is not guided by the wish to transfer national competences to a higher supranational authority at any stage. Collaboration is set up to be more permanent as there is no pre-defined objective to integrate it into the EU at a later stage. A Europe of Nations is characterised by a rather low degree of openness as the participating states value the efficiency of a small group.

Thirdly, there are loose coalitions, which are set-up to fulfil a specific task or purpose (e.g. Contact Group for the Balkans; E3/EU concerning Iran, G6 or Salzburg Group in the field of Justice and Home Affairs). This form of cooperation is characterised by a very low level of institutionalisation and happens without a legal agreement and without a separate institutional

structure. The number of states involved is limited to a small number of EU members (closed circle). However, the participating countries are in most cases very eager to keep the "outs" constantly informed and/or indirectly involved in order to secure their support (e.g. E3/EU) or in order to infiltrate their ideas and agenda into the EU as a whole (e.g. G6, Salzburg Group).

Differentiation through opt-outs

The allocation of an opt-out can be the only way to overcome the opposition of certain EU members towards a further deepening of integration. The opt-out initiative comes from the country wishing to be excluded from a deepening of cooperation in a certain (sub-) policy area. The principle decision to grant an opt-out requires the assent of all EU member states. The basic institutional rules and procedures regulating an opt-out must be agreed unanimously and laid down in the EU's primary law (e.g. through a protocol). The opt-out country might be granted an opt-in opportunity, which allows it to join in and implement a certain measure or legislative act even though it was adopted in a policy area from which it has been excluded.

Affiliation beneath full membership

Differentiated integration need not be limited to EU members. It can also involve countries not (yet) part of the Union. Indeed, the pressure to think about viable and attractive alternative forms of belonging beneath the level of full and unlimited EU membership has increased and is likely to increase further as the Union faces a double challenge. On the one hand, the EU needs to provide neighbouring countries with a more attractive offer if it wants to make sure that EU conditionality continues to be effective. On the other hand, it needs to acknowledge the widespread doubts about future rounds of widening in many EU countries. Despite the fact that the Union's relationship with most of its European neighbours is already very close, there is still some room to improve and extend relations. This can be achieved by reverting to one of the following three main concepts.

First up is "Association Plus". In this case countries do not join the EU but are associated with the Union as closely as possible beneath the level of a *de jure* or *de facto* membership. The extent to which neighbouring countries are associated with the EU can vary significantly.[7] It can include privileged access to the internal market; the establishment of a customs union; the adoption of "deep and comprehensive free trade agreements"; the ability to support CFSP positions and to participate in ESDP operations;

a privileged visa regime; or financial and technical assistance. The association can be based on both bilateral (e.g. ENP Action Plans, Association and Stabilization Agreements) and/or multilateral arrangements (e.g. Barcelona Process: Union for the Mediterranean, European Economic Area). In spite of the different levels of cooperation between the EU and an associated country, one key feature ensures that there is a limit to all forms of "Association Plus": the partner countries do not participate in the internal process of EU decision-making, which remains the sole privilege of the Union and its members. The EU's core institutions – the European Commission, European Parliament and (European) Council – remain closed for associated countries.

Second in line is the concept of partial membership. Affiliated countries are not merely associated but rather integrated in one or more specific EU policy areas without becoming full EU members. Sectoral integration can relate to political (e.g. CFSP or Schengen) and/or economic aspects (e.g. internal market, energy and climate policy, euro). It can involve policy areas including all EU members or fields, which are already subject to a high level of internal differentiation among EU members. "Partial members" become *de facto* members in the respective field and as such fulfil similar obligations and enjoy similar rights as any EU country. Going beyond a "mere" association, partial membership provides partner countries access to the EU's main institutions and thus the ability to influence the Union's decision-making process. Over time, partial membership can be extended to other policy areas and the possibility of an eventual full EU membership is not excluded.[8]

Finally, there is the option of limited membership. In this case the legal status of an acceding state is that of a fully-fledged EU member albeit subject to certain limitations. The new EU country does not enjoy all the benefits of membership as it is excluded from certain policy areas or is not obliged to apply certain legal norms. The latter could for example include a "differentiated acquis" adopted in the framework of enhanced cooperation, which binds only the EU members participating in this particular cooperation.[9] In the framework of previous enlargements, the EU and the acceding country agreed that the latter must from day one of accession respect the Union's acquis and fulfil all obligations deriving from EU membership. In other words, European law was valid right from the beginning although its application was in certain cases temporarily delayed, due to either derogations laid down in the accession treaty (e.g. transition period concerning the free access of labour markets) or due to the fact that the new EU countries were not (yet) able to fulfil certain pre-

defined participation criteria or obligations (e.g. late introduction of the euro, no immediate abolition of border controls). The concept of limited membership deviates from this practice. New member states can be excluded, on a much more permanent basis, from one or more (sub-) policy areas or parts of the Union's acquis, if both parties – the Union and the acceding country – agree to such an exemption in the course of membership negotiations.

Negative differentiation through withdrawal

Finally, this form of differentiation is based on the assumption that states, which are either not prepared or not able to support a further deepening of integration, choose to leave the European Union. After the country opposing more integration has decided to break away the Union, the remaining EU members are able to intensify cooperation with each other. In the case of a voluntary withdrawal, the state which exits the Union and the remaining EU member would have to conclude an agreement setting out the legal, institutional and political arrangements guiding the withdrawal.

Making constructive use of differentiated integration

In the future, differentiation will become a major characteristic of European integration. However, the path towards a more differentiated Europe will not be dominated by one single form of differentiation, but rather will be a much more complex process of mixing and matching. Over time, this will likely lead to the application of a diverse range of flexible cooperation mechanisms. Therefore, if differentiated integration is to become a functional imperative, the central question is which form(s) should be considered to be me most feasible and desirable for advancing the European project. In light of the analysis above, the following conclusions can be drawn.

First, the creation of a new supranational union – with an independent institutional structure based on a separate treaty or constitution – is neither advisable nor realistic. It risks creating new dividing lines in Europe as the members of the new union would most probably invest their political capital in the development of their newly founded entity. In return, the "old EU" would gradually become marginalised and Europe could be split (again) into two opposing camps. On the one hand the members of the new union and on the other the excluded states – which might even seek to place their fate in the hands of other (geo-) political constellations. Observing this from a more global perspective, the resulting division of Europe would (further) weaken the political relevance of the "old continent" in the future multi-polar concert of world powers.

But the creation of a new union is not only undesirable, it also seems unrealistic for two main reasons. On the one hand, the EU has never reached a point at which divergent positions concerning the future of Europe could only be resolved through the establishment of a new union. In the crisis following the double "no" to the Constitutional Treaty in France and in the Netherlands, the member states sought a practical and sober solution within the existing EU framework. Even after the Irish "no" to the Lisbon Treaty or in the course of the global financial and economic crisis, which revealed major differences between EU members, the creation of a new union was never a realistic option. On the other hand, the establishment of a new union would require a massive political effort on behalf of its participants on both the national and European level. Such a move would only make sense if the potential members of a new union were ready to transfer more sovereignty rights beyond the current level inside the "old EU". However, even in the most integration-friendly countries there is little, if any appetite for giving up more substantial national competences.

Secondly, it is preferable that differentiated integration be organised within the EU framework, given that cooperation organised outside the Union' Treaties bears a number of risks. As a matter of course, the opportunites that come with differentiated integration have to be weighted against potential risks. Flexible cooperation among a smaller number of EU members can in some cases lead to the creation of parallel institutional structures, which can weaken the EU's supranational institutional architecture; exacerbate the problem of coordination between different policy areas and damage the overall coherence of the Union; lead to a fragmentation of legislation within and outside the EU framework; potentially decrease the level of transparency and democratic accountability on both the European and the national level; and even create new dividing lines in Europe. These risks are particularly high if closer cooperation is implemented without clear procedures and norms and without the involvement of supranational institutions – which is the case if differentiation is organised outside the EU.

Hence, if politically feasible and legally possible, differentiation should be organised inside the Union's legal and political framework. Closer cooperation within the EU respects and benefits from the Union's single institutional framework; preserves the supranational powers and composition of the European Commission, the European Parliament and the European courts; limits the anarchic and uncontrolled use of flexibility; guarantees a high level of calculability due to the existence of clear-cut

rules concerning the inception, the functioning and the widening of differentiated cooperation; is characterised by a high degree of openness as participation is open to every member state; guarantees a higher level of democratic legitimacy through the involvement of the European Parliament and national parliaments; enables the continuous development of the Union's acquis in line with the requirements of the EU Treaties; and reduces the overall risk of a confrontational split between the "outs" and the "ins".

Thirdly, differentiated integration should not follow a specific master plan, but rather adhere to the concept of "functional-pragmatic differentiation". The idea of applying the instruments of differentiation to create some sort of a "United States of Europe" (Verhofstadt) is unrealistic and counterproductive. It is unrealistic because the wider public and, to an increasing extent, sections of the elites even in the most integration-friendly countries are not (yet) willing to further surrender substantial national competences in order to develop some sort of a federally organised political union. And it is counterproductive, because the idea of creating a "United States of Europe" via the instruments and procedures of differentiation unnecessarily raises negative suspicions – not only among Eurosceptics but also among many of the EU's smaller and new countries which often (mis)perceive proposals to create some sort of political union, via the means of differentiation, as an attempt to create a closed, elitist core Europe from which they could be excluded. Independent of whether such suspicions or fears are justified or not, they raise distrust between EU countries and in return limit the chances that the instruments of differentiation are constructively employed in practice.

Differentiated integration should therefore be conceived and construed as an open-ended process with no final target. In other words, closer cooperation by a group of EU members should follow the logic of "functional-pragmatic differentiation", aiming to overcome specific blockades in certain policy areas – particularly in those fields where decisions in the Council of Ministers (still) require unanimity. The means to overcome blockades are already enshrined in the EU Treaties. So far, however, enhanced cooperation has not been used in practice although it was introduced more than ten years ago. It should therefore be applied to prove whether or not the strict conditions laid down in the EU Treaties can be met, and to ascertain how well the current legal and institutional provisions function and where further improvements are required. Moreover, there is a need to test the practicability of the new special "Passerelle Clause" in the Lisbon Treaty, which in theory allows the

improvement of the decision-making procedures within enhanced cooperation.

Fourthly, cooperation outside the EU should follow the model of an "Intergovernmental Avant-garde", which is open to all member states and aims to integrate the norms and procedures adopted outside the EU into the Union at the soonest possible moment. One should definitely avoid long-lasting cooperation outside the EU in the framework of a Europe of Nations, because this could avert progress in a certain policy area or even lead to negative spill-overs in other policy fields and thereby hamper the overall integration process.

However, the integration of an acquis into the EU can prove difficult for a number of reasons: if norms adopted outside the EU conflict with existing or planned law in policy areas which are (partially) covered by the Treaties; if cooperation outside the Union covers issues which are strongly disputed between EU members; if EU institutions and "outs" are not associated with or at least continuously informed about the activities outside the Union; and if the "outs" are, as a matter of principle, not willing to accept a set of legal norms which were enacted without their participation. The positive example of the Treaty of Prüm has shown that the chances of successfully incorporating a legal or political acquis into the EU framework are higher if the participating states keep the "outs" (EU institutions and other member states) constantly informed and if key EU members – in the case of Prüm, Germany – very actively promote the quick integration of norms originally defined outside the Union into the EU framework.

Fifthly, the allocation of opt-outs should not be demonised. On the contrary, they are often the only way to overcome the opposition of certain EU members towards further deepening. Opt-outs are even capable of triggering integrationist dynamics throughout the Union as the widespread use of the opt-in by the UK and Ireland in the area of Justice and Home Affairs or the potential removal of the Danish opt-outs have already shown. At the same time, the allocation of opt-outs preserves the Union's single institutional framework and does not lead to the creation of new bodies outside the EU framework. In addition, the legal acquis adopted within the EU after the allocation of opt-outs also applies to future member states – which is a major difference when compared to the instrument of enhanced cooperation – since acts and decisions adopted in the framework of the latter do not form part of the Union's overall acquis and are only binding for the participating states. Finally, the institutional and political

affiliation of opt-out countries limits the danger of a divide between opt-out countries and other member states.

Sixthly, alternative forms of belonging are not a long-term alternative to full and unlimited membership. Any form of bilateral or multilateral association will inevitably reach the limits of its attractiveness if the affiliated country strongly aspires to join the club and objectively fulfils the criteria. In this situation, the EU can either deny the neighbouring countries' wish to go beyond the association paradigm – possibly in contravention to the letter of its own founding treaty –, open up the classical path towards EU accession, or look for alternatives below a full EU membership. If the Union decides to engage in the latter, two things will have to be taken into account. On the one hand, any new form of belonging must not preclude the possibility of full and unlimited EU membership at a later stage. European neighbouring countries aspiring to join the EU will only accept an alternative form of belonging, if they are convinced that they have a chance to gain full and unlimited access to the EU at some later stage – provided that they are able to fulfil the necessary obligations.

On the other hand, partner countries will only be ready to accept an alternative to EU entry if the Union offers them a substantial dimension of EU membership including an active involvement in the Union's decision-shaping process in one or the other policy area. In other words, the EU and its members will have to go beyond the mantra "everything but institutions" defined in 2002 by the then Commission President Romano Prodi. If, in the end, the EU and its members are not willing to bear the political, institutional and financial costs, then it should once and for all discard the applicability of new forms of belonging and acknowledge that the continuation of the enlargement process, even if in a substantially delayed timeframe, is the only viable option for the Union to continue exerting a positive influence on the countries in its neighbourhood.

Lastly, the voluntary withdrawal of countries which are less integration friendly can enable a further deepening of integration, but it can also weaken the EU. If the EU and the withdrawing state(s) fail to constructively redefine their relationship, one might witness a deep and enduring political rift between both sides, possibly even leading to a new found antagonism between European neighbours. The departure of one or more countries from the Union could destabilize the EU if the number of countries exiting the Union is large and if the withdrawing states have

played a significant role in a certain policy field (e.g. UK in the field of security and defence). However, in order to benefit from the advantages of the internal market as well as from a functioning inter-institutional structure, the withdrawing state(s) could decide to join the European Economic Area. Alternatively, a withdrawing state could become a "partial" member of the Union in order to continue to participate in one or more EU policy areas, in case both sides considers this to be in their interest.

The need for a positive narrative of differentiated integration

An increase of very diverse forms of flexible integration inside and outside the Union's framework will confront the EU with a severe challenge. The political and institutional complexity of a Europe of different speeds will compel the Union and its members to construct a positive narrative of differentiated integration, which explains to citizens the objectives and reasoning behind flexible integration in a comprehensible fashion. It would not be wise to base such a narrative on a particular vision of Europe's political finality, as this might raise suspicion in some EU countries and therefore limit the potential of differentiated integration. Rather, the narrative of differentiated integration should rely on the definition of a more comprehensive new grand European project, the implementation of which requires the functional application of more flexible forms of cooperation.[10]

Chapter 9

Enhancing the EU's effectiveness in response to international criminality and terrorism: current deficits and elements of a realist post-2009 agenda

Jörg Monar and Hans G. Nilsson*

Providing security to its members is one of the most important tasks of any political system. It may even be regarded as the primary task in the sense that security is certainly not everything but that without it none of the other public goods – or indeed any private good – can be effectively guaranteed.

International criminality and terrorism are essentially cross-border challenges. One only has to look at the global reach of the Al-Qaeda terrorist ideology, particularly with its cells in many EU countries,[1] and at the most recent "Organised Crime Threat Assessment" of Europol[2] to recognise that both of these threats to the security of European citizens not only extend well beyond national borders, but that they even draw a substantial part of their strength from their cross-border nature. The latter allows both terrorists and other categories of criminals to extend their actions, activities, funds, arms and explosives as well as – in the case of organised crime – merchandise into other national territories which may appear more promising in terms of meeting their objectives and/or less effective law enforcement responses.

** The opinions expressed by Hans G. Nilsson in this contribution are personal and do not bind the institution for which he works, nor the Member States of the EU.*

The EU as a security provider: between added value and powerful tension

It is in this realm that the European Union can provide added value in its response to the aforementioned threats. As a political system whose very nature is geared towards providing forms of organisation, norms and action protocols which can reach across the national boundaries of its member states, it would seem to be the obvious framework for an effective cross-border law enforcement and judicial response to the cross-border challenges of international crime and terrorism – both inside of the EU and – through common international action – outside of it. The EU's "area of freedom, security and justice" (AFSJ), which already has an explicit mandate to provide citizens with a "high level of security" seems, at least conceptually, to imply that such a common response to common threats is in place.[3]

Yet providing security and justice to citizens and retaining sovereign control over national territory (reflected in the principle of territoriality) are not only central prerogatives of the modern nation-state but also essential elements of its reason for being and legitimacy. If this makes the members states' governments very protective – which is traditionally the case anyway – of national competences and instruments in the domain of justice and home affairs (JHA), this protectiveness is exacerbated by the fact that "law and order" issues are among the most sensitive political issues in domestic politics, and can play a substantial role in the winning or losing of elections.

In addition, there are some factors which render common European action even more difficult. For one, ministry officials tend to entrench themselves in national practices and legislation which are firmly rooted in longstanding national traditions. Also, most police officers and prosecutors are not used to working in a European context. Likewise, judges and the legal establishments, who typically regard independence as their most important constitutional prerogative, are rather distrustful of the police and judicial systems of the other member states. This can lead to situations were clearly identified common EU threats and objectives become stranded on the sands because of strong national perceptions, approaches, priorities and prejudices.

The powerful tension which exists between common threats and the need for action in the internal security field on the one hand, and the highly resilient role of national systems is unlikely to disappear in the post-2009 context. This needs to be accounted for in any realist political agenda. The

Lisbon Treaty itself – ratified or not – is an example of this persisting tension: on the one hand it expands common objectives and possibilities for action in this domain[4], but on the other hand contains new extended clauses to protect national competences and systems.[5]

The current AFSJ: an essentially cooperation-based response

As a consequence of the factors just mentioned, most EU governments are reluctant to relinquish control over national governance instruments in the JHA domain, preferring instead to retain the maximum degree of national autonomy and control as well as to limit any change to their national law enforcement and judicial systems. In fact, the current Treaties do not provide for any explicit transfer of powers to the EU institutions, or any harmonisation objectives on the scale which we have seen in the case of classic common policy areas such as the common agricultural policy, the internal market or the common commercial policy.[6] In addition, national interests in the sensitive fields of policing, and judicial cooperation regarding criminal matters continue to be protected against far-reaching interference by the unanimity requirement in the Council. "Integration" – in the sense of a process merging several separately existing systems into one single new one[7] – has therefore clearly not been the prevailing political rationale in the EU internal security domain. Instead, the member states have primarily focused on reinforcing cooperation between their national systems. In other words, the primary instruments used so far reflect a preference for a "cooperative" rather than "integrative" approach.

In the fields of policing and judicial cooperation, these instruments include enhanced information exchange; common threat assessments; the coordination of national police operations with a cross-border dimension; best practice identification and transfer; and specialised common training modules. In order to offer support to these procedures, there have also been several structures, bodies, agencies, networks, and groups or entities (within or outside the Treaty framework) set-up to aid functioning and development – such groups have been both permanent and non-permanent, coordinated and non-coordinated, and EU-funded or non-EU-funded. These range from network creations like Europol and Eurojust – which are the most substantial institutional entities over the European Police Academy (Cepol) and the European Judicial Network – to comparatively weak structures reminiscent of the pre-Maastricht "TREVI" framework, like the European Police Chief's Task Force (PCTF) and Eurojustice (still outside the framework of the Union). In the field of

judicial cooperation, the primary instruments, after nearly a decade of traditional intergovernmentalism, have been the application of the principle of mutual recognition; the facilitation of information exchange and of the cross-border servicing of documents; best practice identification and transfer; and Eurojust as an innovative institutional formula to enhance the effectiveness of national prosecutors in cross-border cases.

Without doubt, all of these instruments have provided real added value in the fight against organised crime and terrorism, thus creating synergy effects between the national systems which go far beyond what was available a decade ago. This is exemplified by the successful introduction of the European Arrest Warrant and the recent agreement on the application of the principle of availability, which gives police authorities' quasi-automatic access to certain categories of law enforcement data available in other member states; or by the so-called "Swedish Framework Decision" on law enforcement data exchange. The levels of progress in cooperation within the AFSJ have equally contributed to the emergence of the Union as an international actor in the fight against crime and terrorism, reflected in agreements with several third countries and structured law enforcement cooperation with many more.[8]

The essentially "cooperative" rather than "integrative" nature of all these instruments has allowed member states to limit the adaptation costs to their national systems. None of the instruments mentioned above have led to the subordination of national authorities to a European "command-and-control" chain, any more significant restructuring of national authorities or a massive harmonisation of existing legislation. While it is true that a range of harmonisation (rather "approximation") instruments have been adopted in the criminal law domain – the 2002 Framework Decision on combating terrorism[9] is a major example (as for the first time ever it harmonises the "terrorist intent") – such steps of harmonisation have largely been of a minimalist nature, leaving wide margins for national implementation and accommodating, to a very large extent, special national approaches and interests. Yet this (from the national perspective) "low-cost" approach also accounts for at least some of the current weaknesses of the EU in its response to crime and terrorism, which will need to be addressed in the post-2009 perspective, in particular if (or when) the Lisbon Treaty enters into force.

Identifying the effectiveness deficits

With the Justice and Home Affairs Council having adopted 144 texts, in 2008 alone, relating to the AFSJ, the regular inclusion of internal security

aspects in the Presidency Conclusions of the European Council and the adoption – in addition to the Hague Programme which covers the whole AFSJ – of several Action Plans (the one against terrorism alone providing for over 200 measures) the EU responses to organised crime and terrorism appear at first sight impressive enough. Yet behind the façade of the rapidly growing construction of the AFSJ, there are quite a few structural weaknesses. In the field of *police cooperation,* three of them are worth pointing out.

First, in the absence of any common operational force – and with Europol not having any operational powers – operational action against cross-border crime not only has to be carried out by cooperating national units which are structured and trained differently, but also has to act within different legal frameworks while following different priorities. This entails simultaneously balancing the need for complex coordination mechanisms, which take precious time to be set-up, with the inevitable friction and loss of effectiveness which occur as a result of the time-lag.

Second, as there is no central command authority – as the PCTF provides only non-binding guidance on strategic objectives and principles – participation in cross-border operations ultimately remains voluntary. Equally the actual way in which police forces are deployed remains a matter to be decided upon by national authorities. As a result, the policing resources required to achieve a common objective may not be deployed in time, or may not deployed at all by some member states, or – if deployed – may not be done in a way that achieves the best possible synergy effects.

Third, with no comprehensive legal framework for operational cross-border policing having been established, the deployment of police officers from one member state in the territory of another member state so far continues to be subject to what the European Confederation of Police has rightly called "an untraceable number of bilateral and multilateral, intergovernmental agreements with changing parties."[10] This not only provides major obstacles to the setting-up of cross-border operations and "Joint Investigation Teams", but can also often reduce the effectiveness of cross-border law enforcement, contributing to what the Commission has called "distortions in security."[11]

In the sphere of judicial cooperation in criminal matters there are also a number of effectiveness problems, four of which are of primary importance. First, taking the lowest common denominator approach to the

harmonisation of criminal law (which is partly due to the unanimity requirement under Title VI TEU) means that national systems are left with wide margins of discretion as regards the definition of constituent elements of criminal acts and penalty levels. Naturally, it is very seldom that this approach forces them to make any substantial changes to existing legislation. Moreover, the very concept of a "Framework Decision" implies that member states are only obliged to approximate up to a certain level of minimum standards. This tends to cement some of the differences between the national criminal justice systems, rather than to reduce them.

Second, there is a considerable difference between theory and practice as regards the use of mutual recognition as a policy instrument in the criminal justice field. When dealing with the principle of mutual recognition as such, many of the official EU texts seem to imply that it means a quasi-automatic recognition of a judicial decision that has been adopted by a judicial authority in one member state, by all member states in the Union – a process which does not have any substantive grounds for refusal and any judicial or other forms of review on the side of the executing state, other than purely formal requirements. If one looks at the mutual recognition instruments which currently exist and takes into account the "thinning-out" of principles through exceptions and additional requirements that occurred in the negotiations on the European Evidence Warrant, adopted on 18 December 2008, one can see that this ideal is far from a reality. All of these instruments provide for a range of exceptions, spell out grounds for refusal and give some scope for review by the authorities who request it. In the case of the "European Arrest Warrant", national implementing legislation even provides, in some cases, for additional grounds of refusal, which further reduce the "automaticity" of surrender procedures.[12]

Third, mutual recognition as the "cornerstone" of judicial cooperation in criminal matters is further undermined by the lack of trust among practitioners and negotiators alike. In practice, judges and prosecutors quite often do not seem to trust their colleagues in certain member states or the judicial authorities in other member states which causes friction, a tendency to refuse recognition on minor formalities and corresponding delays. Things are not made easier by the fact that criminal procedural law has not been subject to any harmonisation as trust often depends on procedures in other countries being well understood and considered to provide sufficient guarantees and certainty. Although mutual recognition has been frequently presented as a "cooperative" alternative to "integrative"

harmonisation, the trust problem clearly shows that it is at least partially impaired by an insufficient balance with the latter.[13]

Fourthly, there is also a clear cost side to take into account when comparing effectiveness to the relatively low level of constraint which the current predominance of cooperative instruments imposes on the member states in criminal justice cooperation. There is ample evidence that highlights the practice of member states missing implementation deadlines for Framework Decisions in the criminal justice field and/or transposing EU legislation incorrectly or incompletely – and this even occurs in highly visible fields which have been declared urgent such as the fight against terrorism. A low implementation discipline is made easier for the member states because of the absence of any effective treaty infringement procedures under Title VI TEU. Also, the work of Eurojust continues to be hampered by the absence of prosecution powers at the national level for many of its national members; the incomplete implementation of some key legal instruments in certain member states; and by the fact that national authorities do not automatically refer cross-border cases to Eurojust – as such referrals are still regarded as being a sort of "optional service".

The deepening of police and internal security operations: to what extent is it feasible and desirable?

In talking about scenarios for the future of EU policing and internal security cooperation, the American FBI is often referred to as a potential model. Yet the evolution towards such a federal-state type of police organisation with full cross-border law enforcement powers for certain types of crimes would, at the very least, require: a substantial transfer of law enforcement powers to the European level; a subordination of national police forces to European structures; the definition of "European" crimes (as a parallel to US "federal" crimes) with a corresponding EU criminal law code (see below); the existence of a European executive branch with command-and-control powers over such a European policing structure which in turn would need to be held accountable and controlled by a legislature; and a judicial branch fully empowered to do so in accordance with a state-like checks and balance system. Even under the new Lisbon Treaty, the constitutional and institutional framework of the EU will still be far from meeting any of these criteria.

Such a "maximalist" deepening option in the law enforcement domain would also contain a problematic dimension in terms of effectiveness.

Even the most serious forms of cross-border crime in the EU are still based on local, regional or national structures with specificities of organisation and focus which can differ significantly from one member state to the other. National or sub-national police forces are normally much closer to the "ground" in relation to most forms of serious crime than any European structure could be, therefore there would be a considerable risk that the passage to a centralised European policing structure could for, at least a transitional period interfere with well-established national structures and create efficiency reducing friction between sub-national, national and European structures. However, there are at least four ways in which the EU could – from a realist post-2009 perspective – provide added value in the fight against organised crime and terrorism below the "maximalist" option of a centralised European policing system:

(1) Further facilitation of cross-border police operations. National police officers should – subject to notification of the authorities of the respective member state – be allowed to move freely across internal borders on the basis of EU-wide standardised rules and be empowered to proceed with provisional arrests subject to the rules and confirmation of the respective national authorities. Each member state should create a pool of police officers specially trained for cross-border European police operations whose members – similar to the "Rapid Border Intervention Teams" (RABITs) – could, on demand be rapidly deployed in support of joint operations across various member states. The procedures for setting-up Joint Investigation Teams should be simplified and both their legal and their funding basis strengthened so that they can become a rapidly deployable instrument of a real European policing area. In addition, participation by Eurojust and Europol in Joint Investigation Teams should be made mandatory.

(2) Further "Europeanisation" of law enforcement data. So far both the exchange and the analysis of law enforcement data rests largely on the "pull"-principle, i.e. Europol and national authorities have to request the data they need for analysis and investigation of cross-border crime. There should be an evolution towards the "push"-principle, i.e. national authorities should automatically forward to Europol and/or other national authorities any data they think could be relevant for their respective tasks and territorial remits as well as for facilitating cross-border cooperation. Common selective criteria should be introduced for the selection of such "push" information in order to avoid information overload.

(3) The development of a real coordination role for Europol. As the biggest of the AFSJ agencies and as an body with considerable analysis capacity, cross-border expertise and contacts with national police authorities, Europol – which is at the moment mainly used for information analysis and exchange as well as certain other supporting tasks – appears under-utilised as far as its operational coordination potential is concerned. At the very least, Europol should be vested with a similar role in the operational domain as the Frontex (the agency that has been entrusted with the sphere of external border management). That is, it should play an initiative taking, planning and active coordination role. The opportunity should also be open for Europol – subject to the agreement of the participating member states in each case – to be entrusted with the direction of "Joint Investigation Teams".

(4) Enhancing best practice identification and transfer through common training standards. The AFSJ has a rich reservoir of different law enforcement experiences and practices, some of which are more effective in dealing with certain forms of crime than others. In order to make the best possible use of this resource capacity and to identify and evaluate best practices, agencies such as Europol and Cepol – together with a number of the so far rather limited research funding instruments – should be strengthened in a way that enables them to be used for the introduction of common training standards and modules. Such standards and modules should not only take-up national (best) practices but should also have a European dimension. Additionally, this would make an important contribution to mutual trust-building which is crucial to effective cross-border cooperation. In the medium term, a real European Police Academy [14] should be set-up, building on Cepol. The European Judicial Training Network should be brought into the structures of the European Union and a real training school for judges and prosecutors should (and why not include other categories of people who serve justice, such as notaries) be created.

The convergence of judicial systems: realistic or beneficial?

As the administration of criminal justice can be regarded as the form of state action which is most invasive upon the individual, and as it is often rooted in firmly established legal traditions and public understandings of justice, any harmonisation of criminal law will remain a highly sensitive issue well beyond 2009. The "maximalist" option of a fully-fledged European Criminal law code seems therefore hardly a realistic objective – this, in turn, limits the prospects for the build-up of a European

prosecution and criminal court system, as it would require considerable progress on the harmonisation side. However, the further convergence of national judicial systems can clearly make an important contribution to the fight against international crime and terrorism. Again on a functional level, from a realist, non-maximalist perspective there are at least four ways in which this could be achieved in the post-2009 period:

(1) Further selective approximation of criminal procedural law. As the differences in procedural law – especially regarding the rights of defendants – continue to reduce the effectiveness of mutual recognition instruments and cross-border prosecution, it is important that action is taken to identify the differences which cause the most difficulties. Following their identification they should be gradually reduced through the use of a selective legislative approximation programme, using a step-by-step approach. The new Lisbon Treaty competences in the field of procedural law would surely help, but even without those at least a minimal programme of approximation should be drawn up in order to ensure that criminals find no safe-havens and that high judicial rights standards are respected. If a consensus cannot be reached among all member states nothing should prevent the use of "enhanced cooperation" by a group of member states in taking pioneering steps in this direction.

(2) Further selective approximation of substantive criminal law. International crime will remain a rapidly moving target. The current international financial crisis, for instance, has highlighted the need for adapting criminal justice frameworks and cooperation to the risks posed to economies and societies by manipulation of financial systems. The approximation of national legislation, at least as far as the constituent elements of major forms of international crime and minimum penalties are concerned, is a basic condition for the effectiveness of judicial cooperation in criminal matters within the EU. Existing approximation instruments, together with instruments for responding to new developments in international crime should be constantly evaluated by independent experts and form the basis for new proposals. The Lisbon Treaty provides a legal basis for such an evaluation.[15] Here again, "enhanced cooperation" should be the guiding principal if consensus among all member states proves to be elusive.

(3) Strengthening Eurojust. With Eurojust having proved its value both in supporting cross-border prosecution by national authorities and coordinating cross-border prosecution cases, its currently underutilised potential to serve as the pivot of criminal justice cooperation within the

EU should be fully exploited. This would require a strengthening of the status and resources of the national members – a matter which needs to be addressed by the member states – and mandatory information granted to Eurojust by national prosecution authorities about all prosecution cases with a cross-border dimension. The role of the College of Eurojust in initiating action by national prosecution authorities and providing guidance in cases involving conflicts of jurisdiction should be expanded. Although this might require action by the member states to ensure that such guidance will be given full consideration. The EU could even go a step further and give Eurojust binding decision-making powers in this respect. The prospects for the introduction of a European Public Prosecutor, which are still uncertain, even under the Lisbon Treaty, should not detract from the need to strengthen Eurojust.

(4) Reinforcing mutual understanding and trust between the judicial systems. Judges, prosecutors and other legal actors can only cooperate effectively across borders if they have a proper understanding of the respective "other" judicial system(s) and trust in the professional standards of their counterparts. From a post-2009 perspective, it is therefore crucial that training instruments such as the European Judicial Training Network (EJTN) be reinforced and expanded. For example, the EJTN should be transformed into a real school which can provide: additional financial means for specialised training modules on critical issues of cross-border cooperation; a better understanding of other judicial systems; and judicial language training, which might seem banal but in practice is a hugely important issue. Furthermore, the EJTN itself could be institutionally strengthened to take on more functions. This could include best practice identification and the drawing up of recommendations regarding the training of judges, prosecutors and barristers at the national level; all functions that Eurojust should be fully associated with.

The external dimension

Even the briefest look at Europol's annual OCTA report provides ample evidence to support the fact that crime does not stop at the Union's borders, and that once it is inside the "beast is loose", something that is partly attributed to the abolition of the Union's internal borders. Still, the external dimension of EU policies in the sphere of policing and judicial cooperation remains seriously underdeveloped.

Here are a few examples: significant resources, both from the member states and the Union, are invested into building up capacities for law enforcement and judicial capabilities in the western Balkans. But the way

that it is done is largely piecemeal and without any coordination and attention to priorities. Another example is the underutilisation of police cooperation, and mutual legal assistance and extradition agreements with third countries. During the Greek Presidency in 2003, an attempt to draft model agreements on law enforcement cooperation with neighbouring countries failed – which means, in a practical sense, that the Union's security is at least partly dependent on the quality of the border member states' cooperation with neighbouring countries. It is only in relation to the US – under the impact of the 9/11 terrorist attacks – that agreements on extradition and mutual legal assistance – supplementary to existing bilateral agreements of the Member States – have been concluded, although an agreement with Japan is currently being negotiated. In the meantime, several member states have continued to conclude bilateral agreements with China, India, Morocco, Tunisia, Algeria, and others. This both weakens the international posture of the EU in these fields and raises questions about the benefits which smaller member states – with a more limited international negotiation weight of their own – gain from belonging to the Union.

A more effective integration of policing and judicial objectives into the external agenda of the EU should therefore be regarded as an essential parallel "external" component of any further "internal" deepening of policing and judicial cooperation in the post-2009 perspective. This integration must also allow for the better coordination of internal and external instruments. It should be used to achieve both EU and national objectives as well as to satisfy internal security objectives in the context of the wider EU CFSP and ESDP agenda.

The need for an overall strategy

Whether or not the Treaty of Lisbon eventually enters into force, the recent adoption of a successor programme to the multi-annual Hague Programme for the development of the AFSJ – or the "Stockholm Programme" – provides a strategic opportunity for the Union to address its current deficits, both on the internal and the external side, in the period from 2010-2014. Furthermore, on 10 June 2009, the European Commission finally presented its proposals for the new programme.[16] Identifying the key challenges and making provisions for a range of measures to enhance information exchange and analysis in the fight against cross-border crime, they also include measures to make better use of the potential of Europol, increase trust, facilitate best practice identification and transfer, and to expand existing training facilities.
However, the Commission's proposals are modest when it comes to

sensitive issues like the facilitation of cross-border police operations. They do not establish an effective link between the strengthening of evaluation mechanisms and the evolving selective harmonisation agenda in the criminal justice field. Moreover, they come across as vague regarding the strengthening of Eurojust and say very little about cooperation with third-countries on cross-border crime issues.

Indeed, a five-year programme of action cannot serve as a full alternative to system-changing treaty reforms. Yet with substantial treaty reforms, beyond those of the Lisbon Treaty, appearing rather unlikely in the medium term, the Stockholm Programme could and should be bold enough in its targets to secure the continuous strengthening of the effectiveness of cross-border policing and the growing convergence of judicial systems. Boldness in programming change does not necessarily mean adding lots of substantially new objectives and measures. Over the last decade the Union has been much better at adding new objectives and measures in the fields of policing and judicial cooperation than it has been in ensuring their effective implementation. As quite a few of the existing structures, such as Eurojust and Europol, and action possibilities, such as the international treaty-making powers, are clearly under-utilised, much could be gained by the more decisive and ambitious development of existing measures.

What is also somewhat missing in the current debate about future priorities in the fight against international crime and terrorism is a focus on overall strategy. The EU has so far been pursuing a largely piecemeal approach with regard to the fundamental public good of internal security, focusing on some issues but largely neglecting others. It has failed to sufficiently link legislative objectives to operational ones, and to bring structures and financial instruments in line with internal security objectives, whilst making partial and often ineffective use of its external instruments for internal security purposes. Therefore the elaboration of a "European Union internal security strategy" – modelled on (but possibly more precise than) the European Union ("Solana") Security Strategy – could help to bring all the different legislative and operational, internal and external as well as financial elements together in a more effective and balanced common agenda.

Chapter 10

Adjusting the EU's immigration policy: between the demographic and economic challenge

Anna Triandafyllidou

In the year beginning 1 January 2008, the EU27 experienced a net demographic increase of 2.21 million people, reaching a total of 499.67 million on 1 January 2009.[1] Of those 2.21 million new residents, 1.66 million are due to immigration; only half a million can be accounted for through natural population growth.[2] For more than 15 years now, immigration has been more important than natural growth in shaping the demography of EU countries. Regional disparities are of course noticeable with Ireland and Cyprus recording the highest demographic growth rates while seven new member states and one old member state (Bulgaria, Germany, Estonia, Latvia, Lithuania, Hungary, Poland and Romania) continue to experience a decrease in their population. France, the Netherlands and the United Kingdom are the only countries where positive natural change is the main factor driving population growth.

The immigration-demography-labour market nexus

Yet any attempt to assess the importance of immigration in responding to declining birth rates and rising average life expectancy for EU residents must take the situation of labour markets into account. Here the picture is pretty diversified. Some of the countries with high immigration and/or high birth rates (e.g. Ireland, Cyprus, UK) have experienced low unemployment rates (between 5% and 6% on average) until the end of

2008 but have seen their unemployment rising to 7.5% in the UK and over 11% in Ireland in recent months,[3] while some of the countries that are "losing" population such as Romania or Bulgaria register unemployment at about 6%-7%. Germany alongside France and Greece used to have one of the highest unemployment rates in Europe (between 7% and 8%) as did Poland (nearly 10%) and Slovakia (11%).[4]

Overall trends however have been changing in recent months. While unemployment rates for 2007 generally improved since the year 2000, showing a positive trend in European labour markets, the current financial crisis has inverted the tendency in many countries, increasing unemployment dramatically in Latvia (from 7% to 16%), in Spain (from 11% to 19%). In fact, during the past year unemployment has increased between 1% and 2% in most EU countries, including both those that are migrant senders and those that are migrant receivers.

On the whole, however, unemployment tells us little about which sectors of the labour market perform better or worse and whether relatively high structural unemployment coexists with a need for immigrant workers in certain sectors of the economy. This observation is particularly relevant in the current crisis period as we note that, while all countries are affected by the crisis, they are not affected in the same way. Within the EU, countries with export-oriented economies who experienced a period of economic growth and expansion during the last decade have felt more acutely and more abruptly the impact of the crisis. Britain and Spain have seen their dynamic economies shrink rapidly and enter into a phase of turmoil if not mid-term recession. Naturally, their migrant labour force has also been affected.

The "new" member states that entered the EU in 2004, and witnessed their economies improving and expanding, have also found themselves in a rapidly deteriorating and highly risky situation of severe recession, with a rising public debt that has become difficult to serve. As a result of these developments, their earlier expectations for continuing growth and the return of their emigrants from other EU countries have been proven wrong.

So far, the countries which have felt the crisis less acutely are the stagnant economies in southern Europe, such as Italy, which experienced low growth rates during recent years, or economies experiencing high albeit unsustainable growth, like Greece. The unemployment rates of these countries have also been affected only marginally. However, their migrant

labour force has been disproportionately affected because it is occupied largely in sectors that are particularly vulnerable to the ups and downs of the economic cycle, notably construction, agriculture or tourism.

In times of crisis, the question arises whether immigration flows will be reversed with fewer people coming and some deciding to return to their countries of origin. There are indications that intra EU migrants (e.g. Romanians in Spain or Poles in the UK and Ireland) are trying their luck back in their home country – in other words, they attempt a temporary return, since job prospects have worsened in the destination country. However, this kind of circular mobility is only likely to take place within the EU. Third country nationals come from geographically distant countries. Trips back and forth are very expensive and it is likely that if they go back they will not be able to return through a legal migration channel. Moreover, source countries experience the effects of the crisis too and perhaps more acutely so despite the declining job prospects, destination countries remain more attractive for immigrant workers.

Three socio-economic regions in the EU

Despite the temporary effects of the current financial crisis, and in order to grasp the mid- to long-term migration perspective, it is useful to consider the EU as divided in three broad socio-economic regions. The developed economies of western and northern European countries are characterised by positive demographic growth rates, largely due to immigration, high labour force participation rates for both men and women, and higher unemployment rates among first generation and in particular among second generation immigrants than among natives. In these countries, immigrants are predominantly employed in low to semi-skilled jobs such as construction, tourism, catering, small manufacturing, unskilled jobs in factories, caring and cleaning. In some countries (like the UK or Germany) there is a need for skilled migration; however, this is again concentrated in specific sectors such as the health and the IT sector.

A second group of countries in southern Europe are characterised by low birth rates but high immigration in the last 15 years, highly segmented labour markets with specific sectors being occupied predominantly by immigrants (catering, cleaning, caring, agriculture, construction), high structural unemployment rates for women and young people of both genders, and relatively low labour market participation rates especially for women. The example of Greece is indicative: according to Eurostat, Greece's unemployment rate in 2008 was approximately 8%. The female

rate of labour market participation was 47.3% (OECD data for 2006), the female unemployment rate was nearly 12% while the male unemployment rate was only 5%. Unemployment particularly affects youths between 15 and 29 years of age. For example 17.3% of people of both genders in this age group are unemployed (for women alone the unemployment rate is 22%).[5]

A third group of countries is roughly constituted by the former Communist states of central and eastern Europe. In these countries, we see high participation rates for both men and women, a declining population due to a sharp decrease in birth rates after 1989, high emigration rates in some countries (Poland, Latvia, Lithuania, Slovakia, Romania, Bulgaria) but not in others (Czech Republic, Hungary, Slovenia for instance). All of these countries, with the recent exception of Slovenia and the Baltic states, have experienced relatively high unemployment rates. Emigration from these countries to other member states is not driven by a lack of employment, but rather by low salaries which cannot match the rising cost of living in these countries.

It is clear that immigration in conjunction with demographic trends and labour market performance will affect countries differently, including the future of their welfare systems. For southern European countries (the second group mentioned above) immigration is seen to have a positive net effect on labour market performance, GDP and the welfare system as immigrants belong in their vast majority to the economically active population: they are young and employed and do not rely on the welfare state excessively. Moreover, they contribute significantly to improving the ratio between workers and pensioners, making the welfare system viable. However, studies have shown that if all immigrants remain in their countries of settlement after retirement (assuming a time horizon of 35 years of work) they will end up consuming the amount they have contributed for their own pensions. In other words, in a 30-40 year time frame, the fiscal impact of the current immigrant population will be negligible.

The situation is different and indeed less optimistic in central and eastern European countries (the third group outlined above) whose welfare and pension systems are clearly unsustainable if the present demographic trend continues. These countries have started experiencing labour shortages in several sectors, both low and high skill, as both types of workers are attracted by higher wages in old member states. Moreover the overall decline in welfare service provisions in these countries and the

generational effect of demographic decline suggest that population growth will take a while to pick up again.

Last but not least, the situation in the northern and western EU member states that have been experiencing immigration for several decades is more complex. In several countries including for instance the UK, Germany, France, Denmark, Belgium or the Netherlands, ethnic minorities of immigrant origin and/or immigrant residents appear to be more welfare dependent than their native counterparts. Thus, while these countries attract new immigrant workers who are young and economically active and hence contribute positively to the welfare system, their welfare resources continue to experience a certain drain from their settled ethnic minority populations. In these countries, immigration does not provide a short term answer to welfare spending shortages. But it does respond to labour market demand in the "ethnicised" sectors of the labour market such as cleaning, caring, tourism, construction, tourism and small manufacturing, as well as some high skill sectors such as IT and health services.

The above observations suggest that current migrant flows will not provide a long term solution to Europe's demographic growth problem, particularly if the flows decline or stop. Governments need to work on the assumption that immigration will continue to feed into Europe's labour force, welfare and pension systems. Naturally, most governments find this truth hard to admit in public, especially in times of economic crisis.

The impact of such a continuous intake will, however, be different in the three broad regions outlined above. Immigration flows need to be sustained over time in the first and second region, notably in southern, northern and western European countries to respond to important labour market shortages. High levels of immigration will likewise be necessary to sustain economic growth while keeping wages stable, especially in low skill sectors such as construction, agriculture or cleaning and catering. These sectors would come to a standstill if immigrant inflows stopped. In the southern European region, demand for low-skill workers is satisfied by new economic migrants who enter with or without documents in the EU (in the latter case they regularise their status after a few years through one of the recurrent regularisation programmes implemented in southern Europe). In the northern and western European countries these shortages are filled by family-related migration (family reunification or family formation) that continues through the ethnic and kinship networks of established migrant populations.

The situation is different in the central eastern European region since new member states generally experience strong out-migration pressures and comparatively low immigration. These countries are facing an important socio-economic problem that not only affects their welfare systems but also their labour markets and economies in general as their total populations are declining both because of high emigration rates and low birth rates. Poland for instance experiences labour market shortages in both low and high skill sectors. The Polish government has sought the return of Polish emigrants but given the difference in wages between Poland and some of the old member states where Polish emigrants live (UK, Ireland, but also Italy or France), a significant return migration trend is unlikely in the coming years. At the same time Polish authorities have adopted a restrictive immigration policy in line with the EU requirements for accession, remaining thus unable to respond to regional shortages in the labour market or to incoming migration pressures from Ukraine and other eastern European countries. The overall effect of a declining active population will be felt more acutely in these countries in the decade to come when people born after the 1989 transition will be entering the labour market. These are issues that need to be carefully considered despite and beyond the current crisis which, severe as it may be, will not last for ever.

Assessing the advantages and disadvantages of increasing immigration

Although national economies, labour markets and welfare systems in Europe differ in important ways, there are common effects of immigration that can be discerned in many European countries. First of all, continuing economic and family related immigration will help to address the structural imbalance of European labour markets: newcomers are needed to take the low-paid, low-prestige, dead-end jobs that are of vital importance for the good functioning of free market economies. In addition, recent immigrants provide affordable labour in specific sectors of economic activity that, surprisingly, are common across the EU: these include tourism, catering, private care, cleaning, construction and agriculture. These sectors offer employment to new immigrants in southern, northern and western Europe and also appear to be the sectors where labour demand will be high and will need to be met by immigrants in central eastern European countries.

Migration is, of course, a dynamic process. It is realistic to expect that migrants (even those entering without appropriate documents) will gradually sort out their stay and work status, move up the socio-economic

ladder, settle, and move out of the ethnicised sectors of the labour market or climb up the hierarchy in these types of jobs. It is also realistic to expect that there will be a constant inflow of immigrants from non-EU countries and to a certain extent from the "new" member states to the "old" ones. Different migrant groups will become incorporated in different ways and to different extents in line with their own needs and wishes, and in interaction with the policies and institutions of the host society. There is of course a clear risk that important segments of the migrant population remain marginalised from both an economic and a socio-political point of view.

However, given the demographic trends in the EU and the important immigration pressures from non-EU countries, there does not seem to be an alternative to accepting and managing immigration. Naturally, a long-term solution to the challenge of sustaining Europe's demographic balance and welfare system cannot rely on immigration alone. Continuing inward flows of migration need to be complemented by welfare system reform and by a holistic approach to integration that ensures not only the labour market insertion of newcomers but also their social and cultural participation in society. Without such a holistic approach to integration it will be impossible to prevent and/or solve problems of poor educational attainment, high unemployment, high dependence on the welfare system, cultural alienation and overall marginalisation among second generation immigrants.

Is there a common migration policy in the EU?

If migration is to be a steady feature of European societies now and in the near future, the question arises whether it should and could be regulated at the EU rather than at the national level. In 1990, the abolition of border controls between some EU member states in the Schengen area brought this question to the fore. Today, experts continue to debate this question, and do not even agree on whether the policy initiatives taken at EU level so far can be described as a common EU migration policy. Some argue there has been a common EU migration policy since 1999 when the "communautarisation" of migration policies started (though only under the Lisbon Treaty migration issues would ultimately pass to Qualified Majority Voting).

Others suggest there can never effectively be a common EU immigration policy, first, because national governments are reluctant to concede their sovereignty on these matters to EU structures and, second, because implementation practices vary to such a great extent that even common

legislative measures have limited effects on national contexts. Perhaps the question that needs to be asked and at least tentatively answered is what can and should be regulated at the European level, why and how? In the remainder of this paper I will try to answer this question without, however, entering into the legal or policy details of EU directives on migration, their transposition or implementation problems.

In assessing whether there is such a thing as a common EU migration policy we need to distinguish between the different areas of migration policymaking. In certain areas, EU migration policy has developed rapidly in recent years, setting common standards at minimum and obliging member states to develop specific policies in areas where they had none. This is the case of the "Long Term Resident Status Directive" (2003), the "Family Reunification Directive" (2003), and the two "Combating Discrimination" (2000) directives.

All four directives set common standards and reinforce what I would broadly call "integration measures" that ensure the fair treatment of third country nationals in all member states. These directives directly promote social integration in member states for immigrants and their families. Indirectly, they may also create a sense of belonging to the EU among the migration population. This may happen if migrants perceive that national policy measures ensuring fair treatment, protecting their right to family life and providing them with a more long term perspective of residence with enhanced rights emanate from European institutions and not from national authorities.

The scope of such measures at the EU level differs for each country. For countries with no or little experience in integration measures (e.g. southern and central eastern member states) these directives become an important factor shaping new policies and raising standards of protection. For countries with a long tradition in receiving and accommodating immigrant populations (e.g. Britain, France, the Netherlands, Belgium, the Nordic countries), these directives may be seen as having no effect or indeed they may even have a slightly negative effect as they may reduce rather than enhance the level of protection (the lowest common denominator effect). Naturally member states are allowed to guarantee more rights and more beneficial arrangements for migrants if they wish.

Overall, these directives aim at promoting a common notion of integration and protecting the rights of third country nationals over and beyond national traditions of immigration and accommodation of diversity. The

extent to which they do so is for the time being difficult to assess. We need a longer timeframe to understand, first of all, how these policies have been implemented at the national and local level and whether they have had a clear effect on policymaking at the national level and what this effect has been and secondly, whether restrictive or expansive implementation practices significantly alter the content of the policies and/or their scope. For instance, assessing the level of income of an applicant with a view to approving or rejecting her/his family reunification application, or assessing an applicant's level of integration into a country through language or history tests give wide scope for discretion to local and national authorities which may decide to "filter" the applicants through restrictive implementation practices.

In assessing the success of efforts to create a European migration policy one should take a look at the wider picture. There have been broader consultation and evaluation activities such as the "Migrant Integration Policy Index" (MIPEX) that have adopted a name-and-shame approach exposing countries with very poor immigrant integration policies not only to policymakers but also to a wider public. Such initiatives are related to – although they do not emanate from – the European Commission and provide crucial support to larger processes of developing better integration policies.

There is a second set of EU immigration policies that mainly stem from member state interdependence on migration management matters given that all member states belong to a single European market and most member states belong to the Schengen area: these are the policies related to the fight against irregular migration, illegal employment of aliens and trafficking or human smuggling. These policies have developed the fastest as they emanate from an instrumental need for coordination of border and internal controls and at the same time reflect a common political will to tame the flow of irregular migrants and to prevent illegal employment within EU labour markets. Recent legislative initiatives in this area of policymaking include the recently adopted directive providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals[6] and the directive on common standards and procedures for returning third country nationals who remain illegally.[7]

However, these and other policy measures aimed directly at reducing irregular migration, improving border control, transferring know-how and technology along the EU external borders and combating irregular

migration networks have not been particularly successful in terms of policy outcomes. Moreover, as a result of the excessive emphasis on migration control and border management, the broader picture of migration dynamics has been neglected. Several studies have shown that stricter controls tend to divert the flows rather than stop them altogether. Indeed it could be argued that such policies are meant to appease domestic constituencies rather than actually and effectively combating irregular migration and informal employment.

A third set of immigration policies that have been developing at the EU level concern the incorporation of migrants into the labour market. However, it is not clear why national or local/regional labour markets should be regulated at the EU level since they can be better regulated at the national level. Indeed, labour markets reflect a variety of national contexts and member state economies and labour legislation vary greatly. It is hard to argue that there is a common EU migration policy in this area. Until now and despite repeated attempts by the European Commission, European institutions have failed to promote a common pro-active labour migration management policy. Abandoning its more ambitious perspective in 2003, the Commission, in recent years, has prepared several consultation texts and directive proposals that regulate the movement of specific categories of immigrant workers and promote a method of open coordination in this field (albeit unsuccessfully). The EU has not yet been able to legislate on the two main categories of economic migrants: dependent employees and self-employed workers entering the EU for the purposes of work. Thus, the piecemeal directives and proposals adopted in relation to the movement of researchers, students and high skill workers (the famous Blue Card scheme) remain rather limited in scope.

In conclusion, it can safely be argued that there is a common EU immigration policy as regards migrant integration and combating irregular migration but there is no common EU policy in the field of managing economic migration. Member states still do not see sufficient reasons for harmonising their policies towards economic immigration. On the contrary, as each member state competes against the others to attract migrants with the right skills to their borders, they believe they would have too much to lose.

What migration challenges lie ahead and how to face them?

The main migration challenges that lie ahead for the both the EU as a whole and for individual member states relate to the questions discussed

in the first section of this chapter. Notably, they are related to global disparities in the distribution of resources in the world, strong migration pressures from the global south to the global north, an ageing EU population and the continuous, if not increasing, need of European societies for low-skill low-pay workers to occupy the jobs at the lower end of the labour market.

These general challenges need to be seen in their specific geographical context: the EU's neighbourhood has a large population that potentially presents a formidable migration challenge. At the same time, there are already several member states that need immigration urgently as they are already or will soon be facing severe labour market shortages, related both to low birth rates and to the emigration of their citizens towards other EU member states or third countries.

The challenge that lies ahead for Europe is precisely to develop the area of immigration policy that it has not yet managed to tackle. The EU needs to design and promote realistic and effective migration management policies that simplify channels for regular migration, and correspond to migration pressures as well as labour market needs. One possibility here is the establishment of a points-based scheme that works across the EU but is adaptable to local and regional needs and contexts. This scheme would not only attract immigrants in the labour market sectors where they are needed but also facilitate worker mobility throughout the EU. A points-based system in the EU should be regionally organised so that people with specific skills would gain points for regions that need these skills and not for the entire Union. Points should also be granted for low-level skills if these are needed in sectors that are short of labour supply (e.g. cleaning, caring, and agriculture). Migrant workers would obtain European-wide permits for specific sectors. After a number of years stay (say 3 or 5 years) people should receive long-term general permits that would allow them to move freely within the EU overall labour market. The points-based scheme should be accompanied by appropriate monitoring and evaluation mechanisms so that national level implementation is harmonised and also that it is periodically evaluated in terms of its efficiency in responding to the needs of the labour market, cutting red tape, protecting migrant workers' rights according to EU laws and overall promoting the single market.

This points-based scheme is also likely to be more effective in addressing the parallel concern of brain drain and brain waste facing migrant-sending countries. Highly skilled migrants could be given additional points if they

are prepared to come and work in the EU for a period of 2-3 years and then go back to their countries of origin to transfer the knowledge and experience acquired in the EU. Moreover, the fact that points would be awarded also to low-skill people who are willing to work in low-skill sectors would hopefully limit the effect of brain waste that we observe today.

In short, what is needed today is not a fully reformed approach to migration policy in the EU but rather a willingness to recognise that there are global challenges that can be met more effectively by the EU than by individual member states. The policy areas where member states have done most to develop a common approach, notably in the field of migrant integration and in the area of combating irregular migration, show that the risks involved are not particularly high while the gains are potentially higher. Needless to say, it remains a challenge for national politicians to "sell" these policies to their constituencies in a climate of increasing financial insecurity.

Chapter 11

The EU and asylum policies: the need for greater European solidarity and burden sharing

Charles Jenkins

Human rights have been important throughout the development of European integration. Even before the original Treaty of Paris established the first precursor of the current European Union, the European Coal and Steel Community, the Council of Europe gave pride of place to the defence of human rights. Yet, having concentrated predominantly on economic integration through-out its formative years, it was not until the Treaty of Maastricht that the EU took a first tentative step to build a common policy in Justice and Home Affairs.

The Treaty of Amsterdam of 1997 brought the principle of human rights firmly into the EU itself, stating that "the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all member states", and secondly that "the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms". In conjunction with this EU member states have done a considerable amount to protect the human rights of their citizens and EU membership criteria puts pressure on all 27 member states to respect the Convention, although there are clearly some deficiencies, of which recently the most obvious has been the lack of effective rights for Roma minorities. Yet, moving beyond this, it has to be

said that commitment to the protection of human rights is much weaker in respect to non-citizens, notably those seeking asylum.

In order to shed light on the reasons for this weakness, this chapter will first look at the numbers of asylum seekers accepted as refugees, or otherwise entitled to remain, across the EU. It will then examine the efforts which have been made by the Commission and in some respects member governments to build a common policy towards asylum-seekers, and in those countries which face the greatest pressures compare the aims of the policy in theory with the reality in practice. Noting a large discrepancy between theory and practice, it will make suggestions as to what politically feasible measures might possibly bridge the gap.

The EU's role as host to refugees is a small one

In global terms the EU is not expected to cope with more than a small part of the 11.4 million refugees who were under the responsibility of the UN High Commission for Refugees at the end of 2007, an increase of 1.5million compared with the end of 2006. The EU27 received a total of 240,000 asylum applications in 2008, up from 222,000 in 2007 (but only just over half the figure of five years earlier). First instance – meaning before appeal – decisions gave 24,425 full refugee status, 18,560 "subsidiary protection", (who though not qualifying as a refugee would risk "serious harm" if returned to their country of origin) and 8,970 for other humanitarian reasons (for example poor health or minor status). The largest number of asylum applications were to France (41,800) followed by the UK (30,500) and Germany (26,900).

However, in relation to population, much higher numbers were taken by smaller countries: Malta (6,350 per million inhabitants), Cyprus (4,370), Sweden (2,170) Greece (1,775), Austria (1,530) and Belgium (1,495). There are significant changes from year to year. In 2007, the largest numbers of asylum applications were to Sweden with 36,000. Germany received a moderate 19,000 in both 2007 and 2008, but Germany was, during the 1990s and up to 2001, the leading country by a long margin for asylum requests, with numbers in some years exceeding 100,000, most of which came from former Yugoslavia – a substantial proportion of which received favourable decisions. Recently, there has been a rapid increase in the number seeking asylum in Greece, as well as Cyprus and Malta, due to their location as the first place of arrival from the south and east.

In 2008 Iraq was the source of the largest number of asylum seekers (29,000), the other leading countries being Russia (21,000), Somalia

(14,300), Serbia (13,600) and Afghanistan (12,600). Corresponding with these figures it was Sweden, a country whose government was favourable to the view that Iraq was not a safe country due to the continued insurgency as well conflict between Shi'a and Sunni, that received the largest number of requests for asylum from Iraq. There are indeed 1.5 million refugees from Iraq in Syria and Jordan. It is no doubt partly due to this large number that EU governments other than Sweden (and Sweden has recently decided to take a less accommodating position) have been reluctant to accept Iraqi asylum-seekers.

The goal of a common policy goes back to 1999

The EU set itself a long-term goal of a common asylum policy at a meeting in Tampere, Finland, in 1999. A key aim was to harmonise the qualifications for refugee or subsidiary protection status. A potentially important "Qualification Directive" was subsequently enacted in 2004, but otherwise progress has been slow. The Commission has therefore rightly argued that, with relatively low pressure from asylum-seekers at the moment, the opportunity to increase minimum standards certainly exists.

Following on from this, in October 2008 a "Pact on Immigration and Asylum" was agreed by the European Council. Asylum is only a part of the pact and is not the only aspect of immigration policy which tests the EU's commitment to human rights. Illegal immigrants who have asylum claims that are unlikely to succeed do not, by definition, have a right to stay. However, from a humanitarian point of view the hazardous conditions of their journeys, whether through their own choice or the exploitation of traffickers, are cause for major concern. And there are also significant numbers who are forced by criminal gangs into prostitution within the EU while others end up working in poor and sometimes dangerous conditions, while without basic rights because they are illegal migrants and cannot claim any rights.

With regard to asylum, the Pact aims to meet the requirement of the Geneva Convention of July 28 1951 which provides a right of protection to any persecuted foreigner. The establishment of a common EU asylum procedure – the target is to do this by 2012 – would supposedly offer a higher degree of protection by raising the levels where they are low. This is in principle a commendable aim. The aim in the pact is clearly stated as being to "offer a higher degree of protection". However, a policy of harmonisation could end up harmonising downwards (that is reducing asylum-seekers chances of being given protection) instead of harmonising upwards. For this important reason too rigid an attempt at harmonisation should be avoided.

Definitional issues

The reality is that deciding who has the right to protection is extremely difficult both in terms of establishing the facts and in many cases making a judgement. It used to be generally assumed that persecution was suffered at the hands of governments. But this is often not the case. In a country subject to violent conflict such as Iraq, Afghanistan, Somalia or Sudan, individuals or groups may be targeted by militias or individuals from hostile groups. One such example is that of Iraqis who have worked as interpreters for occupying forces and who are therefore targeted for co-operating with what insurgents see as the enemy. It is surprising and regrettable that the British authorities have not permitted most of these individuals to be given protected status in the UK.

However, given that the situation in Iraq means that the whole population lives in danger, it is not feasible that danger in itself be taken as sufficient ground. Who is and who is not accepted will be difficult and will probably remain largely the prerogative of member states. The tendency to categorise those who are rejected as economic migrants masquerading as asylum seekers is therefore not helpful. Most asylum seekers come from a range of highly unstable countries and their primary motivation is likely to be to find a peaceful place to live. There are also limited numbers of asylum seekers from countries like Russia and China which are broadly stable but where human rights are not always guaranteed. In these cases the authorities have to decide whether the person concerned is a genuine asylum seeker, rather than an economic migrant. But the numbers from such countries are not at present very large.

The Pact's objectives for asylum

Part IV, the part of the Pact dealing with asylum, sets out four central objectives. The first and most concrete objective is to establish a European support office. It is made clear that the office will not have the power to examine applications for asylum or to take decisions. Instead, it is intended to influence national practice and make use of shared knowledge of countries of origin and practice in member states. The office may be able to play a useful role in supporting member states but how substantive that support proves to be remains to be seen. Progress has not been rapid: at the time of writing, July 2009, nine months since it was due to start, the office had not yet been set up. It is initially planned to be in Brussels but eventually in another member state as part of effort to increase member state "ownership" of the policy.

The second objective is to establish "a single asylum procedure" comprising "common guarantees" and a uniform status for refugees and beneficiaries of subsidiary protection by 2012. This seems like a rather long time scale (previously the date had been 2010). The third objective is that, in the case of a crisis in a member state faced with a massive influx of asylum seekers, there should be procedures in place to help. Such procedures do not provide for any element of burden-sharing even if the country in crisis is a small one in relation to the number of asylum seekers, but they do imply the secondment of officials, and the provision of funds.

The fourth and final key objective concerns refugees and displaced people outside the EU. This is certainly an important, perhaps the most important, objective given that numbers of refugees outside the EU vastly outnumber those who reach member states. The aim is to improve cooperation with the United Nations High Commissioner for Refugees with a view to two subsidiary objectives: on the one hand, that of resettling some of those with particular needs, such as medical, in EU member states, although it is unlikely that the proportion taken into the EU will be high. On the other hand, the European Commission is asked to make proposals, in cooperation with the UNHCR, to help third countries "strengthen the capacities of their protection systems". The latter commitment is unlikely to amount to very much unless supported by significant budgetary resources.

The Pact, together with the programme of enacted and planned legislation, represents the theory of EU asylum policy. In some countries, with or without an EU contribution, asylum policy has within limited objectives worked reasonably well. If an EU policy which aims for common standards is to be meaningful it must address situations and countries where things are not working so well. At present the countries where the situation is least favourable are all in southern Europe. This chapter will discuss Greece, Italy and Malta.

The case of Malta

Malta has had a rapidly rising number of migrant arrivals and in 2008 had more asylum-seekers in relation to its own population than any other EU country. It has become one of the most important issues for Malta in relation to its EU membership. The government was strongly criticised by the opposition for signing the Immigration and Asylum Pact, given its lack of binding commitments to help countries like Malta.

In April 2009, there was a major stand-off with Italy when about 150 would-be migrants were rescued by a Turkish cargo boat in waters under Maltese jurisdiction but where the nearest port was on the Italian island of Lampedusa, already crowded with migrants. Italy said they should go to Malta and Malta said they should go to Lampedusa. Eventually they landed in Sicily. However, Malta was the most generous country in the EU in 2008 in terms of the proportion of asylum-seekers to whom it gave some degree of officially-recognised protection, at 60%. (Other countries accepting over 50% included Italy while Greece accepted only 1%.) The conditions of asylum-seekers waiting for a decision are probably less bad in Malta than Italy or Greece, but the important point here is that Malta is the country which most obviously has an excessive burden placed on it in relation to its size. France has agreed to take about 80 asylum-seekers, which is little more than a gesture but better than nothing.

The case of Italy

In May 2009 a major domestic controversy arose in Italy as a result of the decision by the interior minister, Roberto Maroni (of the Lega Nord – a party which takes a hard line on immigration) to send back a ship of would-be migrants to Libya without first determining whether it included asylum seekers. This provoked criticism both from domestic politicians and commentators and the UNHCR, leading in the latter case to a sharp verbal exchange between the defence minister, Ignazio La Russa[1] and the Mediterranean spokesperson of the UNHCR, Laura Boldrini. Mr Maroni tried to defuse the dispute and stated that he saw a role for the UNHCR in Libya to help ascertain which migrants have a claim to asylum. However, Libya is not a signature to the UN Convention on Refugees. It was subsequently argued that the question of whether the boat should have been sent back should not just be a question for Italy but for the EU, since the EU wants Italy to secure its borders against illegal migrants while also claiming to be committed to the rights of asylum-seekers.[2] But apart from a few voices the affair went largely unannounced in other EU member states or in the European Commission and Parliament.

The case of Greece

The country where the pressure is currently highest is Greece. This relates to its position as the nearest EU country to many countries of origin (from Sudan to Pakistan). It has not however always been the case that Greece has been under more pressure than other countries. In the 1990s, Greece did receive a substantial first wave of immigration but this was either from neighbouring countries, particularly Albania, or of ethnic Greeks from former Soviet countries. Even from Albania a high proportion was of

Greek Orthodox Albanians. The cultural challenges of absorption of fellow Europeans were considerably less than that of the mainly Muslim migrants more recently arriving in Greece. Moreover the first wave comprised few asylum-seekers.

Greece does not have the administrative or social service infrastructure to cope with the applications or to provide adequate accommodation and amenities. Unsurprisingly, the broader issue of migration has recently become much more pressing and controversial. The two issues of asylum seekers, on the one hand, and illegal economic migrants, on the other hand become intertwined particularly in the EU's Mediterranean countries because of the numbers of migrants of both kinds which try to cross the sea from North Africa. If the authorities are to give a chance to asylum-seekers they must find those which have genuine claims before turning back the others. As a result of a failure to manage this, large numbers of would-be immigrants are leading a makeshift existence in Greece, particularly Athens and near the port of Patras, from where many are hoping to move on to Italy. In May 2009 a former court building near Omonia Square was being occupied by several hundred such people, attracting strident responses from xenophobic groups.[3]

Greece appears to have a policy of accepting very few asylum-seekers as genuine but that has not prevented a very large wave of migration. In fact, the Greek police estimate that there are half a million illegal immigrants living in Greece, nearly half of the total immigrant population and 5% of the total population. Those who are rejected for asylum are asked to leave but Greece does not have the means or the necessary arrangements with countries of origin to deport them. As noted above, the issues of asylum and illegal migration have become linked. The EU's "Pact on Immigration and Asylum" commits its signatories including Greece to not granting blanket amnesties to illegal migrants as Italy and Spain have done in the past. But this presents Greece with a real dilemma. If its citizens work to absorb the migrants for example providing education for their children they will create a situation where the eventual deportation of families who have settled would be brutally inhumane whereas if nothing is done to absorb them, the chances of increased social tensions are raised. There is a chance that Greece might decide, going against its commitment, that the legalisation of illegal migrants is the easiest option. Since they would then have the right to circulate freely – at least in the Schengen area – it would seem that it is in the self interest of Greece's partners to take an interest in what is happening and to be willing to provide some help.

This point was made strongly by the justice and home affairs commissioner, Jacques Barrot, in a speech after returning from a trip to the border areas of Greece in June 2009. He stated bluntly that Greece "risque d'etre submergée par les flux migratoires". He was shocked by the conditions in detention camps although improvements were made after he had pointed out deficiencies. He concluded by a "cri d'alarme aux Européens et a la communauté mondiale". Without action he said that the human dramas being played out in Greece (but also on the southern Italian island of Lampedusa, in Malta and the Canaries) would be repeated throughout Europe. Unfortunately his cry has fallen deaf ears.

What is to be done?

An ideal policy would aim not only for a common procedure and criteria but would share those granted protection among the 27 member states in proportion to population, perhaps with some modest adjustments to reflect absorption capacity related to the existing community tensions, unemployment and social stability. This would make the application of common criteria and procedures essential and member states would either have to have confidence in the decisions made by the authorities of the other member states or the EU itself would have to become involved in the process. In fact, the former should not be as far-fetched as might at first appear given that, as noted, the proportions granted the right to stay is similar in most member states, except Greece, where it appears too low rather than too high.

Unfortunately, the political will among member states with less migration pressure to share with the countries where the pressure is higher, does not exist. Germany, for example, points out that it took very large numbers of refugees from former Yugoslavia during the wars there in the early and late 1990s (mainly from Croatia and Bosnia in the early 1990s) and then received little help from its partners. This is true. But that was some time ago now, and most of the then refugees have either returned or adapted to living in Germany. The fact that Germany was not helped then cannot be an argument for it not doing so now. Such an argument based on sticking to precedent would have surely prevented any of the achievements that the EU has managed to date.

If the asylum part of the immigration and asylum pact is to be meaningful there must be a greater degree of burden sharing within the EU. Therefore there is a need for the substantial revision of the Dublin system,[4] a system which states that asylum-seekers must be the responsibility of the country where they first arrive and if they manage to reach another EU country

must be returned to the country of arrival. This means that the pressure put on a country varies according to its geographical position. With many asylum seekers coming from the wider Middle East this means that the countries on the south-east of Europe, particularly Greece, have the greatest burdens. This would be inappropriate even if Greece was well equipped to cope. Given that it is not well-equipped the situation is very unsatisfactory and one which should be the concern of the EU as a whole, not just Greece. A new draft regulation would, if adopted halt sending asylum-seekers back to countries which clearly cannot cope but would not do anything to help those who do not manage to make their way onwards, or the Greek authorities.

Even if a fair share-out is for the present not political feasible, there must be some increase in solidarity between member states on the issue, without which claims either to a common asylum policy, or to a serious EU commitment to meeting the requirements of the Geneva Convention, ring hollow. As already mentioned, France has agreed to take in 80 asylum seekers from Malta. This is welcome as it breaks down the rigidity of the Dublin system, but it is a very long way from being sufficient even in the case of Malta.

The EU and its member states also need to make available adequate financial resources. There are still unused sums available from the "European Refugee Fund", the "European Return Fund" and the "European Borders Fund". But these are unlikely to be sufficient. Either the EU needs to find a way of mobilising more of its own funds from under spent parts of the budget, or member states need to show solidarity; for example by sending their own expert personnel at their own cost. Meanwhile, the Greek authorities themselves need to be persuaded to improve their controls and administration procedures and give asylum seekers a better chance, but it is clear that they neither have the trained personnel nor the financial resources on their own (Greece's debt and deficit mean that its public finances are arguably in the worst condition of any country in the euro area).

The need for greater EU solidarity

The issue of how to tackle asylum seekers, particularly those from countries in dangerous turmoil, is far from being a simple one. Efforts to "construct a Europe of Asylum" and to "offer a higher degree of protection" as called for in the "Pact on Immigration and Asylum" are commitments, in the short-term which involve costs, both financial and in terms of social adaptation, but which in the longer term will lead to refugees contributing

to society as they have done in the past. There is a role for further amendments to EU legislation, which the Commission, at the request of the European Council, is preparing. But there is also a greater need, than is so far appreciated, for solidarity. This requires a degree of burden sharing by other member states with countries which at any given time come under most pressure; at the present, apart from two very small countries, Cyprus and Malta, the main country under such pressure is Greece. Therefore the EU's "common asylum policy" is as good as that of its least compliant member state, in other words, it is as good as Greece's policy.

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Chapter 6

1 With regard to this see Larry Siedentop, "A Crisis of Legitimacy", in Prospect, n°112, 2005; Thierry Chopin, "La crise de légitimité de l'Union européenne", in Raison publique, n°7, Presses universitaires de la Sorbonne, 2007.

2 The issue of the Union's politicization is the focus of a mainly academic debate today, the exemplary presentation of which can be found in "La politisation de l'UE : remède ou poison?", published by Notre Europe (2006), together with the recent discussion on Andrew Moravcsik's article, "What can we learn from the Collapse of the European Constitutional Project?", Politische Vierteljahresschrift 47:2, 2006; see also the work by Simon Hix, including What's wrong with the European Union and How to Fix it? (Cambridge Polity Press, 2008) and that of Loukas Tsoukalis, including "Pour une Europe plus politique", in Raison publique, n°7, op.cit.

3 Cf. for example this extract from the Schuman Declaration of 9th May 1950: "By pooling basic production and by instituting a new High Authority, whose decisions will bind France, Germany and other member countries, this proposal will lead to the realization of the first concrete foundation of a European federation indispensable to the preservation of peace."

4 The effect of the 2004-2007 enlargement cannot be reduced down to a simple quantitative issue: the analysis of institutional practice between 2004-07 shows the fragility of the simplistic logic that consists in saying that what worked well with 6 members and quite well with 12 or 15 can no longer work with 25 or 27. It appears that EU25 and since January 1st EU27 does not necessarily function less well that EU15. A particularly revealing example is provided by the comparison of the Intergovernmental Conference results (IGC) 2000 (with 15 members) and that of 2004 (with 25 members). Recent studies show that the community machine continued to work normally after the "big enlargement" in 2004 and that the transfer over from 15 to 25 members (today 27) did not lead to an unmanageable cacophony of irreconcilable interests, notably thanks to the more frequent use of the vote during the Council of Ministers. See with regard to this Renaud Dehousse, Florence Deloche-Gaudez, Olivier Duhamel (dir.), Elargissement. Comment l'Europe s'adapte (Les Presses de Sciences Po, 2006).

5 Cf. On the conceptual couple "input" and output legitimacy, cf. Fritz Scharpf, Governing in Europe : Effective and Democratic ?, New York, Oxford U.P., 1999 and also Robert E. Goodin, Reflective Democracy, New York, Oxford U.P., 1999.

6 Andrew Moravcsik, In Defence of the Democratic Deficit: Reassessing Legitimacy in the European Union, in Journal of Common Market Studies, 40 (4), 2002.

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8 For example, the democratic legitimacy of the ministers who sit on the Council as well as the members of the European Commission, appointed by governments that result from a democratic process and inducted by MEPs, elected by universal suffrage.

9 Cf. Philipp Pettit, Depoliticizing Democracy, Ratio Juris, vol. 17, n°1, March 2004

10 Moses Finley, Politics in the Ancient World (Cambridge, U.P., 1983).

11 I have borrowed this conceptual couple from Pierre Rosanvallon, La légitimité démocratique. Impartialité, réflexivité, proximité (Le Seuil, 2008).

12 See J.-P. Fitoussi, La règle et le choix. De la souveraineté économique en Europe (Le Seuil, La République des idées, 2002).

13 Ibid.

14 See for example R. Dehousse, "Constitutional Reforms in the European Community : Are there Alternatives to the Majoritarian Avenue?", in West European Politics, 18/3, 1995, p. 118-136 and also Giandomenico Majone, Dilemmas of European Integration (Oxford University Press, 2005)

15 With regard to this see the distinction of Sefano Bartolini between "constitutive" and "isomorphic" issues, in "Should the Union be "politicised'? Prospects and Risks", Notre Europe, 2006 - http://www.notre-europe.eu/uploads/tx_publication/Policypaper19-en.pdf

16 Bartolini, op. cit.

17 Article 190 § 4 (138 § 3) of the consolidated EC Treaty : "The European Parliament shall draw up a proposal for elections by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States. The Council shall, acting unanimously after obtaining the assent of the European Parliament, which shall act by a majority of its component members, lay down the appropriate provisions, which it shall recommend to Member States for adoption in accordance with their respective constitutional requirements".

18 Article 138 A of the TEU: "Political parties at European level are important as a factor for integration within the Union. They contribute to forming a European awareness and to expressing the political will of the citizens of the Union".

19 Regulation (EC) n° 2004/2003 of the European Parliament and of the Council of 4th November 2003 regarding the status and financing of the political parties at the European level.

20 See Y. Bertoncini, Union européenne : le défi de la révérsibilité, in T.Chopin and J. Lacroix (dir.), Raison publique, n°7, Presses de la Sorbonne, 2007.

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Chapter 7

1 European Commission (2008), Standard Eurobarometer, 69 & 70. http://ec.europa.eu/public_opinion/archives/eb_arch_en.htm

2 European Commission (2008), Standard Eurobarometer, 69. http://ec.europa.eu/public_opinion/archives/eb/eb69/eb69_en.htm

3 The Financial Times published a poll on attitudes to the EU in the 5 major EU states in collaboration with Harris, "Poll finds 44% think life worse in EU" , 19 March 2007. http://www.ft.com/cms/s/0/4552740a-d5be-11db-a5c6-000b5df10621.html?nclick_check=1

4 See Timothy. Garton Ash, 'Today's European Union is 27 states in search of a story', The Guardian 4 January 2007.

5 European Commission (2009), Standard Eurobarometer, 71. http://ec.europa.eu/public_opinion/archives/eb/eb71/eb71_en.htm

6 European Commission (2008), Standard Eurobarometer, 68-69-70. http://ec.europa.eu/public_opinion/standard_en.htm

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Chapter 8

1 The present paper does not distinguish between the terms differentiated integration, differentiation, flexible integration, flexibility, differentiated cooperation or flexible cooperation but rather makes use of them as synonyms.

2 In order to avoid misunderstandings the present paper does not rely on previously defined concepts of differentiated integration. It rather conceptually develops a new set of diverse forms and subforms of differentiation. It does so on the grounds of the observation that concepts such as Europe á la carte, variable geometry, core Europe or abgestufte Integration mean different things to different people, which in return tends to create confusion rather than analytical clarity.

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4 For an analysis of permanent structured cooperation see: Sven Biscop, Permanent Structured Cooperation and the Future of ESDP, Egmont Paper 20, Brussels, 2008; Gerrard Quille, The Lisbon Treaty and its implications for CFSP/ESDP, Directorate-General for External Policies of the Union, European Parliament, February 2008; CEPS, EGMONT and EPC, Foreign Policy – Many Opportunities and a Few Unknowns, in The Treaty of Lisbon: Implementing the Institutional Innovations, joint study of CEPS, EGMONT and EPC, November 2007, pp. 121-141.

5 The Nice Treaties have set the minimum number of participants in enhanced cooperation at eight, the Lisbon Treaty at nine member states.

6 See Guy Verhofstadt, The United States of Europe, The Federal Trust, London, 2006; see especially pp. 83-86. When Verhofstadt speaks of the eurozone he also includes those EU members, which aim to introduce the euro in the near future (see p. 84).

7 For a more detailed description of different forms of an Association Plus see Janis A. Emmanouilidis, Alternatives between Full Membership and Non-Membership – Fata Morgana or Silver Bullet?, Athens, June 2008, pp. 3-11.

8 For more concrete proposals based on the idea of a partial membership see: Franz-Lothar Altmann, EU und westlicher Balkan – Von Dayton nach Brüssel: ein allzu langer Weg?, SWP-Studie S 1, January 2005; Charles Grant, Europe's blurred boundaries: Rethinking enlargement and neighbourhood policy, Centre for European Reform (CER), October 2006; in particular pp. 66-72; Cemal Karakas, Für eine Abgestufte Integration – Zur Debatte um den EU-Beitritt der Türkei, HSFK Standpunkte, Nr. 4/2005; Cemal Karakas, A Compromise Solution for Turkey's EU Ambitions, Europe's World, Summer 2007.

9 The Lisbon Treaty takes up an original provision of the Constitutional Treaty, which explicitly states that acts adopted in the framework of enhanced cooperation "shall not be regarded as part of the acquis which has to be accepted by candidate States for accession to the Union" (Art. 20.4 TEU-L).

10 For more about the need for a new European grand project see Janis A. Emmanouilidis, Global Europe 2025, ELIAMEP, Athens, June 2009.

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1 See the threat assessment of Islamist terrorism in Europol: TE-SAT 2008. EU Terrorism Situation and Trend Report 2008 (TE-SAT), The Hague (Europol) 2009, pp. 17-24.

2 Europol: OCTA 2008. EU Organised Crime Threat Assessment, The Hague (Europol) 2009.

3 Articles 61(e) TEC and 29 TEU.

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5 Article 67(1) TFEU makes the construction of the AFSJ subject to the "respect [of] the different legal systems and traditions of the Member States" and Article 4(2) TEU (Lisbon) states generally that the Union shall respect "essential State functions including […] maintaining law and order and safeguarding national security" and that "national security remains the sole responsibility of each Member State."

6 Framework Decisions are however "binding" on the Member States (Article 34 TEU).

7 Along the lines of the definition of economic integration developed in B. Belassa: Towards a Theory of Economic Integration, in: Kyklos, 1961, 1-17, p. 1.

8 For a recent overview see European Commission: Second progress report on the implementation of the "Strategy for the External Dimension of JHA: Global Freedom, Security and Justice", COM(2008)1971 of 27 May 2008. OJ L 164/3 of 22 June 2002.

9 European Confederation of Police, Future Priorities for Police Cooperation in the European Union, Brussels, August 2004.

11 COM(2005) 317 of 18 July 2005, p. 2.

12 See the 2007 European Commission report on the implementation of the European Arrest warrant, COM(2007) 407 of 11 July 2007, pp. 8-9, and Council of the European Union: Outcome of proceedings of Working Party on Cooperation in Criminal Matters (Experts on the European Arrest Warrant) of 17 July 2007, Council document no. 12053/07 of 23 July 2007, pp. 2-3, and COM(2007) 407 of 11 July 2007, pp. 8-9.

13 See on this point also Sandra Lavenex: Mutual recognition and the monopoly of force: limits of the single market analogy, in: Journal of European Public Policy, Vol. 14, no. 5, 2007, pp. 773-774.

14 It may be regarded as an irony that the only "real" European Police Academy that exists is the one which is situated in Budapest which is run by the United States.

15 Article 70 TFEU.

16 COM(2009) 262.

Chapter 10

1 European Commission (2008), Eurostat, Statistics in Focus, 81.

2 European Commission (2008), Eurostat, Data in Focus, 49.

3 Eurostat, Unemployment statistics, http://epp.eurostat.ec.europa.eu/portal/page/portal/eurostat/home/ consulted on 30 July 2009.

4 European Commission (2007-2009), Eurostat, Data in Focus http://epp.eurostat.ec.europa.eu/portal/page/ portal/eurostat/home/

5 National Statistical Service of Greece (www.statistics.gr), data provided upon request by the author, May 2008.

6 European Union, Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, 18 June 2009, 2009/52/EC, available at: http://www.unhcr.org/refworld/docid/4a55ea4e2.html

7 European Union, Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, 16 December 2008, 2008/115/EC, available at: http://www.unhcr.org/refworld/docid/496c641098.html

Chapter 11

1 See "Migranti, Frattini frena La Russa 'L'Onu sbaglia, ma va rispettato'" La Repubblica, May 17th 2009. http://www.repubblica.it/2009/05/sezioni/cronaca/immigrati-7/la-russa-boldrini/la-russa-boldrini. html?ref=search

2 See Bernard, Philippe. & Aloïse, Salvatore., "L'Italie accusee de violer le droit d'asile après le refoulement des migrants vers la Lybie", Le Monde, 16th May 2009 http://www.lemonde.fr/cgi-bin/ACHATS/acheter. cgi?offre=ARCHIVES&type_item=ART_ARCH_30J&objet_id=1082628

3 See "Gov't accused of failing on migrants", Athens Plus, May 15th 2009. http://www.ekathimerini.com/4dcgi/_w_ articles_politics_100009_19/05/2009_107286

4 The Dublin system originated with the 1990 Dublin Convention which, with amendments, was brought into EU law by the 2003 Dublin II Regulation.

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