
Explain and Understand the EU in the context of its crisis

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Introduction

The European Union is nowadays walking through a very deep crisis. That is the reason why it cannot be today understood, or even be explained properly, unless we take account of this situation and its future consequences.

The economic crisis and its effects; democratic deficit of the integration process, the arise of strong euroscepticisim positions across Europe, the very recent “Brexit”; intergubernamentalism preponderance inside the institutional framework, drama of refugees at European, controversy about international agreement on free trade like TTIP or TISA, the “No” of Dutch referendum on Ukraine-EU agreement, the Troika policies... All of them are epitomes of an integration process that is in a critical situation.

Nor Students nor Professors can turn their back to this reality. This must be critically analysed in order to find out solutions to this grave position. It is time to apply a new epistemology, which will focus on real problems and factual contradictions inside of European Union. In our view, that is the only way to advance into a better EU.

So this book pretends to be an instrument to reflect on the problems of integration process and how could they be resolved. It has been configured as teaching material to explain the EU subjects at Law Faculty at UEx. And I hope that could be useful to all Professors and Students that would like to approach to EU Studies through the factual problems of EU integration process.

The book is divided into four parts: constitutional Issues, Institutions, Rights and EU Policies. Each part is focused on a different kind of problems and realities of EU.

On the other hand, this book is also a very good opportunity to promote the use of English language in Extremadura University not only by Professors but also by Degree and Doctorate Students.

Finally I would like to thank UEx-SOFD because of the opportunity to develop a project about promoting the use of English in EU-Teaching. I would also personally thank to all the Professors and Students that have contributed with their efforts to elaborate this book.

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CONSTITUTIONAL ISSUES

On the Limitations of Constitutional States

JORGE ALGUACIL GONZÁLEZ-AURIOLES

1. Introduction

It seems axiomatic to declare that the process of European integration poses a challenge to traditional constitutionalism. Hesse has argued that the changes taking place in constitutional states are less and less coherent if one ignores the laws generated by the process of European integration. It is impossible to understand the changes in the regulatory forces of internal constitutions without examining the new laws¹. This text aims to hold up the truth of this statement in a field that is very specific but highly critical.

This is because, in fact, it has been traditionally supported by much discourse that the key moment in the life of parliamentary bodies is the debate and approval of the budget, and thus it is decisive in explaining

1. HESSE, K, "Constitución y Derecho constitucional", BENDA, E; MAIHOFER, W; VOGEL, H; HESSE, K; HEYDE, W, *Manual de Derecho constitucional*, Madrid. Barcelona: Marcial Pons, 2001, pages. 13-15.

the deeper meaning of our current constitutionalism. The first section of Article 134 of the Spanish Constitution of 1978 states: “It is for the Government to draft the State Budget and for Parliament to examine, amend and approve”; and in its third section, “The Government must submit to the Congress of Deputies the State Budget at least three months before the end of the previous year.” As is common knowledge, this budgetary debate was, up until now, only restricted by the statutory regulations of the parliamentary bodies that governed its proceedings.

Certain regulations issued by the European Union affect this key moment of parliamentary life, and accordingly our constitutional reality, imposing on it considerable limitations. Of course, these limitations could be justified by powerful economic reasons, but it seems difficult to justify an economic constitutionalism that has abandoned neutrality, and has taken the side of any political-economic party, however legitimate that party may be. The German Federal Constitutional Court ruled on this issue in a resolution published on March 1, 1979: “The Basic German Law contains no definition or guarantee of any economic model, but rather entrusts the economic system to the legislator, who will decide freely within the context of the Basic Law, with the only basis being a generic democratic legitimacy.”² In this way, the basic principle of neutrality was established in the economic constitution, something which could be called into question by the new regulation of European law which, as will be further discussed below, falls squarely within this essential postulate. We will first analyse how the process of European integration comes to affect the autonomy of a constitutional state, in order to then outline the necessity of configuring the European Union from the basis of traditional constitutional law.

2. BVerfGE 50, 290 (337).

2. European Integration, Compromising the Constitutional State

As is well-known, all branches of the state are involved in its political leadership, a fact noted by Otto, among others³. Only a government that is controlled politically by its parliament and legally by its courts can have the power to express this political authority. The current European Union embodies a legal-political order that allows, at least partially, the divestment of that leadership, control and accountability from the government. The new configuration of government, which can hardly be understood to hold the above mentioned power, expresses the limitations of the constitutional state. In particular, as has already been stated, the budgetary authority of government, and especially the control which parliament exercises over the budget, symbolize the highest expression of authority from a constitutional state. The European Union's recent legal-political developments compromise this authority in ways that are increasingly clear. This occurs, as we shall see, in at least two complementary ways. The first way is through the limitations of internal law by European law, in the areas of management, control and accountability of the government. The second way refers to the general limitations imposed by European law on the role of government. We will focus on this second element, as this is the clearest way in which government's parliamentary control is affected.

Indeed, the coordination of economic policies imposed explicitly by the Treaty on European Union, signed in Maastricht in 1992, and which was part of the Stability and Growth Pact in 1997, reached its peak in the Franco-German summit of August 16, 2012. At this summit, it was agreed to order Member States to amend their constitutions to incorporate, in effect, the rule of budgetary stability, called the Golden Rule. Secondly,

3. OTTO, I de, "La posición constitucional del Gobierno", *Documentación Administrativa* nº 188, pages 139 y ss.

this economic coordination was established through the legislative developments of recent years through the Treaty of Lisbon, finally ratified in 2009, which made adjustments to the both the Maastricht Treaty and the treaty establishing the European Community.

The first limitation is presented through the tax commitments adopted at the heart of the European Union in order to incorporate the maximum number of Member States, and above all the pan-European agreements. The inclusion of the principle of budgetary stability in the constitution of Member States, and specifically the reform of Article 135 EC, poses significant problems⁴. These problems express themselves not only in the loss of authority, and thus of control and accountability of the government, but also in the possible infringement in the financial independence of Spain's autonomous communities⁵, and thus, ultimately, are a threat to the regional organization of the constitutional Spanish state⁶. The exceptions incorporated into the article itself, which provide a way around the limits of deficit and debt volume, only partially offset these problems⁷.

4. MEDINA GUERRERO, M, "La reforma del artículo 135 CE", *Teoría y Realidad Constitucional* nº 29, 2012, págs. 131-162

5. MEDINA GUERRERO, M, "La reforma del artículo 135 CE", op. cit, pages 139-145

6. It seems evident that without financial autonomy all hopes of supporting a politically decentralized state are doomed, MEDINA GUERRERO, M, *La incidencia del sistema de financiación en el ejercicio de las competencias de las Comunidades Autónomas*, Madrid: Centro de Estudios Constitucionales, 1992, page 27.

7. These problems are showcased in the apparent conditioning that entails with the budgetary power of the executive and the constraint of constitutional openness on this matter. The constitutionalization of a particular political option, which is legitimate but not exclusive, regulates one of the essential values on which our social and democratic rule of law is based: that is, political pluralism. As Gutiérrez Gutiérrez observes, "the constitution, the rule that allows access to public power to various political orientations, should set not limits to the power of the majority other than to guarantee freedom and equality to individuals, and the rights of the minority", "Reforming the constitution, between budgetary stability and constitutional stability", <http://respublicapinto.50webs.com/reforma.pdf>. The controversial procedure of the reform, and the fact that it only had the support of the two major parties, with all other political groups deferring consensus, only serve to

The second limitation is achieved through the creation of a new institution, the Board of Governors of the European Stability Mechanism, which was not considered in the original law, and which can only exercise power over the states which adhered to the common currency, the Euro. The legislative development of the European Union law of the last few years can be recognized in the modifications to Article 136 of the Treaty on the Functioning of the European Union (TFUE), realized by the European Council Decision 2011/199/UE, which created margins to establish a mechanism of stability for Member States whose currency is the euro. The most immediate consequence was the Treaty Establishing the European Stability Mechanism, which was adopted by Eurozone countries on February 2, 2012. The ESM is thus an economic fund to assist states of the Eurozone with sovereign debt problems, created on July 11, 2011 by the finance ministers of the Eurozone countries. The ESM governing body is the Board of Governors and major decisions are made by common accord.

The possibilities of control that are introduced with this new body carry a high degree of conditioning of the budgetary powers of Member States and an erosion of the role of parliaments in controlling budgets, the most significant of which can be found in the adoption of Regulation (EU) No 473/2013 of the European Parliament and the Council of May 21, on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States of the Eurozone. Furthermore, a common budgetary calendar was established, whereby under the fourth article, all Member States must publish their medium-term plans and their medium-term budgetary compliance, preferably before April 15 and no later than April 30 each year. In addition, no later than October 15 each year, Member States must publish their draft central administrative budget for the next year, together

raise further questions over the aforementioned reform, RIDAURA MARTÍNEZ, M^a JOSEFA, "La reforma del artículo 135 de la Constitución española: ¿pueden los mercados quebrar el consenso constitucional?" *Teoría y Realidad Constitucional* n° 29, 2012, pages. 237-260.

with the main parameters of the draft budget of all other sub-sectors of government. Under Article 7 of the Regulation, the Commission shall give an opinion on the draft budgetary plan, as soon as possible and no later than November 30.

In the exceptional cases where, after consulting with the Member State concerned within the timeframe of one week from the submission of the budgetary plan, the Commission identifies an especially serious case of non-compliance in the budgetary policy obligations established in the Pact of Stability and Growth, the Commission will issue a judgement within the timeframe of two weeks from the submission date of the budgetary plan. In this judgement, the Commission will request the submission of a revised budgetary plan in the short time possible, and at the latest three weeks after the issuing of the judgement. The judgements of the Commission will be made public and presented to the Eurogroup. If the Commission detects a breach of the Pact of Stability and Growth, it will ask the relevant government to make amendments within three weeks, thereby forcing a revision of the budget. While it is true that there is no real right of veto within European institutions, if a Commission judgement makes a suggestion, then it should be followed.

Unlike Spain, Germany adopted a specific law that regulated the financial participation of this country within the ESM. This law provides legislative support to the decisions to be taken by the executive representative of the Board of Governors. Specifically, the fourth article of the law gives the German parliament the right to approve or reject the intervention of the German representative to take appropriate measures⁸. However, decisions of the Board of Governors and the Board of Directors can be taken by common accord, but also by qualified majority or simple majority. The German representative, thus, may find that the position he or she defends is that of the minority and not held unanimously.

8. Gesetz zur Finanziellen Beteiligung am Europäischen Stabilitätsmechanismus (ESM-Finanzierungsgesetz – ESMF inG), 13.09.2012.

But in any case, there are identical problems to those described above in the normal parliamentary proceedings at a national level. The legitimacy of the representatives of different states in the Council is already once removed (at least, for example, in the parliamentary systems of Germany, England, Italy, Spain, and most other Member States), since, in turn, they are representatives of governments chosen not by the vote of the people, but by elected parliaments. Secondly, and above all, there is a certain asymmetry between the approval and legitimation on a European level and the proceedings on a national level: it is impossible for the State to legitimize and control measures that have been taken in a different context, and that are subject to debate and transparency beyond the control of Member States. Indeed, in terms of legitimacy and control, the outcomes of a meeting between 27 ministers can only be attributed to them as a whole rather than as individual and independent representatives of each of the Member States. An optimal democratic control by the Member States of the European Union's decisions would require that these are adopted unanimously; however, this in turn would make it impossible to control the reasons for not reaching a decision.

3. Towards a Constitutional European Union Law

Given this reality, it is worth understanding the defensive position of states, and in particular constitutional states, against the risk of globalization. However, this line of argument can overshadow what has been one of the main axes of constitutionalism, that is, its dynamic dimension and its self-transforming character. What's more, it should be remembered that a state alone cannot guarantee, under current conditions, the model of coexistence that was originally intended. Indeed, in order to ensure constitutional principles, it is absolutely necessary to go to supranational places. In short, it is no wonder that in certain constitutional doctrine concerned with the effective realization of constitutional principles the transition from "a constitutional state to a constitutional law

for the international community”⁹ has been hypothesized, and suggest the likeliness of the various legal frameworks that compose the international order determining state constitutionalism, and that constitutional guarantees should be ingrained in international law. Indeed, Gutierrez argues that it is impossible to conceive of an international constitution, but rather that these legal frameworks could adopt the process of constitutionalization. Gutiérrez also suggests the development of a constitutional law for the international community, running parallel to state constitutionalism. In any case, he calls for constitutionalism and international doctrines to work together in finding a theoretical solution to process the new type of pluralism¹⁰. This combined project seems like it would work from the need to implement alternative regulations within the international community to the ones discussed in this text.

To conclude, given the current situation, it seems appropriate to postulate, together with my teacher Antonio López Pina, a rapprochement between the European Union law and the different constitutional traditions of the Member States, but that there will remain a significant disharmony; Europe is clearly an irreversible project¹¹. Nevertheless, as López Pina and Gutiérrez observe, we should not ignore the asymmetry between the solid tradition of constitutional law and the experimental character of European law when these two elements need to cooperate. If the aim is to establish a European public institution and social order in line with the rule of law and the equal freedom of all citizens, the traditional theories of constitutionalism carry a legacy that could well determine the forging of a new common law. The challenge, therefore, is to conceive of European law from the doctrine and experience of constitutional law,

9. GUTIÉRREZ GUTIÉRREZ, “De la Constitución del Estado al Derecho constitucional de la Comunidad internacional”, op. cit, pages 15-91.

10. GUTIÉRREZ GUTIÉRREZ, “De la Constitución del Estado al Derecho constitucional de la Comunidad internacional”, op. cit, pages 90, 91.

11. LÓPEZ PINA, A, *Europa, un proyecto irrenunciable. La Constitución para Europa desde la teoría constitucional*, Madrid: Dykinson, 2004.

and in this way to correctly analyse issues and trends in the creation of a new common law. Precisely because reforming a treaty of the European Union is a reform of a constitution, the best way of preserving the principles of that constitution is not to keep adapting it to the changes, which may be erratic or even subversive, of common law, but rather to drive the adoption of the common constitutional principles of Member States by the European Union¹². If European law prevails over constitutional law, as it seems to be doing with the new regulation, there will be no way of preserving the constitutional order of the Member States, and of Spain in particular, if it is not by applying those very same constitutional principles of European law. In short, the aim should be to extract the logical conclusion from the principles of constitutional homogeneity between Member States and the European Union, as enshrined, for example, by Article 23 of the German Basic Law signed in Bonn. In this way, an effective guarantee of rights can be achieved, ensuring the provisions of Article 2 of the Declaration of Rights of Man and Citizen: “The goal of any political association is the conservation of the natural and imprescriptible rights of man.”

12. LÓPEZ PINA, A; GUTIÉRREZ GUTIÉRREZ, I, “Preservación de la Constitución, reforma de los Tratados”, *Cívitas Europa* nº 7, 2001. Tesis desarrollada también en LÓPEZ PINA, A; GUTIÉRREZ GUTIÉRREZ, I, *Elementos de Derecho Público*, Madrid: Marcial Pons, 2002.

TTIP, Right to Regulate and the Judicial Independence to Debate: Questioning Social and Democratic State of Law?

AINHOA LASA LÓPEZ

1. TTIP: Just Another Investment Treaty?

Since the beginning of the negotiations, in 2013, the Transatlantic Trade and Investment Partnership (TTIP) between the European Union (EU) and the United States of America (US)¹³, has been in the eye of the hurricane, due to, above all, the following concerns: horizontal regulatory cooperation and good regulatory practices, non-tariff barriers and technical barriers to trade, investment protection (fair and equal treatment, most-favoured nation treatment, protection against direct and indirect expropriation, umbrella clause), and investor-to-state dispute settlement (ISDS).

13. Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America, adopted by the Council on 17 June 2013. Text of the negotiating mandate available at: <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf> (last retrieved 29/04/2016).

The first aspect, regulatory cooperation and good practices, makes reference, according to the European Commission's language, to state's right to regulate in the public interest, offering a guarantee against the approach traditionally followed by Member States (MS) in their Bilateral Investment Treaties (BITs). In particular, safeguarding the sovereign right of States to legislate to achieve legitimate policy objectives, "such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity"¹⁴. The starting point is to avoid the rights of investors to a "stable business environment", offering a general guarantee against repeated legislative changes. Therefore, the aim is to reconcile investment protection standards with the right of governments to regulate.

Nonetheless, this "improvement" of the right to regulate has to facilitate trade and investment according to good regulatory practices. These practices include internal coordination, early information on scope and objectives, stakeholder consultations to assess whether and how their interests might be significantly affected and feedback on the existing regulatory framework¹⁵. So, this means that regulatory acts have to be prudent and work out in advance their potential impacts on trade and investment. However, trade and investment do not have to settle up with their potential social costs.

But, the most controversial issue in this regard is that regulatory cooperation in practice means a sustainable deregulation under the globalization's rules. The European integration process appears as a paradigm on this point. In the seventies the European judge made the principle of mutual recognition the cornerstone to preserve the internal market. Mutual recognition is the principle under which MS must allow goods that are

14. European Commission draft text TTIP-investment, Section 2 Investment protection, article 2.1. Draft available at: http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf (last retrieved 27/04/2016).

15. Textual proposal on regulatory cooperation on TTIP, available at: http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153120.pdf (last retrieved 28/04/2016).

legally sold in another member state also to be sold in their own territory. Besides, it also applies to non-harmonised goods, that is, those goods that are not already covered by EU-wide legislation setting common requirements. Its main future was that it removed the need to harmonise all national technical rules. Although it is true that this principle only affected to free movement of goods, soon spread its effects to social field. Those MS with lower social standards wanted to use their competitive advantage to compete with those MS with higher social standards but also with better technology. To avoid a race to the bottom the MS reached an agreement, to provide a regulatory minimalism, a minimum floor of standards. This regulatory minimalism implies that social values have to act in a functional way following the parameters adopted by the global power form. The levels of regulation are determined by the global governance system, and not by the national legislations. This system decides the level of regulation and the common standards outside the traditional decision-making process¹⁶.

The second center axis looks for delving into the liberalization of trade in goods through the elimination of non-tariff barriers. The third aspect promotes foreign investment including key concepts like “fair and equi-

16. Weiler, J.H.H. “The constitution of the common market place: text and context in the evolution of the free movement of goods” *The evolution of EU law*. Craig, P & De Búrca, G (ed.), Oxford University Press. 1999, p. 353-363. Gardner, A. “The velvet revolution: article 90 and the triumph of the free market in Europe’s regulated sector”, *European Competition Law Review*, nº 2, 1995, p 78. Poiares Maduro, M. “Reforming the market or the State? Article 30 and the European Constitution: economic freedom and political rights”, *European Law Journal*, nº 1, 1997, pp. 55-82. Reich, N. “Competition between legal orders: a new paradigm of EC Law?”, *Common Market Law Review* (29), 1992, pp. 891-896. Kitch, E. “Regulation and the American common market”, *Regulation, federalism and interstate commerce*, Dan Tarlock, A (ed.), Oelgeschlager, Gunn & Hain. 1981. Sinn, S. “The taming of leviathan. Competition among governments”, *Constitutional Political Economy*, nº2, 1992, pp 178-180.

table treatment”¹⁷ and direct and indirect expropriation”¹⁸ among others. Here the criticism focuses on the need to clarify, avoiding an ambiguous language, the meaning of the concepts to prevent claims against legitimate public policy measures. Finally, TTIP includes the establishment and functioning of arbitral tribunals. We will tackle this issue with more detail in the next chapter.

Once summarized the main TTIP’s contents, the following step is to reflect on the necessity to sign this type of treaty. In accordance with the majority doctrine, the BITs are an answer to the World Trade Organization’s (WTO) legitimacy crisis¹⁹. Due to the failures of Doha and Cancun Rounds, WTO’s members decided to begin to negotiate BITs outside the falls of the WTO. The struggle to control global trade motivated a rise of those types of treaties. This would be the case of the TTIP between EU and US. Apart from the economic reasons²⁰, the TTIP has, above all, a geo-

17. According to article 3.2, Section 2 Investment Protection, “A party breaches the obligation of fair and equitable treatment (...) where a measure or a series of measures constitutes: (a) denial of justice in criminal, civil or administrative proceedings; or (b) fundamental breach of due process, including a fundamental breach of transparency and obstacles to effective access to justice, in judicial and administrative proceedings; or (c) manifest arbitrariness; or (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; or (e) harassment, coercion, abuse of power or similar bad faith conduct; or (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties (...)”. TTIP draft text, op. cit., p. 4.

18. Article 5.1, Section Investment Protection, states, “Neither Party shall nationalize or expropriate a covered investment either directly or indirectly through measures having an effect equivalent to nationalisation or expropriation (hereinafter referred to as ‘expropriation’) except: (a) for a public purpose;

(b) under due process of law; (c) in a non-discriminatory manner; and (d) against payment of prompt, adequate and effective compensation”. TTIP draft text, op. cit., p. 5.

19. Wilkinson, R. *The WTO: crisis and the governance of global trade*, Routledge, 2006, pp. 101-141.

20. The Commission’s assessment of the likely benefits of the Transatlantic Trade and Investment Partnership (TTIP) is based on analysis carried out by the Centre for Economic Policy Research. The CEPR study predicts that an ambitious TTIP deal would increase the

political reading. During the last decades both countries have seen as the emerging countries won the battle to impose the global economic model's rules. Bearing these coordinates in mind, TTIP might be a good strategy to recover the lost legitimacy. The aim is to redefine the global economic framework according to their rules, parameters, imposing in an indirect way their regulations to the emerging markets, not for nothing the control of global governance system is at stake²¹.

2. Resolution of Investment Disputes: Does the International Investment Law Subdue the Right to Regulate?

One of the most controversial contents of the BITs is the ISDS tribunals. These arbitral tribunals had in the firsts BITs the function to guarantee the foreign investors' rights against potential States' abuses where they made their inversions. Some voices claimed that these international courts were absolutely necessary to protect world trade. The firsts BITs were signed between North and South-East countries. The lack of confidence in their national courts required alternative mechanisms to solve the controversies between investors and States²². From this approach ar-

size of the EU economy around €120 billion (or 0.5% of GDP) and the US by €95 billion (or 0.4% of GDP). This would be a permanent increase in the amount of wealth that the European and American economies can produce every year. For more details see: Transatlantic Trade and Investment Partnership. The economic analysis explained. European Commission, September 2013. Available at: http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151787.pdf (last retrieved 29/04/2016).

21. Brattberg, E. Toward a transatlantic renaissance? TTIP's geopolitical impact in a multipolar world, *Foreign Policy Papers*, 2015.

22. "One of the main reasons why foreign investment must continue to be protected even in democratic countries is politics, and the lack of effective separation of powers between the executive branch and the judicial system. The fact that two of the EU Member States that will be a party to TTIP are ranked below Russia and Zimbabwe in judicial independence shows that investors seeking redress in domestic courts face potential discrimi-

bitral tribunals were the most appropriate mechanism to preserve at the same time investors' interests and state regulation.

However, TTIP is an investment treaty between North countries. Therein, why the US and EU have chosen this procedure? Have domestic courts or European judge lost their credibility and legal certainty to solve disputes?

On the other hand, recently arbitral tribunals have acted more as guards of the economic imperative of promoting and protecting investments that as a conciliatory channels of the investors' economic interests and the sovereign right of States to legislate in the public interest²³. The objective of providing to investors a suitable business environment at the expenses of the right to legislate summarizes the international arbitrators' aptitude, as a general rule.

Other points of contention are:

- The criteria to choose arbitrators: arbitrators can act in other ISDS cases as lawyers.
- The ultimate control over the interpretation of the rules: national tribunals or ISDS tribunals?
- The transparency of the arbitration process: most of the documents remain far from the public opinion.
- The lack of binding clauses not to undermine the right to regulate.
- The absence of appellate mechanism to correct ISDS tribunals' wrong decisions.

nation even in EU Member States". Persson, I. Why libertarians should welcome ISDS", 2015, available at: <http://www.cato-unbound.org/2015/05/15/ingrid-persson/why-libertarians-should-welcome-isd> (last retrieved 29/04/2016).

23. For example, Ottawa was ordered to pay Exxon Mobil Corp. and Murphy Oil Ltd. \$ 17.3 million after a NAFTA panel ruled that had violated the trade agreement by imposing retroactive research-spending requirements on its offshore oil producers. The Veolia group (a French company) decided to challenge one of the few concessions won by Egyptian salaried workers in the 2011 "spring" — a rise in the monthly minimum wage from 400 to 700 Egyptian pounds (\$ 56 to \$ 99). The French multinational considering that this increase was too much, decided to, in June 2012, claim against the Egyptian measure. Veolia's claim is still pending.

- The improperly balance investment international rules and regulatory acts.

II. From the current ISDS system towards an Investment Court: increasing legitimacy of arbitral tribunals?

To correct ISDS's malfunctions, on 16 September 2015, European Commission approved its proposal for a new and transparent system for resolving disputes between investors and states – the Investment Court System (ICS)²⁴.

This ICS is composed of:

A Tribunal of First Instance, named Investment Tribunal, composed of fifteen judges. Five of the judges would be EU nationals, five nationals of the US and five national of third countries. Following the procedure of a court system comparable to domestic and international courts, the disputing parties would not choose their judges. Three judges would be assigned randomly to each case, but always one judge from the EU, one judge from the US and one judge from a third country (Article 9 of the draft text on Dispute Resolution and Investment Court System). Regarding to the applicable law and rules of interpretation (Article 13 of the draft text on Dispute Resolution and Investment Court System), the Investment Tribunal will apply exclusively to the provisions of TTIP, in accordance with customary rules of interpretation of public international law (paragraph 2). The domestic law will not be part of the applicable law. Furthermore, where the Tribunal is required to ascertain the meaning of a provision of the domestic law of one of the parties as a matter of fact, it would follow the prevailing interpretation of that provision made by that party's domestic courts or authorities (paragraph 3). But

24. The text of the proposal on Investment Protection and Resolution of Investment Disputes and Investment Court System in TTIP is available at: http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf (last retrieved 27/04/2016), pages 11-39.

the draft TTIP text clarifies that the meaning giving to the relevant domestic law by the Tribunal will not be binding on either party's domestic courts (paragraph 4).

An Appeal Tribunal²⁵ (article 10 of the draft text on Dispute Resolution and Investment Court System), similar to national or international courts, is composed of six members appointed jointly by the EU and the US: two EU nationals, two nationals of the United States and two nationals of third countries. The appellate mechanism would review awards as regards errors of law and manifest errors in the assessment of facts.

The members of the Tribunal and of the Appeal Tribunal under TTIP:

- would possess the qualifications required in their respective countries for appointment to judicial office, or be jurist of recognised competence, demonstrating expertise in international investment law and international trade law (Article 9.4, and Article 10.7 of the draft text on Dispute Resolution and Investment Court System).
- would be subject to a code of conduct (Article 13 of the draft text on Dispute Resolution and Investment Court System), ensuring the respect of high ethical and professional standards. The draft TTIP text sets out procedures to guarantee full impartiality of judges, for instance by forbidding that judges also act as legal counsel in investment dispute cases. Moreover, if a disputing party considers that a judge has a conflict of interest it can send a notice of challenge to the appointment to the President of the Tribunal or to the President of the Appeal Tribunal.

Finally, the draft TTIP text also includes provisions to prevent parallel claims. In fact, investors may first seek to obtain redress in domestic courts, before submitting a claim to the Investment Tribunal. This is the

25. The TTIP negotiating directives (see note 1) mentioned an appellate mechanism applicable to investor-to-state dispute. The Parliament's 2015 Resolution also contained a reference to the need to include an appellate mechanism (Recommendation XV). This resolution is available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0252+0+DOC+XML+V0//EN> (last retrieved 28/04/2016).

so-called “no u-turn” approach with the objective of encouraging resolving a dispute in the domestic courts while leaving the possibility to access the investment dispute resolution system under TTIP where the treatment in the domestic system falls short of the basic guarantees contained in the investment protection provisions of TTIP (Article 14 of the draft text on Dispute Resolution and Investment Court System).

3. European Commission’s Proposal for the Investment Court System: a New Era in the Settlement of Investment Disputes?

Comparing the European Commission’s approach on arbitral tribunals with the ISDS’ deficits described, the main questions would be:

1) Does the ICS really make the international arbitration process more predictable for governments and investors?

Key word: appellate mechanism.

2) Can the investors’ safeguards leave space for unwarranted interpretations by arbitral tribunals?

Key words: right to regulate, standards of investment protection.

3) Are the qualifications and ethical requirements enough to preserve arbitrators’ impartiality?

Key words: code of conduct for arbitrators.

4) Is ICS compatible with the principle of autonomy of EU legal order?

Key words: the domestic law does not fall under the competence of ICS, domestic law as a factual matter.

5) Instead of “no-u-turn”²⁶, would be “fork-in-the-road”²⁷ a better way to avoid parallel claims?

Key words: domestic remedies, international remedies.

26. To request investors to waive their right to go to domestic courts once they submit a claim to an arbitral tribunal.

27. Investors have to choose between ICS and domestic courts at the beginning of any legal proceeding.

6) Would be necessary to include social responsibility clauses binding for foreign investors, as a matter subject to claim?

Key words: social parameters, investors' responsibilities.

7) In addition to deep knowledge on international investment law and international trade law, would the arbitrators have to demonstrate expertise in international social law?

Key words: decent employment in the International Labour Organisation (ILO), equality for women and men.

4. Conclusions

1. Reviewing the relationship between ICS and national courts and tribunals: the shadows

According to the article 117.1 of the Spanish constitution "Justice emanates from the people and is administered on behalf of the King by Judges and Magistrates of the Judiciary who shall be independent, irremovable, and liable and subject only to the rule of law".

The provision regulates the rule of law in Spanish legal order, taking into account the relationship between sovereign and the courts or tribunals' functions. The judicial power serves the general interest, acting in accordance with the Constitution and regarding UE law when the national public authorities apply it. The democratic grounds of Spanish justice guarantee, as the Constitution regulates, the independent of Spanish judges. At the same time, the Spanish Constitutional Court has the constitutional control of laws and regulations having the force of law as well as the pre-emptive and repressive control of international treaties and agreements (Title IX and articles 94 and 96 of the Spanish Constitution).

Therefore, when the European Commission proposes another judicial system outside the control of the ordinary tribunals and Constitutional Court, the reasons must be absolutely respectful with the autonomy of national laws. Following with this reasoning, what are the real grounds of ICS?

On the one hand, the rules that must be apply to resolve the disputes?

On the other hand, the potential lack of neutrality of national courts and European tribunals?

If we consider the first argument, international and investment trade law is the most suitable order for settling investment disputes, one can argue that this jurisdictional control by the ICS is developed from the values of a private law model. In fact, investment system takes as reference an arbitral model designed for the international trade. However, the Tribunal of First Instance has to decide about a conflict between public interests and investors' interests. Hence, they have to control governmental decisions and these decisions must be evaluate according to the International Treaties' provisions.

With regard to the second thesis, the supremacy of transparency and impartiality in the name of the fair trade, what happens with the national investors? They have to subject to domestic jurisdictions or European judicial power. Why they can use the same reasoning to subject their disputes with national legislators to ICS?

2. The need to rebalance standards of investment protection: introducing the legal language of social values in the ICS

It is argued by the European Commission that the risk of incompatibility of arbitral tribunals with the principle of autonomy of the national legal systems and the EU legal order is unfounded. Basically because ICS only would interpret the international agreement in question and would examine EU law and domestic law as a matter of fact, that is, in a manner that it would not be binding on the public powers. The right to regulate for public policies is preserved. But, in the praxis is it true?

It is important to note that TTIP draft text includes investors' basic guarantees that governments shall respect: no expropriation without compensation, the possibility to transfer funds relating to an investment, fair and equitable treatment and physical security, respect by the governments to their own written and legally binding contractual obligations towards an investors, and compensation for losses.

These key provisions joint to the right to regulate are the basis for the protection granted to public policies and investors. But, what is not so

clear is the position of citizenship's fundamental social rights. International trade parameters are the grounds to resolve the potential settlements, domestic laws remains in theory at national level and as a matter of fact at international arena. The hierarchical order of private values is undeniable, they are legally binding. Quite the opposite, there are not key social safeguards as they are defined by the international social law. US has not ratified 70 ILO conventions, among others, Equal Remuneration Convention, 1951 (No. 100), Discrimination (Employment and Occupation) Convention, 1958 (No. 111)²⁸, whereas the member states of the European Union have ratified them. Even if each of domestic laws do not interfere between them, at least in theory, as TTIP draft text states, if the harmony between different systems is guaranteed, why is it not included in the ICS similar guarantees to enforce workers' rights? Legally binding social rights, including sanctions for the enforcement of ILO's fundamental rights? The TTIP draft texts lacks enforceable provisions requiring investors to respect social compromises adopted by domestic laws. This legal vacuum generates considerable doubts in relation to those legal orders linked to social constitutionalism, as if the case of the Spanish Constitution.

It is soon to predict if the TTIP will be a mixed agreement, though there are a lot of contents that interfere with the MS' competences. If this is the case, national parliaments and constitutional courts will have a good opportunity to protect formal and material constitutional guarantees, including those common to European MS.

28. A full list of ILO conventions not ratified by United States is available at: http://www.ilo.org/dyn/normlex/en/f?p=1000:11210:0::NO:11210:P11210_COUNTRY_ID:102871 (last retrieved 28/04/2016).

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Why the EU Economical Crisis Is a Crisis of Constitution? The Unavoidable “Constitutionalization” Process of the European Union

JOSÉ ÁNGEL CAMISÓN YAGÜE

1. Introduction

The European Union is not only an organization is also a complex idea that has been elaborated since very long time by the Europeans. Europe is not only a physical continent or even a group of peoples that shares certain common values;²⁹ Europe is much more than this, Europe is a way of civilization, which has been successfully developed for centuries de-

29. The relevance of the European values has been strongly underlined by the EUComission President in relationship with the immigration crisis: “*Europe for me is and always has been a community of values. This is something we should be and yet are too seldom proud of.*” J.C. JAUCKER, “A call for collective courage”, (24.08.2015), NEWEUEOPE (<http://www.neweurope.eu/article/a-call-for-collective-courage/>)

spite of violence, wars, crisis and ideological or religious conflicts among Europeans.³⁰

Very deep inside the spirit of this European way of civilization the values and ideals of constitutionalism, like separation of powers, democracy and human rights, had always played a significant role.³¹ So, these constitutional values and ideals have become one of Europe's basic and structural principles since the Enlightenment and the French Revolution until nowadays, when they seem to come into a crisis.

The concepts and values of constitution and constitutionalism have evolved in Europe jointly with the idea of State. But at the present time the ideas of State³² and Constitution³³ are both suffering a grave crisis as a consequence of the globalization process.³⁴ Although globalization

30. B. VOYENNE; *Historia de la idea europea*, Barcelona, Ed. Nueva Colección Labor, 1965, 5 p.: "La idea de Europa debe poco a la geografía, a la geografía servir a aquélla en determinados tiempos y circunstancias. La idea, es decir, la razón suprema de un proceso histórico, su principio, su fin, ¿dónde radican sino en voluntad oscura o clarividente, tenaz o débil, libre o necesaria de los hombres que la han concebido? La conciencia de los europeos. Obra ni de un día ni de mil años. Frecuentemente desaparecida. Pero siempre vuelta a nacer (...) Una civilización es aquello que tiene conciencia de existir como un todo distinto. Y esta conciencia es una cultura. Europa es esto, ¿pero cabe imaginar cosa mayor?."

31. M. FIORAVANTI; *Constitución. De la antigüedad a nuestros días*, Madrid, Ed. Trotta, 2001.

32. H. HELLER; *Escritos Políticos*, Madrid, Ed. Alianza, 1985, pp. 258 "La unidad de la decisión territorial nos hace captar la esencia de lo político como un equilibrio dialéctico entre la unidad y la diversidad infinitas de los actos sociales –confusamente desplegados en todas direcciones–, para el logro de una unidad ordenadora y ordenada. (...) Llamamos Estado a la unidad de actos que constituyen la instancia territorial. Con ello, el problema fundamental de toda política resulta ser el nacimiento y mantenimiento de esa unidad de decisión territorial, de un lado, en la pluralidad de actos de voluntad que la integran, y de otro, dentro de la pluralidad de los señoríos territoriales que la circundan".

33. J.J. GOMES CANOTILHO; *Direito Constitucional e Teoria da Constituição*, Coimbra, Ed. Almedina, 2003, págs. 52 y 53: "Por constituição moderna entende-se a ordenação sistemática e racional da comunidade política através de um documento escrito no qual se declaram as liberdades e os direitos e se fixam os limites do poder político".

34. One of the features of the globalization process is the progressive demise of the constitutional Nation-State that is taking place nowadays. VENTER, F. (2010), Global features

brings us some good opportunities for development,³⁵ the globalization process also involves an ideology that seriously menaces the idea of State, the idea of constitution and the constitutional values and moreover the idea of European civilization. The globalization has been developed almost in absence of State and Constitution. These lacks of State and Constitution provoke that the powers that have been ruled and controlled by the State and the Constitution during the past, like economy or markets, are now virtually free to fulfil their interests virtually without limits.³⁶

of Constitutional Law, Ed. Wolf Legal Publishers, Potchefstroom, South Africa, pp. 20: “*From a legal, especially constitutional law point of view, globalization procedures serious challenge to conventional premises: the axiomatic notion of the nation-states as the cornerstone of the territorial sovereignty of almost 200 states of the world as it developed over centuries, is rapidly losing definition, the state’s perceived dominance as provider of the framework within law is made, administrated, adjudicated and enforced is increasingly being challenged (...)*”.

35. Point. 1.5 of the United Nation Millennium Declaration (2000) Available at: <http://www.un.org/millennium/declaration/ares552e.htm>: “*We believe that the central challenge we face today is to ensure that globalization becomes a positive force for all the world’s people. For while globalization offers great opportunities, at present its benefits are very unevenly shared, while its costs are unevenly distributed. We recognize that developing countries and countries with economies in transition face special difficulties in responding to this central challenge. Thus, only through broad and sustained efforts to create a shared future, based upon our common humanity in all its diversity, can globalization be made fully inclusive and equitable. These efforts must include policies and measures, at the global level, which correspond to the needs of developing countries and economies in transition and are formulated and implemented with their effective participation*”. SINGER, P. (2004). *One World. The ethics of globalization*, Yale University Press, Yale, United States, 196-201 pp.

36. C. de CABO MARTÍN (2010). *Dialéctica del Sujeto, dialéctica de la Constitución*, Trotta, Madrid, Spain, pp. 119: “*Lo real de la globalización –y aunque no se pueda reducir a ello, pero es el aspecto más decisivo y el que aquí ahora importa– en el sentido económico financiero, no es tanto la expansión del capitalismo, que siempre ha tenido en ello su expansión más profunda (que por otra parte es de ‘subsistencia’, pues, como es conocido, sólo puede subsistir ‘acumulando’, en su sentido más propio, es decir, creciendo económicamente de*

The European integration has been inspired since its earliest steps by the idea of a federal State and the idea of Constitution³⁷ and the integration process tends to have a real constitution but,³⁸ in fact, it has been mainly conducted by the interest of markets and neoliberal economy.³⁹ Although the European Union shows at continental scale the major disadvantages of the globalization, it also has got inside its soul the ideas of State and Constitution that are, in my point of view, the most useful keys to solve the economical crisis and also the most important instruments to rule the globalization in Europe.

manera continuada) cuando el crecimiento exponencial (Sousa) de las interrelaciones transfronterizas, entre otras razones porque el poder político (estatal) lo permite y posibilita, de manera que también puede definirse la globalización como la liberación del Poder económico del Poder político, la Economía de la Política”.

37. Declaration of 9 may of 1951: “(...) *The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe (...)*”.

38. *Vid. Paragraph 23 CASE 294/83 Court of Justice of European Union, “Les Verts”, it was the first time that the European Union Court spoke about the constitutional dimension of European Treaties. (...)* *The European Economic Community is a community based on the rule of law inasmuch as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the treaty* “. PIRIS, J.C.; *Does the European Union have a Constitution? Does it need one?*, Harvard Jean Monnet Working Paper 5/00, Harvard Law School, 2000, pág. 8: *“The founding Treaties organize the government of the Union, by describing the composition of its institutions and prescribing the extent and manner of exercise of their powers”.*

39. J. HABERMARS, (1994), *Faktizität und Geltung*, Ed. Suhrkamp. Frankfurt am Main, Germany, *“Die Güter-, Kapital und Arbeitsmärkte gehören einer eigener, von den Absichten der Subjekte unabhängigen Logik. Neben der Administrativen Macht, wie sie in den staatlichen Bükratien verkörpert ist, ist das Geld zu einem anonymen, über die Köpfe der Beteiligten hinweg wirksamen Medium der gesellschaftlichen Integration geworden.”* Harmes, A. (2006), *Neoliberalism and Multilevel Governance. In Review of International Political Economy, Vol. 13, No. 5 (Dec., 2006), pp. 743. “The neoliberal project for multilevel governance can be theorized as a self-conscious attempt to promote a form of “disembedded federalism” where the economy always operates at least one level above that of polity in order to create an exit option (...)*”.

Europe must restore its integration project through the ideas of State and Constitution not only in order to overcome the existing crisis but also to survive in a globalized World. For sure these ideas, State and Constitution, must be redefined for European Union and for the XXI century, but we must keep their essence in European integration project⁴⁰ or the unruléd globalization forces could destruct it.⁴¹

My paper will be divided in two main parts. The first one will be dedicated to evidence how the lack of State and the lack Constitution in the European Union are important grounds of the economical crisis.⁴² On the

40. M. ZAMBRANO, *La agonía de Europa*, Ed. Trotta, Madrid, 2000: “*Ir a descubrir qué haya sido en verdad Europa no es para nosotros más que ir a descubrir lo que de ella nos resulta irrenunciable. O mejor, para explicarnos bien qué es eso irrenunciable, que nos irrenunciable, que nos mantiene en angustioso anhelo, tenemos que intentar ver qué ha sido Europa, encontrar sus ejes, sus principios, el armazón que ha hecho posible su crecimiento y plenitud (...) Pero tratando de encontrar que la esencia de eso que llamamos Europa, de eso que por nada aceptamos –seguir viviendo nuestra vida sin su vida– buscaremos también el principio de su posible resurrección*”.

41. P. de VEGA GARCÍA, (1998), *Mundialización y Derecho Constitucional: una palingenesia de la realidad constitucional*, Ed. Instituto de Estudios Constitucionales Carlos Restrepo Piedrahita, Bogotá, Colombia: pp. 10: “*(...) pero se trata de un Estado que sometido a presiones y embates de notable envergadura, ve por doquier disminuidos sus ámbitos de actuación y comprometidas las propias razones de su existencia*” and pp. 15: “*Nada tiene de particular que ante tan patéticas circunstancias, en las que el Estado se esfuma progresivamente, la sociedad civil se descompone y las ciudades ven eliminados los espacios públicos donde en nombre de la justicia pudieran formular sus reivindicaciones, surge la necesidad y se plantea el problema de cómo definir y donde situar nuevamente las viejas categorías del Estado*”.

42. *Ibid.*, pp. 69 “*En cualquier caos, de lo que interesa aquí dejar constancia es del hecho de que la introducción del Derecho Constitucional en el tiempo obliga paralelamente a su adecuada colocación en el espacio. El aquí y el ahora, como en otros muchos aspectos de la vida de los hombres, también son coordenadas inescindibles en el Derecho Constitucional. Resulta por ello sorprendentemente extraño que los nobles y meritorios intentos por colocar el Derecho Constitucional en el tiempo, no se hayan visto acompañados de similares esfuerzos intelectuales por realizar su correspondiente ubicación en el espacio, olvidando que desde la polis griega hasta el Estado Moderno, el referente especial constituye siempre el presupuesto inexcusable y el punto de partida de toda especulación jurídica*”.

other hand, the second part will be focused on the need of quick implementation of the ideas of State and Constitution in the European integration project in order to overcome the crisis and to make Europe survive as a way of civilization in the globalized World.

2. The EU Economical Crisis as an Outcome of the Crisis of Constitution

The economical crisis that European Union is suffering nowadays is in part a consequence of the crisis of Constitution. This crisis of Constitution has got two levels: the European Union level and the National level. Both are inextricably connected and both are at the basis of the economical crisis.

2.1. Crisis of Constitution: The European Union Level

Since the very early steps of the EU-Integration project, the scholars have defined it as “functional federal” organization. The first European Communities were configured as federal organizations but only related to some economical areas, while the State Members of these “functional federation” remain as sovereign States, except for the economical common areas under the rule of the Communities.⁴³ It was a federal agreement but restricted only to several areas. At this point it is also very relevant to remark that since the Coal and Steel Community the European Communities have got an institutional framework that was designed remembering a federal state, although they have not the same powers as the institutions of a real federal state.⁴⁴

43. J. L. IGLESIAS BUIGES, “Federalismo y soberanía en la historia de la Unión Europea” en *Revista de Instituciones Europeas*, 1976, nº 3, págs. 657 y ss.; D. SIDJANSKI, *El futuro federalista de Europa. De los orígenes de la Comunidad a la Unión Europea*, Barcelona, Ed. Ariel, 1998.

44. Treaty establishing the European Coal and Steel Community (1951) *Article 7. The institutions of the Community shall be: a High Authority, assisted by a Consultative Committee, a Common Assembly, a Special Council of Ministers, a Court of Justice*”

It was planned that the European Integration project would evolve from a free trade area into a federal. This evolution would be realized following the neofunctionalism principles that were established by Schuman and Monnet at the Declaration of 9th of May of 1951.⁴⁵ At the present the Integration project has already achieved a very high level of economical integration and interdependence among the EU-Member States, but we must emphasize that the economical integration is in fact a political integration for two reasons. The first one is that the economical decisions have got always a political dimension. And the second one is that, as Monnet foreseen, the economical integration demands a subsequent political integration. It is like a bicycle, once you started to pedal you cannot stop unless you want to fall down.

The problem that the present economical crisis evidences is the lack of a political regulation of the EU political-economical integration. And this political regulation can only be realized through a constitution, like it has been realized inside the States during the two past centuries through the economical constitution. The crisis also reveals that the EU institutional framework is not capable of acting as a State institutional framework, like in the USA, because although it is formally configured as State institutional framework it does not have the powers that State Institutions are supposed to have to manage critical situations. This handicap of UE Institutional framework provokes that the response of EU-Institutions to the menace of the crisis are always very late and very confused, and these situation gives more chance to operate to those who are causing this economical crisis. Anyhow this institutional handicap could be removed by means of a real constitution that configured a strong EU-institutional framework capable of response to the menaces of a globalized World.

45. Declaration of 9th of May of 1951 *“The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe,*

It is true that EU has got a sort of substantial constitution,⁴⁶ but is not if truth be told a real one.⁴⁷ This EU-Constitution has been described as a multilevel,⁴⁸ dual⁴⁹ or transitional. Anyhow some scholar has also already defended that those powers that EU-member States have been put in common at the European level must be ruled by a real constitution as the same way that these powers have been ruled at the national level before they have been transferred to Europe.⁵⁰ So, there is not only suf-

46. C de CABO; *Teoría Histórica del Estado y del Derecho Constitucional*, Vol. II, Barcelona, Ed. PPU., pág. 181: “Constitución en sentido substancial se utiliza para designar el conjunto de normas que regulan los aspectos fundamentales de la sociedad estatal, sin tener en cuenta su origen ni rango y que forman, por tanto, un conjunto heterogéneo de normas que sólo tienen en común la importancia de la cuestión que regulan para la vida del Estado. Es lo que se conoce con el nombre de “ordenamiento constitucional”, cuyo contenido es difícil de determinar dada la imprecisión de ese criterio de la importancia”

47. J.C. PIRIS,; *Does the European Union have a, Constitution? Does it need one?*, Harvard Jean Monnet Working Paper 5/00, Harvard Law School, 2000, pág. 8: “The founding Treaties organize the government of the Union, by describing the composition of its institutions and prescribing the extent and manner of exercise of their powers”. Vid. P; CRUZ VILLALÓN; *La Constitución Inédita. Estudios ante la constitucionalización de Europa*, Madrid, Ed. Trotta, 2004. “(...) quien todavía crea que el debate sobre la constitucionalización de Europa arranca del firme supuesto de que Europa carece de Constitución está completamente equivocado. Por el contrario, y como es conocido, es muy posible que la CE/UE tenga ya, o incluso haya tenido siempre, una “constitución”, aunque no sea una Constitución “como la de los Estados”.

48. I. PERNICE, “Multilevel constitutionalism in the European Union”, en *European Law Review*, vol. 27, nº 5, Octubre de 2002, págs. 511 y ss.

49. A. von BOGDANDY; “Zweierlei Verfassungsrecht. Europäisierung als Gefährdung des gesellschaftlichen Grundkonsenses” en *Der Staat* 39 (2000), Heft 2, págs. 163 y ss.

50. F. BALAGUER CALLEJÓN, “El debate constitucional en la Unión Europea: ¿Hacia una Constitución de la Unión Europea? en M. A. GARCÍA HERRERA (Ed.), *Constitución y democracia. 25 años de Constitución democrática en España*, Volumen II,, pág. 16: “Los Estados están transfiriendo ámbitos de poder a la Unión Europea que estaban sometidos al Derecho constitucional interno y que deben seguir sometidos a Derecho constitucional (...)”. Vid. J.M. MARTÍNEZ SIERRA, “La Constitución europea. ¿Qué papel cumple en este momento? Una lectura crítica” en *Documentación Social*, nº. 134, págs. 43 a 61.

fering an EU-democratic deficit⁵¹ there is also suffering a deficit EU of real Constitution.

2.2. Crisis of Constitution: The State Level

The EU integration project also involves a crisis of constitution inside the EU State Members. The nation states, despite of the transfer of power to the EU-level, are suffering a “desconstitutionalization” process. The more the integration process advances the more the “desconstitutionalization” process advances inside the State. It is more problematic because, as we have already explained, there is not a correlative process of constitutionalization at the EU level.

One clear example of this is the problematic incardination of national Parliaments in the integrations process.⁵² The National Parliaments are the main loser in the European integration project because they lose legislative and control powers on these areas that have been transferred to the European Level. There are two ways that provide the participation of National Parliaments in the European Union institutional process: the “indirect” participation and the “direct” participation. On the one hand, the “indirect participation” consists on the participation that National Parliaments carry out inside the national environment in relationship with European affairs. On the other hand, the “direct participation” consists on the role that National Parliaments play in the European arena. That means that National Parliaments participate directly in European institutional system. For instance, the participation they make through

51. *Vid. in extenso* A. von BOGDANDY; “Notas sobre la ciencia del Derecho Europeo” en *Teoría y Realidad Constitucional*, núm. 5, 2000, págs. 203 y ss. *Vid.* también sobre el déficit democrático en la UE en C. TAIBO; *Crítica de la Unión Europea*; Madrid, Ed. Catarata, 2006, pág. 14 y ss.

52. *Vid.*, C. STORINI, *Parlamentos nacionales y Unión Europea*, Valencia, Tirant lo Blanch-Instituto de Derecho Público Comparado, 2005; y F. J. MATIA PORTILLA, *Parlamentos Nacionales y Derecho Comunitario derivado*, Madrid, CEPC, 1999.

the “COSAC”. The expectations that the Declaration 23, annex to Niza Treaty, gave for the “constitutionalization” of the National Parliaments’ participation, has finally not be mostly satisfied. Nevertheless the Lisbon Treaty forecasts a new direct participation mechanism, the “early warning system”.⁵³ This early warning system gives National Parliaments the opportunity to exercise a political control of the subsidiarity principle; but this solution does not contribute too much to reduce the constitutional and democratic deficit. Neither the indirect participation nor the direct participation is adequate to resolve the democratic deficit and the constitutional deficit of the European Union.⁵⁴ As we can see it is one clear example of what we consider “desconstitutionalization”, we have got National Parliaments but they are not capable to realize their constitutional missions, besides there is not a real European Parliament that assumes the constitutional role that National Parliaments left.

On the other hand, it is also very important to consider that during the last two decades we have witnessed how the globalization has been configured, following the principles of capitalism and neoliberalism

53. I. COOPER, “The Watchdogs of subsidiarity: National Parliaments and the Logic of Arguing in the EU”, en *Journal of Common Market Law Studies*, Vol. 44. núm. 2, 2006,

54. J.A. CAMISÓN YAGÜE.: *La participación directa e indirecta de los parlamentos nacionales en los asuntos de la Unión Europea*. Madrid, Ed. Senado, 2010, pág. 823: “*la participación de los Parlamentos nacionales en la Unión Europea no es una solución suficientemente válida para resolver el déficit constitucional y democrático del proceso de integración. Incluso podemos afirmar que lejos de ser una solución, constituye un problema para la consecución de la mejor de las soluciones posibles a dichos déficit. Esta solución no es otra que colocar al Parlamento Europeo en el lugar que le corresponde como verdadero Parlamento del sistema político constitucional de la Unión Europea. Desde la perspectiva constitucional la solución sigue siendo la que siempre fue desde la génesis del constitucionalismo contemporáneo: la creación de un sistema de poderes democráticos donde el Parlamento sea la piedra angular en torno a la que se articule un sistema de contrapoderes. Dicha solución constitucional se posiciona frente a las “iuseuropeistas” que han pretendido soslayar el déficit constitucional del proceso de integración mediante la participación indirecta y directa de los Parlamentos nacionales*”.

theories. So, in the light of the apparent economical success obtained by the financial economy, the Nation-States have renounced to keep their economical constitutions in force. In other words, the Nation-States, especially those of Europe that have been configured as social States, have sacrificed their economical constitutions in order to articulate a substantial economical global constitution according to the needs of neoliberalism.⁵⁵ Step by step Nation-States have been renouncing to keep their markets and economies under control of their constitutions in order to converge into a global trade area as wide as the planet. In this sense, using the postulate of subsidiarity, the economical globalfederalism has extended itself on the basis of the idea that the wider and opener to all the market was the better it will work. So, Nation-States have placed their factual economical constitution on a higher political level, the global one, as a result of the needs of capitalism and neoliberalism, because it seemed that the results of this wide global market would be better. However, the global economical and financial crisis that we are living nowadays is pointing out downright to the opposite.⁵⁶

55. HARMES, A. (2006), Neoliberalism and Multilevel Governance. In *Review of International Political Economy*, Vol. 13, No. 5 (Dec., 2006), pp. 743. *“The neoliberal project for multilevel governance can be theorized as a self-conscious attempt to promote a form of “dis-embedded federalism” where the economy always operates at least one level above that of polity in order to create an exit option (...)”*.

56. J.F.; MARTÍN SECO, *La trastienda de la Crisis. Lo que el poder económico quiere ocultar*, Barcelona, Ed. Península, 2010: *“En los últimos treinta años, el capital ha dado jaque mate a los Estados nacionales, único ámbito en el que, mejor o peor, se habían establecido mecanismos medianamente democráticos, y en el que el poder político había impuesto límites y reglas a las desmedidas ambiciones del poder económico. (...) La desregulación de la economía y la eliminación de todo tipo de reglas, de manera que el capital funcione internacionalmente con total libertad, trasladan el verdadero poder más allá de las fronteras nacionales, a ámbitos carentes de cualquier responsabilidad política y democrática”*.

3. The Need of Quick Implementation of the Ideas of State and Constitution in the European Integration Project

Paraphrasing the 9th may Declaration, Constitution and Europe *cannot be safeguarded without the making of creative efforts proportionate to the dangers which threaten* them. If there is a possibility to keep a any constitutional order inside the EU-Member Stats at this globalized World, this possibility pass necessarily through the fast development of a real European State ruled by a real democratic Constitutional values of “liberty, equality and fraternity”, that have been conducted the constitutional evolution of Europe. If there is a response for the economical crisis is to restore at the European level the checks and balances that have proof to be effective to promote a real development of our European society and to control the economical powers.

At the present situation there is not only a question of if a the Nation State could survive,⁵⁷ the question to resolve is if the European way of civilization could survive, and it will be only possible, in my point of view, if we restore and rebuilt the constitution and the State at the European Integration project, otherwise our European values are doomed to disappear.

And to conclude, I really think that is very important to promote at Schools and Universities the study the constitution and constitutional values and is also important to concern the futures generations that the European way of civilization is seriously threaten.

57. PRANDINI. R. The morphogenesis of constitutionalism. In P. Dobner and M. Loughlin (Eds.). *The twilight of Constitutionalism*, Oxford University Press, Oxford, United Kingdom, 2010. pp. 316: “We are witnessing a new beginning in the morphogenetic cycle, as we can see retrospectively that the state monopoly of the political governance in simply a relevant but historical incident of the ongoing process”.

INSTITUTIONS

The New European Economic Governance and the Role of the European Council

COVADONGA FERRER MARTÍN DE VIDALES

1. Introduction: The Strengthening of the European Council's Role in the Economic Policy Area in the Aftermath of the Economic Crisis and the New Rules on the European Economic Governance

Currently, the European Council is the highest political authority of the European Union. It is the holder of a set of competences that make it the responsible of the main institutional decisions and of those ones politically sensitive for the functioning of the Union. Through its existence it has consolidated its own sphere of decision, which goes beyond the mere role of orientation and impetus that Treaties assign to it. Besides, it exercises a political leadership that serve as guidance for the works of the Council, inviting the Commission to develop political initiatives in specific areas and monitoring Member States' domestic policies⁵⁸.

58. In this regard, see FERRER MARTÍN DE VIDALES, C., *La naturaleza del sistema institucional de la Unión Europea. Conclusiones del estudio del Consejo de la Unión, del Consejo*

That role of impetus and orientation can be clearly observed in the area of economic policy⁵⁹. According to article 121.2 of the TFEU the European Council, acting on the basis of a report from the Council, is the responsible for discussing a conclusion on the broad guidelines of the economic policies of the Member States and of the Union; conclusion on which basis the Council adopt a recommendation setting out these broad guidelines⁶⁰.

And practice has demonstrated that the orientation and impetus role of the European Council in this area is decisive⁶¹. No important decision escapes from it, especially those related with the adoption of the budgetary discipline rules and the prohibition of excessive deficit⁶². Field where,

Europeo y de la participación de los Parlamentos nacionales en la Unión Europea, tesis doctoral, 2009, capítulo II, pp. 175-323.

59. The economic policy is one of the areas in which the Union's competence is limited, as Member States coordinate their policies in this area according with the orientations provided each year at the Union level. It is an area where the Union has a strong leadership role, through the broad guidelines that it can establish in this area. See ALONSO GARCÍA, R., *Sistema Jurídico de la Unión Europea*, 2ª edición, Civitas, Thomson Reuters, Cizur Menor (Navarra), 2010, p. 97.

60. The broad guidelines are prepared in advance. At the end of January each Council configuration sends its contributions in this regard. On the basis of these contributions and other works, the Commission prepares the debate that the ECOFIN holds before the spring summit, meeting where it adopts a report establishing the key issues to be discussed by the European Council in its spring summit. Subsequently, in the spring summit, the European Council establishes priorities, on which basis the ECOFIN finally begins the formal procedure provided for in article 121.2 of the TFEU and formulates a draft for the broad guidelines on which basis the European Council discusses a conclusion in its June meeting. Then, the ECOFIN adopt a recommendation setting out the broad guidelines as the Treaty provides. See DASHWOOD, A., "Decision making at the Summit", *The Cambridge yearbook of European legal studies*, Volume 3, 2000, p. 92.

61. *Ibid*, p. 101.

62. For example, the SGP was adopted by the European Council. See Resolution of the European Council on the Stability and Growth Pact, Amsterdam 17 June 1997 [OJ C 236 of 2.8.1997].

in the aftermath of the economic crisis⁶³, the European Council's role has been strengthened.

Until the economic crisis and the new rules on the European Economic Governance, the economic policy coordination was mainly based on consensus (for example, through the so-called open method of coordination). The only enforceable rules were defined in the fiscal policy framework through the SGP⁶⁴. However, despite the European Council's guidelines adopted with this method, the reforms at national level did not progressed at the rhythm desired and were difficult to accomplish⁶⁵.

The situation changes since the economic crisis, which led to the adoption of different measures in order to strengthen the budgetary discipline rules, to the creation of new mechanism for the supervision of macroeconomic imbalances, and to the adoption of a permanent framework for crisis resolution. The objective was to achieve a greater coordi-

63. As it is well known, the economic and financial crisis showed the inefficiency and inadequacy of the mechanisms of the EMU, as well as the problems of having a complete monetary union but not an economic, fiscal and budgetary one. The TEU of 1992 formally enshrined the EMU, which would lead to the creation of the single currency (the euro). However, the process derived in the creation of a complete monetary union, but the fiscal policy remained as Member States' competence, although through the SGP strict limits were established to control their public deficits and their levels of public debt. Besides, it was prohibited that the ECB financed directly Member States deficits, and the rule of no bail-out was imposed. See ROCHA VÁZQUEZ, M. DE LA, "El futuro de la Unión Económica y Monetaria Europea: ¿qué ha fallado y qué reformas se requieren", *Documento de trabajo 54/2010*, OPEX, Fundación Alternativas, 2010, pp. 7-8. To try to solve these problems, the Member States begun to reform the rules and functioning of the EMU. *Ibid.*, p. 5.

64. Vid. ZOPPE, A., "Economic governance", *Fact Sheets on the European Union*, European Parliament 2014: http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuid=FTU_4.1.4.html

65. In this regard, see FERRER MARTÍN DE VIDALES, C., "El papel del Consejo Europeo en la política económica y la política de empleo de la UE. La interconexión entre ambas políticas y las consecuencias de la crisis económica", paper presented to the VIII Simposio internacional ECSA SPAIN-AUDESCO, Madrid, 7 June 2013.

nation of the economic and budgetary policies⁶⁶ (through the European Semester), solve the problems caused by the crisis and foster growth and employment⁶⁷. Besides, it has been ensured that Member States carry out reforms that were pursued time ago.

The European Council has been at the head of some of the mentioned measures since, as we will examine in the following lines, has given precise orientations and has demanded the Council, the European Parliament and the Commission to adopt the pertinent decisions, even imposing to them deadlines. All despite that according to article 121.2 of the TFEU the European Council is only responsible of discussing a conclusion on the broad guidelines of the economic policies of the Member States and of the Union.

Acting this way, the European Council presents its decisions as political decisions in order that the Council and the other Institutions give them a legal basis, which has frequently occurred even without making any change⁶⁸. The decision-making process provided in the Treaties⁶⁹ is therefore altered.

On more than one occasion the European Council has taken the initiative in key issues and has prepared the whole decision-making process when, according to Treaties, the decision should have been taken by the Council and the Commission. In this way, the Commission has seen its role as holder of the right of initiative diminished⁷⁰. Besides, as Puetter

66. See VALLÉS LIBERAL, J., MONZÓ TORRECILLAS, J., “El refuerzo del gobierno económico europeo”, *Presupuesto y Gasto Público* 63/2011, p. 69.

67. Objective also pursued by the Europe 2020 Strategy, adopted by the European Council in its conclusions of 25 and 26 March 2010.

68. Maintaining this way two stages in the decision-making process: a political one within the European Council and a legal one within the Council. See WERTS, J., *The European Council*, John Harper Publishing, London, 2008, p. 33. See, also, FERRER MARTÍN DE VIDALES, C., *La naturaleza del sistema institucional...*, *op. cit.*, point III, chapter IV.

69. Where, as a general rule, the Commission initiates and the European Parliament and the Council adopt the act jointly through the ordinary legislative procedure. See Art. 294 TFEU.

70. Thus, for example, it was the European Council the one that carried out the whole process that led to the creation of the EMS or the so-called Lisbon process of 2000. See WERTS, J., *op. cit.*, p. 34.

points out, the European Council frequently reserves the adoption of the final decision and creates proceedings and working methods that affect the works of the Council and the Commission⁷¹.

Is precisely this way of acting the one that, once more, we can observe since the economic crisis regarding the new measures adopted on the new European Economic Governance of the Union.

The new rules on the European Economic Governance

As we have already mentioned, the economic crisis has forced to adopt a series of measures in order to reform the rules and functioning of the EMU, and to strengthen the economic governance of the European Union. Within the different measures adopted we find, on one side, those related with a bigger coordination and surveillance of Member State's economic, fiscal and budgetary policies and, on the other side, the ones that seek to safeguard the financial stability of the euro zone⁷² and those aimed to reform the financial sector⁷³. We will focus our analysis in the first measures mentioned.

In this regard, the new rules are contained in the so-called *six-pack* and *two-pack*, packages of legislative measures that strengthens the surveillance of Member State's economic, fiscal and budgetary policies (with specific provisions for the euro area Member States), and in the Treaty on Stability, Coordination and Governance in the EMU (TSCG), that reinforces

71. See PUETTER, U., "Organising the EU's responses to the global economic and financial crisis – the role of the European Council and the Council", Paper presented at the 12th Biennial Conference of the European Studies Association (EUSA), Boston, 3-5 March 2011, p. 3.

72. First, by establishing temporary mechanisms for the financial assistance to Member States (the European Stabilisation Mechanism and the European Financial Stability Facility) After, through the adoption of a permanent mechanism: the European Stability Mechanism –ESM–.

73. By establishing a system for supervision and banking resolution at the Union level: the Single Supervisory Mechanism (SSM), the Single Resolution Mechanism (SRM) and a single rulebook.

the two mentioned packages. These rules are applied in the context of the European Semester, new cycle for the coordination of the economic and budgetary policies of the Member States⁷⁴. Added to them is the Euro Plus Pact, whose objective is also strengthen the economic pillar of the EU.

At the head of the adoption of the *six-pack* and the *two-pack* has been the European Council, giving precise guidelines as we have already stated. We now examine the conclusions of the different European Council's summits that reflect this important role that the Institution is playing.

2. European Council Conclusions Related with the Adoption of the Rules that Frame the New European Semester

As we have already mentioned, it is the European Council the institution that is in the origin of the *six-pack* and the *two-pack*. In its summit of March 2010, the European Council asked its President, in cooperation with the Commission, to create a special Task Force charged to present to the Council the necessary measures to reach the objective of an improved framework for crisis resolution and for a better budgetary discipline:

7. The European Council asks the President of the European Council to establish, in cooperation with the Commission, a task force with representatives of the Member States, the rotating presidency and the ECB, to present to the Council, before the end of this year, the measures needed to reach the objective of an improved crisis resolution framework and better budgetary discipline, exploring all options to reinforce the legal framework⁷⁵.

In its meeting of June 2010, the European Council gave its agreement to a first set of orientations to strengthen the economic governance of

74. See EUROPEAN COMMISSION, "The EU's economic governance explained", MEMO/15/6071, Brussels, 26 November 2015.

75. See point 7 European Council conclusions of 25 and 26 March 2010.

the Union, including several regarding the strengthening of the rules on budgetary discipline: the strengthening of the preventive and corrective arms of the Stability and Growth Pact; presenting to the Commission in the spring, from 2011 onwards and in the context of a “European semester”, Stability and Convergence Programmes for the upcoming years; etc. And the European Council invited the Task Force and the Commission to rapidly develop further and make operational these orientations:

Enhancing economic governance

9. The crisis has revealed clear weaknesses in our economic governance, in particular as regards budgetary and broader macroeconomic surveillance. Reinforcing economic policy coordination therefore constitutes a crucial and urgent priority.

10. The European Council welcomes the progress report of the President of the Task Force on economic governance and agrees on a first set of orientations.

11. The present rules on budgetary discipline must be fully implemented. As regards their strengthening, the European Council agrees on the following orientations: a) strengthening both the preventive and corrective arms of the Stability and Growth Pact, with sanctions attached to the consolidation path towards the medium term objective; these will be reviewed so as to have a coherent and progressive system, ensuring a level playing field across Member States. Due account will be taken of the particular situation of Member States which are members of the euro area and Member States' respective obligations under the Treaties will be fully respected; b) Giving, in budgetary surveillance, a much more prominent role to levels and evolutions of debt and overall sustainability, as originally foreseen in the Stability and Growth Pact; c) from 2011 onwards, in the context of a “European semester”, presenting to the Commission in the spring Stability and Convergence Programmes for the upcoming years, taking account of national budgetary procedures; d) ensuring that all Member States have national budgetary rules and medium term budgetary frameworks in line with the Stability and Growth Pact; their effects should be assessed by the Commission and the Council; e) ensuring the quality of statistical data, essential for a sound budgetary policy and budgetary surveillance; statistical offices should be fully independent for data provision.

12. As regards macro-economic surveillance, it agrees on the following orientations: a) developing a scoreboard to better assess competitiveness developments and imbalances and allow for an early detection of unsustainable or dangerous trends; b) developing an effective surveillance framework, reflecting the particular situation of euro area Member States.

13. The European Council invites the Task Force and the Commission to rapidly develop further and make operational these orientations. It looks forward to the final report of the Task Force, covering the full scope of its mandate, for its meeting in October 2010⁷⁶.

The Task Force presented its final report in the summit of October 2010⁷⁷, which was endorsed by the European Council, which also indicated that the recommendations provided by the aforementioned report should be adopted legislatively by summer 2011, following a fast-track approach: *“The European Council endorses the report of the Task Force on economic governance. Its implementation will allow us to increase fiscal discipline, broaden economic surveillance, deepen coordination, and set up a robust framework for crisis management and stronger institutions. The European Council calls for a “fast track” approach to be followed on the adoption of secondary legislation needed for the implementation of many of the recommendations. The objective is for the Council and the European Parliament to reach agreement by summer 2011 on the Commission’s legislative proposals, noting that the Task Force report does not cover all issues addressed in these proposals and vice-versa. This will ensure the effective implementation of the new surveillance arrangements as soon as possible. The result will be a substantial strengthening of the economic pillar of EMU, enhancing confidence and thus contributing to sustainable growth, employment and competitiveness”*⁷⁸.

76. See points 10, 11 and 13 of the European Council conclusions of 17 June 2010.

77. The report can be consulted in the Council Note 15302/10 of 21 October 2010.

78. See point 1 of the European Council conclusions of 28 and 29 October 2010.

Again, in its summit of February 2011, the European Council pointed out that an agreement should be reached before the end of June 2011: *“The European Council called on the Council to reach in March a general approach on the Commission’s legislative proposals on economic governance, ensuring full implementation of the recommendations of the Task Force, so as to reach a final agreement with the EP by the end of June. This will allow strengthening the Stability and Growth Pact and implementing a new macroeconomic framework”*⁷⁹.

This way, the recommendations of the Task Force on economic governance resulted in the adoption of the package of six legislative measures called *six-pack*.

However, these measures did not calm the markets so, in view of the worsening of the economic crisis, the European Council emphasised again (in its summit of December 2011) the need to fully implement the new economic governance and to continue the structural reforms and fiscal consolidation efforts in order to return to the sustainable growth and improve confidence. Thus, it decided that two new Commission proposals (aimed to strengthen the *six-pack*) known as *two-pack*, should be rapidly studied and with priority by the European Parliament and the Council so they could be approved by summer 2012:

1. Recognising the worsening economic and financial situation, the European Council discussed ongoing efforts to lift Europe out of the crisis. The European Union’s new economic governance, as set out in paragraph 3, must be fully implemented with a view to building confidence in the strength of the European economy. Structural reforms and fiscal consolidation efforts must continue to lay the ground for a return to sustainable growth and thus help improve confidence in the short run [...]

2. Recalling the key priority areas for growth it identified in October 2011, in particular, the Single Market Act, the Digital Single Market and the reduction of

79. See point 27 of the European Council conclusions of 4 February 2011.

overall regulatory burden for SMEs and microenterprises, the European Council stressed the need to swiftly adopt the measures with the most potential to boost growth and jobs. It therefore supports the principle of a fast-track programme and invites the Council and the European Parliament to give particular priority to the speedy examination of the proposals identified by the Commission, including in its Annual Growth Survey, as having substantial growth potential. It endorses the actions proposed by the Commission in its report on minimising regulatory burdens for SMEs”⁸⁰.

Last, in its summit of December 2012, the European Council stressed as an immediate priority the completion and implementation of the measures adopted to strengthen the economic governance, in particular the six-pack, the TSCG and the two-pack, asking the co-legislators to adopt the last package without delay: *“5. The immediate priority is to complete and implement the framework for stronger economic governance, including the “six-pack”, the Treaty on Stability, Coordination and Governance (TSCG) and the “two-pack”. Following the decisive progress achieved on the key elements of the “two-pack”, the European Council calls for its rapid adoption by the co-legislators”⁸¹.*

3. Questions and Issues Brought Up for Discussion

1. Evaluate the European Council’s role in the adoption of the new measures on European Economic Governance.
 2. Examine the incidence of the European Council’s role in the decision-making process provided for in the Treaties.
 3. Tackle the problem of the creation of new working methods not contemplated in the Treaties by the European Council.

80. See points 1 and 2 of the European Council conclusions of 9 December 2011.

81. See point I.5 of the European Council conclusions of 13 and 14 December 2012.

4. Conclusions

The rules on the new European Economic Governance of the EU imply a stricter coordination and surveillance of Member States economic, fiscal and budgetary policies. The main problem is the way these new measures have been adopted. As it has been examined, the European Council is the institution that has been at the origin of the main measures that regulate the new cycle of coordination and surveillance of Member State's economic and budgetary policies, giving precise orientations to the other European Institutions and asking them to adopt the necessary measures, even imposing deadlines⁸². Besides, it has created new working methods, as the Task Force on economic governance, which has adopted the recommendations that have been in the origin of the European Semester and the six-pack that codifies the aforementioned Semester.

Institution that it is not subject to an adequate control⁸³ because, although article 10.2 of the TEU places the control on the National Parliaments, in practice they do not have any mechanisms to demand responsibility to its ministers, as the European Council requires a collegiate control⁸⁴.

It must also be pointed out that the mechanism used for the adoption of the broad guidelines for the economic policy and the new work-

82. As we have mentioned the European Council uses, to this regard, a method for the adoption of decisions that has been using time ago: the adoption of the decision at political level in its meetings and the subsequent activation of the mechanisms of the Treaties to transform that decision into legal rules.

83. See MARTÍNEZ SIERRA, J. M., *El Sistema Institucional de la Unión Europea: la problemática presente y futura*, Tesis doctoral, UCM, Madrid, 2000, chapter II.

84. See MARTÍNEZ SIERRA, J. M. y DÍAZ MARTÍN, J. M., "Del Control y la Responsabilidad en la Unión Europea", *Revista Universitaria Europea*, nº 3, 2002, p. 136; KIIVER, PH., *The national parliaments in the European Union: a critical view on EU constitution-building*, The Hague, Netherlands: Kluwer Law International, 2006, p. 73.

ing methods introduced by the European Council –the Task Force-, that are in the origin of the new rules on economic governance, are opaque and do not allow the participation of the public opinion⁸⁵. And it cannot be forgotten that through these mechanisms the new rules that imply a stricter surveillance of Member States’ economic and budgetary policies have been adopted; and that they have forced Member States to carry out important reforms, especially those that want to remain in the euro area.

85. See FERNÁNDEZ-MACÍAS, E., “La política laboral española en el seno de la UE. ¿Una integración sin competencias?”, *Revista Sistema* núm. 225-226, 2012, p. 58.

European Central Bank. Evolution and Future

JORGE URBANEJA CILLÁN

I. Preliminary Issues

Public management structures on the financial system have begun a broad and deep reform process in response to the financial crisis that began in 2007. The reform process has acquired a distinct identity in the European Union, particularly in the States belonging the Economic and Monetary Union. European monetary integration, since its adoption in the Maastricht Treaty of 1992, suffered from a number of structural weaknesses that have prevented the Union could react in a proper way against the crisis. Although unevenly among the Member States of the Union, the crisis took on a structural dimension in Europe, producing its extension from the financial system to the public debt of some of its states, as well as a contagion of instabilities among themselves States. In these terms, the crisis has come to question some of the essential elements that had designed the process of monetary integration, as is its own irreversibility.

In order to adopt an effective response to the financial crisis, the European Union agreed a series of provisional measures, which proved inadequate given the seriousness of events. Therefore, the Union has had to

deal with a committed process of structural reforms, with the difficulty of doing so at a time of tensions in financial markets. In this reform process, the EU has had to overcome tensions intergovernmental and strict constitutional limitations on economic and monetary policy.

In addition to strengthening the provisions on tax and economic policy coordination matters, there has been reform of the Treaties with the aim of allowing the constitutional lace a major agreed reforms, such as the establishment of a permanent mechanism for management crisis, the European Stability Mechanism. As has happened on other occasions throughout the evolution of the European integration process, these advances have been based on decisions taken outside the institutional system of the Union, raising significant controversy as to its compatibility with EU law and its possible future inclusion in the Community system.

Structural reforms in Europe have been completed an ambitious project called banking union, which is primarily aimed at limiting contagion between sovereign debt and public finances of Member States and promote financial integration in Europe. This process presents as essential elements: the creation of a single rulebook on prudential regulation, a system of European supervisory and crisis management mechanisms, which in turn comprise single standards, a single resolution mechanism and further integration into systems deposit guarantee. In parallel to the differentiated reality that implies the existence of the Economic and Monetary Union, the proposed banking union, although open to all States, it has developed heterogeneously; that is, with a common regulatory system to all States, in prudential matters and crisis management, while integrating the supervisory and resolution only affect the Member States of the Economic and Monetary Union.

The preparation of a supervision system at European level has been one of the main innovations agreed under the reform process. Along with a system of institutionalized cooperation for Member States through the European Supervision Authorities (ESAs), there has been the allocation to the ECB powers of prudential supervision of credit institutions. The compatibility of these functions with its constitutional powers in monetary policy is the main questions raised by the planned system.

II. Economic and Monetary Union and the Absence of Specific Provisions on Banking Supervision

The final shape of EMU is carried out in Title VIII of the Treaty of Maastricht, being structured about: a single monetary policy, exerted by the ECB within the ESCB; fiscal policies that are the exclusive competence of the Member States, setting common results; and minimum criteria for coordination in other economic policies⁸⁶. Thus, EMU is a diptych, formed by the “economic union” and the “monetary union”. However, the process has a marked asymmetrical, since the monetary union implies an absolute transfer of state monetary powers in favor of Community institutions (ECB); while the economic aspect is limited to coordination of national economic policies, remaining as competence of the Member States⁸⁷.

Thus, the functions assigned to the ECB confined exclusively in setting monetary policy and also with a very specific purpose, such as to ensure price stability. This reality becomes even constitutional reflection, so that as established by art. 127.1 TFEU: “the primary objective of the European System of Central Banks (...) shall be to maintain price stability”⁸⁸.

86. ESCOLANO, R., “La arquitectura financiera europea: del Tratado de Maastricht a la realidad actual” en FERNÁNDEZ MÉNDEZ DE ANDÉS, F. (Dir.), *La crisis en Europa: ¿un problema de deuda soberana o una crisis del Euro?*, Papeles de la Fundación, num. 44, Madrid, 2012, p. 85. (Available in <http://www.fef.es/new/publicaciones/papeles-de-la-fundacion/item/156-44-la-crisis-en-europa-%C2%BFun-problema-de-deuda-soberana-o-del-euro?.html>).

87. LÓPEZ ESCUDERO, M., “La articulación jurídica de la Unión Económica y Monetaria en su fase definitiva”, *Revista de Derecho Comunitario Europeo*, num. 4, 1998, p. 402.

88. As Professor LASTRA notes, “the primary objective of the ECB is price stability, i.e., the control of inflation. The ECB is heir to the stability culture of the Bundesbank and a creature of its time: economic theory and evidence supported the case for a price-stability oriented (...). If the Maastricht Treaty had been signed in 2010, the enumeration and prioritization of objectives would have been different. But treaties are difficult to amend, and an expanded European Union has made treaty reform ever more difficult (not to mention the opening of Pandora’s Box that the negotiation of certain provisions would entail)”. LASTRA, R.M., “The

Along with this, as an essential guarantee for the exercise of the functions entrusted to the ECB shall exercise its powers under the principle of absolute independence, which also appears constitutionally recognized. Thus, according to art. 130 TFEU, “when exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute of the ESCB and of the ECB, neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body. The Union institutions, bodies, offices or agencies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the European Central Bank or of the national central banks in the performance of their tasks”.

Therefore, the independent exercise of the functions of the ECB acts against both Member States and to the Community Institutions. This independence is specified in different aspects such as institutional independence, independence of staff by the ECB, regardless of functional character and financial autonomy⁸⁹.

Thus, the creation of EMU does not affect initially the responsibility for financial supervision, which remained almost exclusively state competition⁹⁰. While aware of the evolving nature of the integration process and the reality of the Member States, characterized by a large number

Evolution of The European Central Bank”, *Fordham International Law Journal*, vol. 35, núm. 5, 2012, p. 1264.

89. LASTRA, R.M., “Central bank independence”, *Revista de Estabilidad Financiera*, núm. 18, 2010, pp. 49-66; (available in <http://www.bde.es/f/webbde/Secciones/Publicaciones/InformesBoletinesRevistas/RevistaEstabilidadFinanciera/10/May/Fic/REF201018.pdf>).

90. SAIZ DE VICUÑA, A., “The ESCB and Its Role in Banking Supervision”, en LASTRA, R.M., (ed.), *The Reform of International Financial Architecture*, Ed. Kluwer International Law, Londres, 2001, pp. 117-123.

of States which confer competences of banking prudential supervision to central banks; Treaties opened up the possibility of conferring supervisory powers to the ECB. For this purpose, special and *ad hoc* legislative procedure for assigning responsibilities to the ECB prudential supervision of credit institutions and other financial institutions of the States of the Eurozone included. These constitutional provisions have been used for the creation of the *Single Supervisory Mechanism* as an essential element in building *banking union*.

III. New Functions of the European Central Bank on Prudential Supervision. The *Single Supervisory Mechanism*

1. *The Unification of Supervision of Credit Institution*

The debate on the need for centralization of powers in prudential supervision at European level is an issue that has arisen since the beginning of monetary integration. However, the reality has been marked by a decentralized system based on the single authorization, supervision by the country of origin and bilateral cooperation among national supervisors.

With the recent financial crisis a process of reform of financial supervision in the EU was launched, with the aim of promoting an efficient institutionalized cooperation between national supervisors; through the creation of the European Supervisory Authorities and the European Systemic Risk Board. However, the ongoing reforms did not involve a change in the decentralized model of supervision, which continued being based on national supervisors.

However, the model described has undergone significant changes due to the events during the financial crisis, in particular the need for public support for a significant number of entities, which has generated instability for the whole EU and particularly for Member States of the Eurozone.

In those circumstances, in order to eliminate the existing contagion between financial crisis and sovereign debt crisis, the *banking union* project was promoted. As an essential element of the process, the estab-

lishment of Community instruments for banking supervision and the creation of mechanisms for crisis management was necessary. The creation of integrated banking supervision mechanisms was the first of these approved elements such functions entrusted to the ECB, which from this time assumed important functions of financial supervision.

2. Legal Foundation

In accordance with the wording of art. 127.6 TFEU, “the Council, acting by means of regulations in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament and the European Central Bank, confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings”. Stated in these terms and as specifically listed in the Regulation 1024/2013, this article is the constitutional basis for the creation of the SSM.

3. Scope

Under the system established by Regulation 1024/2013, the powers of SSM appear delimited in terms of a double standard, as is membership in EMU and the “significance” of the entity; restoring itself, thus a dual system of supervision of credit institutions in the EU.

3.1. Territorial

The application of the banking union is projected onto a special dual perspective; on the one hand, regulatory instruments, which apply to all EU States; on the other hand, the creation of instruments reinforced application, which will include EMU States, and can be extended to other member States. In these terms, the SSM will be formed by all States whose currency is the euro; it may be extended to those States which are not members of the Eurozone, but have established close cooperation with SSM (art. 2.1 of Regulation 1024/2013).

3.2. Subjective

The system of dual supervision created by the SSM also has as one of its criteria, the nature of credit institutions, extending the direct powers of the ECB on character entities “significant”, while on the other entities exercising supervision indirectly. The development of criteria for the allocation of supervisory responsibilities to the ECB is a core element of the Mechanism, because it determines submission to divergent regulatory frameworks and supervision for entities operating in the same market⁹¹.

Thus, according to art. 6.4 *Regulation 1024/2013*⁹² are considered significant entities those who meet any of the following requirements: the total value of its assets exceed 30,000 million; the ratio of its total assets in respect of the State of establishment GDP exceeds 20%, unless the total value of its assets is less than € 5,000 million⁹³. They also have the quality of significant entities *ope legis*, the three banks larger than a participating Member State and the entities that have received direct financial assistance from the EFSF or the ESM⁹⁴. Finally, the ECB itself have

91. GARCÍA DE CAL, J.L., “El Mecanismo Único de Supervisión: un paso más en largo camino hacia la unión bancaria”, *Revista General del Derecho Europeo*, num. 30, 2013.

92. In applying this criterion the ECB will monitor directly around 150 groups of credit institutions, which represent around 80% of bank assets in the Eurozone.

On September 4, 2014, the ECB has published the list of significant and less significant entities, grouped by States and determine the entities over which the ECB will begin its powers. (Available in <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm-listofsupervisedentities1409es.pdf>).

93. Therefore, as GARCÍA-ÁLVAREZ notes, the size criterion can be estimated both absolute terms and relative terms, depending on the volume of assets in relation to GDP of the Member State of establishment. GARCÍA-ÁLVAREZ, G., “La construcción de una unión bancaria europea: la Autoridad Bancaria Europea, la supervisión prudencial del Banco Central Europeo y el futuro Mecanismo Único de Resolución” en TEJEDOR BIELSA, J.C. y FERNÁNDEZ TORRES, I. (Coord.), *La reforma bancaria en la Unión Europea y en España. El modelo de regulación surgido de la crisis*, Ed. Thomson Reuters-Civitas, Navarra, 2014, p. 108.

94. The inclusion of this criterion has as main purpose the protection of the interests of Europeans taxpayers. VERHELST, S., “Assessing the Single Supervisory Mechanism: Passing the point of no return for Europe’s Banking Union”, *Egmont Paper num. 58*, Royal Institute

jurisdiction to determine the significant relevance of an entity when its activity is international and cross-border asset or liability represents an important part of its total assets or liabilities⁹⁵.

4. Operation of the Mechanism

4.1. The Necessary Cooperation between the ECB and National Supervisory Authorities

This dual monitoring system enshrined in SSM, both territorially and subjective view requires the establishment of important instruments of cooperation between the ECB and national authorities with responsibility for supervision. Moreover, the composition of the Mechanism, which are integrated both the ECB and national supervisors, becomes imperative internal cooperation in the SSM for the effective exercise of their supervisory functions.

In this regard, *Regulation 1024/2013* imposes the ECB and Member States to cooperation, with the aim of achieving an effective and consistent functioning of the Mechanism. Especially, this cooperation acquires a significant importance in the field of information, because national supervisors, for reasons of proximity, can more easily access the information necessary for the exercise of supervisory functions, although they are exercised by the ECB.

for International Relations, Brussels, 2013, p. 19. (Available in <http://www.egmontinstitute.be/wp-content/uploads/2013/07/Egmont-papers-58.pdf>).

95. In this sense, VERHELST considers: “the possibility for the ECB to take charge of the supervision of a bank is a pivotal element in the credibility of the SSM. Without such a provision, the ECB would not be able to exercise its final supervisory authority. Yet, the ECB will have to dare to use its powers to claw back the delegation of supervision when it has doubts regarding a national supervisor’s actions”. *Ibid.* p. 20.

4.2. The Separation of the Functions of Supervision and Monetary Policy

This question takes on a specific dimension in Europe as a result of the constitutional powers of the ECB. As noted, the primary objective, recognized by the Treaties, the ESCB, coordinated by the ECB, is price stability through the exercise of their exclusive competence in monetary policy.

In those circumstances, it was considered essential to establish a series of safeguards designed to prevent potential conflict of interest between the exercise of monetary policy as an essential competence of the ECB, and new prudential supervisory functions. As stated expressly, the ECB opinion issued in the legislative procedure of adoption of *Regulation 1024/2013*, “it is essential to strictly separate monetary policy and supervisory tasks conferred on the ECB, to prevent potential conflicts of interest and ensure autonomous decision-making for the performance of these tasks, while ensuring compliance with the ESCB institutional framework. To that end, appropriate governance structures are needed to ensure separation between these tasks, at the same time allowing the overall structure to benefit from synergies”⁹⁶. In this sense, art. 25.2 of *Regulation 1024/2013* provides that, “the ECB shall carry out the tasks conferred on it by this Regulation without prejudice to and separately from its tasks relating to monetary policy and any other tasks. The tasks conferred on the ECB by this Regulation shall neither interfere with, nor be determined by, its tasks relating to monetary policy. The tasks conferred on the ECB by this Regulation shall moreover not interfere with its tasks in relation to the ESRB or any other tasks”.

The mechanisms established by Regulation to ensure that absolute separation of functions affecting staff by the ECB and the organizational structure created for the exercise of supervisory functions. Thus, the Regu-

96. *Opinion of the European Central Bank of 27 November 2012 on a proposal for a Council regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions and a proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) (CON/2012/96)*. (OJEU February 1, 2013).

lation determines that the personnel involved in the prudential supervisory functions is organizationally separate from the rest of the staff by the ECB, fitting into hierarchical structures differentiated (art. 25.2, paragraph 2 of *Regulation 1024/2013*). Thus, it has created an ad hoc administrative structure responsible for monitoring tasks, claiming an absolute separation of decision-making bodies. The result of this was created the Supervisory Board as a body that happens to be included in the administrative structure of the ECB, which assumes the development of supervisory functions⁹⁷.

However, despite the provisions established by Regulation 1024/2013, organic separation decision can not be absolute. Although the Supervisory Board assumes the development of new functions of the ECB, final decisions, in accordance with art. 129 TFEU will be necessarily adopted by the Governing Council; that is, the same body that deals with monetary policy. Thus, although the regulation requires to set up meetings and orders strictly separate agendas for meetings of the Governing Council for the functions of monetary policy and supervision, seems unfeasible absolute separation alleged by European legislation⁹⁸.

4.3. The Broad Powers of the Mechanism

Following a broad conception of the role of public supervision of credit institutions, *Regulation 1024/2013* confers on the ECB, in cooperation with the national authorities, a broad set of powers (art. 4.1 of *Regulation 1024/2013*).

- Prior authorization of credit institutions established in Member States and, where appropriate, their revocation; competition authority on all credit institutions of the Member States, irrespective of their possible significant nature spread.

97. OLESTI RAYO, A., “La estabilidad financiera en la Unión Europea y la supervisión prudencial de las entidades de crédito”, *Revista de Derecho Comunitario Europeo*, núm. 48, 2014. p. 437.

98. VERHELST, S., “Assessing the Single Supervisory Mechanism: Passing the point of no return for Europe’s Banking Union”, *loc. cit.*, p. 29. As the author concludes, “both on the national and the European level there is hence no Chinese wall between bank supervision and monetary policy”.

- Perform functions that correspond to the competent authority of the Member State of origin under European Union law, in relation to credit institutions established in a participating Member State wishing to establish a branch or provide cross-border services in a Member State competitor.
- Evaluation of notifications of acquisition and sale of qualifying holdings of credit institutions.
- Monitor whether credit institutions and funds guarantee adequate management and coverage of their risks.
- Proceed to the “consolidated supervision” of the parent companies of credit institutions established in one of the participating Member States.
- Participate in the supplementary supervision of financial conglomerates in relation to credit institutions that are part of them, assuming the role of coordinator in accordance with EU law.
- Supervision on resolution plans and early intervention, when a credit institution fails or will probably violating prudential requirements.

4.4. Accountability

Although, in accordance with the provisions of art. 130 TFEU, the ECB shall act independently in the exercise of their functions, it appears linked to the constitutional functions of the ECB, that is, the independence is recognized for the development by the ECB’s monetary policy. However, as noted Professor LASTRA independence in monetary policy need not have the same scope and intensity of supervision on financial supervision⁹⁹.

The essential complement to the independent exercise of their functions is mandatory accountability of the ECB in the performance of their supervisory functions. The assumption of these responsibilities by the

99. LASTRA, R.M., “Institutional Design of Supervision”, en LASTRA, R.M. (Ed.), LASTRA, R.M., *Legal Foundations of International Monetary Stability*, 1^a ed., Ed Oxford University Press, Oxford, 2006, p. 102.

ECB must be inevitably accompanied by the establishment of an effective system to ensure transparency and accountability, mainly to the Council and the European Parliament, while Institutions hold democratic legitimacy of the States members of the Union¹⁰⁰. These requirements are specified in the public reporting by the Supervisory Board before the European Parliament and to the *Eurogroup* and the possibility that these Institutions can address questions about the development of supervisory functions (art. 20 of Regulation 1024 / 2013). In addition, the system is completed with established accountability mechanisms not only to the Community Institutions, but also to the States themselves. Thus, the Supervisory Board is required to submit these reports monitoring to national parliaments, which may also submit comments and questions to the ECB itself on the development of its supervisory activities (art. 21 of Regulation 1024/2013).

4.5. Financing of the Mechanism

The SSM financing system is structured on the establishment of a fee, to be paid by the entities whose supervision is carried out under the SSM own (art. 30 of *Regulation 1024/2013*), i.e., all those established in a participating member State (including branches of third States).

The central element set for calculating the rate for each entity is its own risk profile¹⁰¹; must not be a benefit to the ECB in relation to the estimate for the exercise of supervisory functions expense.

100. VERHELST, S., "Assessing the Single Supervisory Mechanism: Passing the point of no return for Europe's Banking Union", *loc. cit.*, p. 29. As the author continues, "supervisory decision-making is more prone to subjective elements than monetary policy. Therefore, bank supervisory tasks call for a substantial degree of accountability, which is to a certain extent in contrast to the accountability that is needed for monetary policy".

101. UGENA TORREJÓN, R., *Revista de Derecho de la Unión Europea*, num. 28, 2015, pp. 155-156.

IV. Conclusions

The financial crisis highlighted the inadequacy of existing supervisory model, based solely on national powers, having not worked well cooperation mechanisms between national supervisors under EU law. Therefore, in response to the financial crisis and in order to accommodate the growing level of integration present European financial markets, known as the European System of Financial Supervision was created. This system was structured on an integrated cooperation on micro-prudential supervision level and the creation of a specific body with powers of *macroprudential* supervision.

In the process of development of the banking union, there has been the centralization of the functions of prudential supervision in the framework of a single monitoring mechanism, which is structured on the following basic principles: an integrated by the ECB system and supervisors national, under the ultimate responsibility of the ECB; separation of supervisory functions and monetary policy, independence in the exercise of its functions and democratic control. Furthermore, although the mechanism will apply automatically to all Member States of the Eurozone, it is allowed the incorporation of other States of the Union, in order to respect the unity of the internal market. Although it has followed the formal procedure laid down in the Treaty on the Functioning of the European Union, the broad functions attributed to the ECB in prudential supervision can undermine its constitutional configuration, including a significant decrease in its independence.

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The Challenge to the Transparency of the European Union: Lobbies

LORENA CHANO REGAÑA

1. Introduction

The desire to influence the decisions political by means of persons or groups is something inherent in public life. In every period of history has existed an interaction between political community and interests groups.¹⁰² Society demands concrete answers and is structured, not only as political parties, but also as groups who have a particular interest and try to influence the institutions to achieve measures that satisfy their interest.

Associations of people who defend a common interest have always existed. They are the basic institution, natural, against political parties.¹⁰³ The difference is that while political parties held a wide range of inter-

102. ÁLVAREZ VÉLEZ, M.I. and DE MONTALVO JÄÄSKELÄINEN, F., “Los lobbies en el marco de la Unión Europea: una reflexión a propósito de su regulación en España”, *Teoría y realidad constitucional*, num. 33, 2014, UNED, p. 360.

103. DUVERGER, M., *Introducción a la política*, Ariel, Barcelona, 1997, p. 201.

ests and try to satisfy to broad sectors of society, the interest group is just confined a certain interest. Lobbies, as opposed to political parties are not intended to access political power, but simply to influence it. The goal is to obtain political decisions that are favorable to the represented interests.¹⁰⁴

The fact that a group of people shows interest in political decisions, laws and policies than affect them is not necessarily unlawful, not in the least illegal. What is more, the dialogue between institutions and civil society could be described as natural and even beneficial. The existence of intermediaries that articulate this dialogue would be useful to translate the social, economic and civil needs to the institutions responsible for decision-making.¹⁰⁵ In this way, lobbying appears as a useful tool for the interaction of society and public authorities. If it is so, which is the problem? Why does the term appear linked to ideas of corruption and influence peddling? Why is lobbying a challenge to transparency in the European Union?

The following pages will attempt to respond to these questions and reflect the underlying problem.

2. CONCEPTUAL DELIMITATION: LOBBY, LOBBYING Y LOBBISTA

According to the Dictionary of Real Spanish Academy, “lobby” is an Anglo-Saxon term that responds to a double sense: on one side, “hall” (that is to say the area next to the entrance into the living-room)¹⁰⁶; and, on the other hand, “pressure group”. If we delve into the definition that the text gives to us about “pressure group”, we could throw the following defini-

104. ÁLVAREZ VÉLEZ, M.I. and DE MONTALVO JÄÄSKELÄINEN, F., *ob. cit.*, p. 361.

105. HABERMAS, *Problemas de legitimación en el capitalismo tardío*, Cátedra, Madrid, 199, pp. 128 and following.

106. Note the metaphor used to nominate lobbyists: “lobby” is the hall of the institutions, where the phenomenon of lobbying happens.

tion of “lobby”: “Set of people that influences an organization, sphere or social activity in their own interests.”

Three basic characters can be drawn from this definition:

- Firstly, group character, i.e. it has to be a “group of people” who are grouped under a common interest, aside from the “political party” or “trade union” formats. The right to freedom of Association is a fundamental right recognized both at the State level by the different Member States of the European Union and in the own right of the European Union. Thus, article 12 of the Charter of Fundamental Rights of European Union¹⁰⁷ says: “1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests. 2. Political parties at Union level contribute to expressing the political will of the citizens of the Union.” Limits to these characteristics would include any form of illicit association, classified as illegal, criminal or terrorist, according to the specific legislation on the matter.
- Secondly, “interested character”, that is, the group acts “for the benefit of their own interests”, which denotes that there has to exist a common interest. This interest has to be a legitimate interest. Legitimate interest means that you must not pursue any illicit activity, civil, administrative or criminal one. Difficulty is to determine if economic interest is legitimate. Some authors argue that it should not mediate lucrative interest, but political or social.¹⁰⁸ However it must be noted that the majority of the lobbies in the scope of the European Union

107. The latest consolidated versions have been used for references to the current text of the Treaty on European Union (TEU), Treaty on the Functioning of the European Union (TFEU) and the Charter of Fundamental Rights of the European Union (the Charter). They are published in DOUE C-326, on 26th October 2012.

108. ÁLVAREZ VÉLEZ, M.I. and DE MONTALVO JÄÄSKELÄINEN, F., *ob. cit.*, p. 362.

are economic.¹⁰⁹ And that economic interest of huge business groups is the spirit that moves to the lobbies that represent them, although they require another type of measures and interact with political power.

- The third element is “influence”. The objective of this group of people is to influence “in an organization, sphere or social activity”. Or in terms more emphatic, “press” to the institutions responsible for decision-making and legislation.

In other words, the “lobby” is the tool whereby the translation of private interests to the public institutions is articulated, since these institutions exercise the decision-making and legislative powers in the European Union. This involves the approximation of civil society, the economic sector and the various social groups to the laws and policies that are approved in a democratic system.¹¹⁰

The “lobbying” is the professionalization of the activity of interaction between both spheres.

The “lobbyist” would be the name given by the professional who is dedicated to carry on the business of lobbying.

3. Applicable Legal Framework

One of the major challenges facing the European Union in relation to the phenomenon of lobbies is this activity is vague and is not institutionalized in a uniform manner. Unlike political parties or trade unions, lobbies have not a regulation that would ensure the exercise of the activity in a way legitimate and free of suspicions of corruption and influence peddling.

The institutions of the European Union, especially the Commission, have been developed in parallel to the lobbying phenomenon. According to MO-

109. On 22nd June 2016 there are 9.438 organizations registered in the register, of which over 60% are in the economic sector. Statistics are available on the website:

<http://ec.europa.eu/transparencyregister/public/homePage.do#>

110. To deepen the conceptual framework: *vid.* ALONSO PELEGRÍN, E., *El lobby en la Unión Europea. Manual sobre el buen uso de Bruselas*, Editorial Esic, Madrid, 1995, pp. 31-121.

RATA, the drivers of the process of integration of the European Union always considered of vital importance the role of pressure groups to “establish stable relations among economic and social elites of the States members and the high authority CECA (predecessor of the European Commission)”, with the aim of advancing the process of European integration.¹¹¹ Discussions on the Single European Act (in force since 1987) have highlighted the importance of non-governmental economic and social actors in the European integration and the need for a regulation on the system of representation of the Community interest.¹¹² The scenario of the European Union is appropriate for the proliferation of these groups, since the complexity, the originality and the fragmentation of the European institutional architecture offer greater accessibility to those non-governmental actors.

The “constitutional”¹¹³ basis to the existence of lobbies is placed in article 11.1, 2 and 3 of the Treaty on European Union (hereinafter, TEU), which establishes:

1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.
2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.
3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union’s actions are coherent and transparent.

Article 151 of the Treaty on the Functioning of the European Union (hereinafter, TFEU) establishes “the Union will recognize and promote the role of the social partners in your area,” facilitating dialogue among them.

111. MORATA, F., “Influir para decidir: la incidencia de los lobbies en la Unión Europea”, *Revista de Estudios Políticos (Nueva Época)*, núm. 90, 1995, p. 131.

112. *Ibid.* More information:

<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:xy0027&from=ES>

113. I mean by this adjective to the legal basis in European law.

Apart from the Primary law, there is a code of good practices to be observed by lobbies, as well as performance standards to be followed by these groups and their members.¹¹⁴ Broadly speaking, the process of normalization can be summarized as follows.¹¹⁵

Of concern for transparency, the first attempt to regulate the activity comes with the “White Paper on European Governance”¹¹⁶, which pretended to achieve “greater transparency and greater responsibility of all participating” in the process of policy-making in the European Union, as well as “a greater degree of consultation and participation, a more open use of the knowledge of experts and a new approach to planning in the medium term” for “analyze a form much more “critical pressures of institutions and stakeholders in favor of new political initiatives”.

In response to the commitments made in the White Paper, the Commission publishes a communication in 2002 under the title “Towards a reinforced culture of consultation and dialogue – Proposal for general principles and minimum standards for consultation of interested parties by the Commission”.¹¹⁷ The Commission expressed the importance of the played role by lobbyists as a link between citizens and the European institutions and establishes a series of general principles that should govern its relations with the parties concerned, as well as a set of minimum standards for the procedures of consultation of the Commission.

For its part, the “Green Paper – European Transparency initiative”¹¹⁸,

114. The code of conduct appears in Annex III to the interinstitutional agreement between the Commission and Parliament published on 19th April 2014. Available on the website: [HTTP://EUR-LEX.EUROPA.EU/LEGAL-CONTENT/ES/TXT/?URI=URISERV:OJ.L_.2014.277.01.0011.01.ENG](http://eur-lex.europa.eu/legal-content/es/txt/?uri=uriserv:OJ.L_.2014.277.01.0011.01.ENG)

115. A fortiori, more information: RODRÍGUEZ TORRES, M.C., “Marco regulatorio de las actividades de los lobbies en la Unión Europea”, *Revista General de Derecho Europeo*, num. 39, 2016, pp. 1-38.

116. Available on the website:

<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:l10109&from=ES>

117. Available on the website:

<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52002DC0277&from=ES>

118. Available on the website:

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52006DC0194>

drawn up by the Commission in May 2006 defines lobbying as “a legitimate part of the democratic system, regardless of whether it is carried out by individual citizens or companies, civil society organizations and other interest groups or firms working on behalf of third parties (public affairs professionals, think-tanks and lawyers)”. According to the Green Paper “lobbying activity” means all activities carried out with the aim of influencing the processes of elaboration of policies and decision making of the European institutions. In the opinion of the Commission, interest groups can be divided into non-profit (European, national and international federations, associations) and organizations for profit (legal advisors, public and private companies and consultants).

Concern about the lack of transparency is manifested by an attempt to regulate the activity of lobbies by the Commission and the European Parliament jointly. The European Parliament launched its register of interest groups in 1996; the European Commission, for its part, began its own voluntary register in June 2008. On 23rd June, 2011 is signed an “Agreement between the European Parliament and the European Commission on the establishment of a transparency register for organizations and self-employed individuals engaged in EU policy-making and policy implementation”.¹¹⁹

The Transparency Register is a voluntary system, based on an interactive public tool.¹²⁰ It offers citizens a simple and direct access to information about the participants in the taking of decisions, pursued interests and resources used. This register is complemented by a unique code of conduct. The code includes a set of ethical principles based on the goodwill of the parties. The agreement¹²¹ also includes a mechanism for complaints and sanctions to ensure compliance with the code. Penalties

119. Available on the website:

[**http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32011Q0722\(01\)**](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32011Q0722(01))

120. Available on the website:

[**http://ec.europa.eu/transparencyregister/public/homePage.do?locale=en#en**](http://ec.europa.eu/transparencyregister/public/homePage.do?locale=en#en)

121. Available on the website:

[**http://eur-lex.europa.eu/legal-content/es/TXT/?uri=uriserv:OJ.L_.2014.277.01.0011.01.ENG**](http://eur-lex.europa.eu/legal-content/es/TXT/?uri=uriserv:OJ.L_.2014.277.01.0011.01.ENG)

are the expulsion of the register and the prohibition of entry into institutions. Note that sanctions are overcome and nothing burdensome.

In line with the transparency, we must include also the “European Parliament decision of 1st December 2011 amending the Rules of Procedure relating to a Code of Conduct for Members of the European Parliament with respect to financial interests and conflicts of interest”¹²², that from this date obliges European Commissioners and Members of Parliament to declare remunerated activities performed outside of Parliament. To this should be added the regulation of the so-called “legislative footprint”, under which, the Members of the European Parliament must attach a document that includes the list of all groups with which they have gathered during the elaboration of the report.

Finally and in regards to efforts to achieve transparency, political orientations of President Juncker¹²³ and the Commission work programme for this year 2016¹²⁴ assume the commitment whereby the Commission will propose a new transparency register that will be compulsory for all institutions of the EU. The objective is that citizenship has knowledge about who seek to influence the European Parliament, the Council and the Commission in the framework of the legislative process.

Projected changes in the Transparency Register are part of a broader commitment to reform the formulation of EU policies. In its “Programme of improvement of the legislation”¹²⁵, presented in May 2015, the Commission made a commitment to open its policy-making process the views and control the population. In this regard mechanisms and interactive tools like consultations to citizens, initial impact assessments or roadmaps have been set up¹²⁶.

122. Available on the website:

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52011DP0540>

123. Available on the website:

https://ec.europa.eu/priorities/publications/president-junckers-political-guidelines_en

124. Available on the website: http://ec.europa.eu/atwork/pdf/cwp_2016_en.pdf

125. Available on the website: http://europa.eu/rapid/press-release_IP-15-4988_en.htm

126. An example has been the public consultation on the proposal for a mandatory

The fact is that, despite the attempts of visibility and transparency of the institutions of the European Union, an aura of mistrust and corruption involves lobbying activity. Lobbying is a diffuse and blurred activity that walks between legality and illegality and whose exercise arouses quite controversies.

4. Problematic Dimension: Lobbies and Transparency in the European Union

If we start from the initial definition, which considered lobbying as the professional activity of dialogue between different social actors and institutions responsible for the development of legislation and policies in a democratic system, we can infer the existence of them is not illegal, but that its illegality comes from the method by which its activity is articulated. It means that the system is perverted when employed methods are vitiated. But, how to detect that the methods employed are flawed? Where is the fine line that separates lobbying from influences peddling and corruption? Perhaps in the benefits that can be obtained by those who are at the forefront of institutions and by who let influence in exchange for any privilege in the present or in the future? Perhaps in the use of the information in a way not transparent for the benefit of some lobbies that have access to that information, while others ones have not access...? Whatever the answer, the truth is that the line that separates legitimate access and influence public authorities from suspicious and corrupted activities, is very thin and not always delimited.

The legal position of lobbies in the European Union has been contextualized and has been shown as the conglomerate of precepts and rules is nothing but a set of declarations of good intentions and mere ethical

commitments of optional nature, which do not have practical effects and whose non-compliance does not have greater consequences to be expelled from the voluntary Register, or, at most, the prohibition to entry into institutions. This last sanction, configured as the strictest measure to respond to breaches of the code of good practice, is reduced to nothing, because you can sort through the creation of another lobby.

In this context, the question is: could the solution be a legal regulation on transparency and a compulsory register, as the Commission Junker observes? Is it effective that citizens know who meets each Commissioner with and for what purpose? In that way, would speculation finish? Would lobbying develop legitimately and with guarantees for civil society?

Before answering these questions, other big problem in relation to lobbies remains to be addressed. I am referring to the connivance of the lobbies with the European institutions, in particular, with the Commission, where we note that lobbyists and the Commissioners live together every day and share spaces, making it difficult to determine, in some cases, where the legislative initiative originates: If in the Commission in accordance with European Union law, or in lobbies. This collusion is easily observable in buildings of the European institutions. It is difficult to control meetings that Commissioners can have with lobbyists every day, when they share their space with the representatives of the main lobbies in Brussels.

In this case, the challenge that the European Union must assume is how regulate or articulate this collusion of interests within European institutions. The problem lies in that the debate and the conspiracy are generated in an extralegal and opaque space, or at least, in a space where the legality is attenuated.¹²⁷

Another point in this regard is that this connivance does not occur between the European Union and any lobby, but only with respect to those

127. CRIADO DE DIEGO, M., "On the Concept of Political Representation: Broad Lines for the Study of Representative Democracy Transformations", *Revista Derecho del Estado*, num. 28, January-June, 2012, pp. 97 and 98.

interests groups that have power and economic sufficiency to have a headquarters in Brussels and pay specialized people (lobbyists) to represent their interests. Here, in the possibility of exercising influence, it is detected a certain inequality. This inequality, result of the exacerbated capitalist system, is the key to the deficiency of the system and to the structural problem of corruption and influences peddling that affects the European Union.

5. Conclusions

In relation to the transparency of the European Union and to the activity of lobbies in the institutions, the following problems have been detected:

- I. Lobbies are inorganic bodies apart from the institutional architecture of the European Union with influence in decision-making and in the implementation of public policies. In the absence of democratic legitimacy and distance of the citizenship regarding the institutional powers of the EU, lobbies have played the model of social action at European level. Initially, this would not be open to criticism. The problem is in the identification of legitimate interests and in the use of legal methods to access and exercise influence.
- II. The activity carried out is diffuse and is not institutionalized in a uniform manner. In contrast to political parties or trade unions, lobbies have not a regulation that would ensure the exercise of the activity in a legitimate way and free of suspicions of corruption and influence peddling.
- III. All measures that have so far been taken to achieve transparency in lobbying are mere declarations of will of optional character that has no practical effects neither any real sanctioning effects.
- IV. The most serious problem that has been detected is the connivance of lobbies with the European institutions. This collusion is only possible for those lobbies with headquarters in Brussels. This is reflection of the inequality and structural failures of the democratic system of the European Union.

Faced with these problems the question asked is: could the solution be a legal regulation on transparency and a compulsory register, as the Commission Junker observes?

The answer is negative. The problem is structural. The European Union is structured on a set of scales, in which the upper scale is unavailable for the lower scales. In the top are big business and commercial, economic and professional corporations that have economic resources to be present in Brussels and the ability to influence. Regardless of having or not a legal regulation, lobbies of large companies and the economic sector are those who will be present at European level.

This will not change because a compulsory register of lobbies is established, or the fact of informing about the activity of the Commission, the Parliament and the Council. This way it would improve transparency and access to information by citizens. In addition, there would be a greater control of regulated activities of lobbying. However, the structural problem of segregation in scales in the European Union would not end. Connivance of lobbies and the decision-making power would not finish. There would still be conspiracy.

6. Teaching Resources

Audiovisual:

- Viewing of the documentary: “Business in Brussels”, available on the website: <https://www.youtube.com/watch?v=l6hoAGdYVIs>

Interactive:

- Website of Transparency Register, available on:
- <http://ec.europa.eu/transparencyregister/public/homePage.do>
- Public consultation on the proposal for a mandatory Transparency Register: http://ec.europa.eu/transparency/civil_society/public_consultation_es.htm
- Results and more information about the consultation:
- <http://ec.europa.eu/transparencyregister/public/staticPage/displayStaticPage.do?reference=NEWS&locale=es>

- Website of the European Parliament in relation to ethics, transparency and interest groups:
- <http://www.europarl.europa.eu/atyourservice/es/20150201PVL00051/Grupos-de-inter%C3%A9s>

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CRIADO DE DIEGO, M., “On the Concept of Political Representation: Broad Lines for the Study of Representative Democracy Transformations”, *Revista Derecho del Estado*, num. 28, January-June, 2012, pp. 77-114.

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RODRÍGUEZ TORRES, M.C., “Marco regulatorio de las actividades de los lobbies en la Unión Europea”, *Revista General de Derecho Europeo*, num. 39, 2016, pp. 1-38.

Legislation available on the website:

<http://eur-lex.europa.eu/collection/eu-law.html?locale=en>

Other websites for more information:

Website of European Transparency portal:

http://ec.europa.eu/transparency/index_es.htm

Website of Transparency Register:

<http://ec.europa.eu/transparencyregister/public/homePage.do>

Website of the European Parliament:

[http://www.europarl.europa.eu/atyourservice/es/20150201PVL00051/
Grupos-de-inter%C3%A9s](http://www.europarl.europa.eu/atyourservice/es/20150201PVL00051/Grupos-de-inter%C3%A9s)

Website of European Consilium:

[http://www.consilium.europa.eu/es/general-secretariat/corporate-
policies/transparency/](http://www.consilium.europa.eu/es/general-secretariat/corporate-policies/transparency/)

RIGHTS

Taking Social Dimension “Seriously”? Analyzing Juncker’s Proposal on “a European Pillar of Social Rights”

AINHOA LASA LÓPEZ

I. Why Now Is the Time to Rebalance the Social Rights at European Economic Governance?

The current debate about the management of the euro zone crisis focuses, on one hand, on correcting the failures of the structural design of the Economic and Monetary Union (six pack, two pack, European Semester), and, on the other, on the necessary incorporation of mechanisms of positive integration to act as a counterweight to the unconditioned centrality of the market¹²⁸. We will focus in this second dimension, that is, the positive integration.

128. Schellinger, A., “Giving teeth to the EU’ social dimension. Dismal failure and promising potential”, *International Policy Analysis*, Friedrich-Ebert-Stiftung, September 2015, available at: <http://library.fes.de/pdf-files/id/ipa/11649.pdf> (last retrieved 25/04/2016). Vandebroucke, F., Vanhercke, B., A European Social Union: 10 tough nuts to crack. Background

Regarding to this, it is important to mention the Five Presidents’ Report “Completing Europe’s Economic and Monetary Union”¹²⁹. In particular, the chapter entitled “Towards Economic Union – Convergence, Prosperity and Social Cohesion” deserves special attention because it stresses the unavoidable correlation between an efficient transnational social model and a smooth functioning of the European Economic and Monetary Union (EMU). Specifically, a stronger focus on employment and social performance as an economic necessity, “For *EMU* to succeed, labour markets and welfare systems need to function well and in a fair manner in all euro area Member States. Hence, *employment and social concerns* must feature highly in the *European Semester*”¹³⁰.

As it can be observed three words have been, on purpose, underlined, social values, EMU and European Semester. The main reason is that the Five Presidents understand the necessity of a real European Social Union as a functional necessity, not an autonomous one. Precisely, this nuance is the cornerstone to appreciate the causes and effects of the persistent asymmetry between social governance and economic governance.

Considering this premise, the first objective is to define the key aspects involved in the relationship positive integration-negative integration. Secondly, once defined the spaces for the development of a European social normative framework, we will introduce the preliminary outline of Social Rights Pillar in order to identify its more relevant proposals. Thirdly, taking account of structuring the public consultation about the Pillar, we will select some questions included in the three categories around

report for the Friends of Europe High-Level Group on ‘Social Union’, Spring 2014, available at: <http://www.friendsofeurope.org/media/uploads/2014/10/03-03-14-Report-SocialUnion-FINAL-V-2.pdf>

(last retrieved 25/04/2016), pages 1-159, in particular, 49-62. VV.AA. Resocialising Europe in a time of crisis. Countouris, N & Freeland, M (ed.), Cambridge University Press, 2013.

129. Available at: https://ec.europa.eu/priorities/publications/five-presidents-report-completing-europes-economic-and-monetary-union_en (last retrieved 25/04/2016)

130. Five Presidents’ Report, op. cit., p. 9

which the consultation is divided. Finally, the conclusions will be show a critical perspective on the potentialities of Juncker’s strategy to earn a “social triple A”.

Beginning with the definitions, the term social model has to be considered at European arena without bearing in mind the meaning of this concept in the constitutional traditions common to the Member States (MS). Despite the current division competence design of the Treaties on social and employment policy, the European social model adopts the parameters linked to the fundamental principles (market economy with free competition), giving unity to the European constitutional design. Its institutional complex is built from a new material reality, market constitutionalism, opposed to that of the Social State. The definition of social intervention for and from the market, introduced by the term “social market economy”, involves a new centrality, the centrality of the market. There is not a dialectical relationship between market and social justice, simply, because the first element has a residual effect, “to be agree with the internal market”. Within the highly competitive social market economy (Article 3 of TEU, paragraph 3), the absence of a European social and employment policy unrelated to the market is justified by the conditioning of its conformity with the market.

Consequently, the setting of social goals and objectives recognized by the Treaties are supposed to be reached by the monetary and economic demands of the EMU, the one and only ground of the European market constitutionalism model. This reflection involves considering social model from the EMU’s criteria, disregarding any reference to social model linked Social State. Under the auspices of a reinforced architecture for EMU, the new legislative pack of European Economic Governance (EEG) has been materialised in the reform of the Stability and Growth Pact (SGP), the Euro Plus Pact (EPP), the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), and the Treaty establishing the European Stability Mechanism (TESM).

The relevant of the reformed EMU is that it introduces stricter mechanisms consolidating the cannons of the monetary union, control of the

inflation and public debt. Besides, the new EEG rules and related monitoring operate within the framework of the European Semester, a yearly cycle of economic policy coordination. Its task is to assess national economic and fiscal policies before they are adopted by the MS. In particular, the European Semester covers 3 blocks of economic policy coordination: structural reforms, focusing on promoting growth and employment in line with the Europe 2020 strategy; fiscal policies, in order to ensure sustainability of public finances in line with the SGP prevention of excessive macroeconomic imbalances¹³¹.

The most remarkable aspect that pervades this “*nouveau*” EMU’s architecture is that it questions the balance between the respect for national sovereignty in the definition and direction of economic policies and the maintenance of a sustainable economic convergence¹³². Although it is important to note that this lack of symmetry is not something new. The Maastricht Treaty meant the beginning of the end of economic government and the assumption by euro area MS of new principles and fundamental values clearly opposed to social constitutionalism, from social link to economic bond.

So, under these premises, the notion of social rights in the European legal order adopts a different constitutional basis to those of the Social State. First, European social rights have not a constitutional force equivalent to the fundamental economic rights of free movement and market

131. For more information about the functioning of the European Semester: <http://www.consilium.europa.eu/en/policies/european-semester/> (last retrieved 25/04/2016).

132. Craig, Paul. P. “Economic governance and the Euro crisis: constitutional architecture and constitutional implications”, *Oxford Legal Studies Research Paper*, n° 3, 2014, pp. 19-40. VV.AA. Redefining European Monetary Union governance in light of the euro zone crisis. CIDOB, 2015. Woodruff, David. M. “Governing by the panic: the politics of the eurozone crisis”, *LEQS Papers*, n° 81, 2014, pp. 1-62. Varoufakis, Y. Holland, S. Galbraith, James K. A modest proposal for resolving the eurozone crisis, 2013, available at: <https://varoufakis.files.wordpress.com/2013/07/a-modest-proposal-for-resolving-the-eurozone-crisis-version-4-0-final1.pdf> (last retrieved 25/04/2016).

access. They are mere parameters of normative legitimacy, additional rights to economic freedom. Second, this configuration impedes the consolidation at European level of legally binding regulatory safeguards. Social policy appears as a set of good promises that MS and EU should have in mind. The unequal relationship between the social aims and the need to maintain the competitiveness of the Union’s economy reveals the mercantilisation of social rights at European space (Article 151 of TFEU). At the same time, employment policy is subject to the objective of following the monetarism’s constraints, without parallel resources to give to right to work a social and political effect (Articles 145, 146.1 of TFEU). European social rights are introduced in a vicious circle where they can only be promoted according to the rationality of the economic calculation¹³³.

II. European Pillar of Social Rights: Much Ado about Nothing?

On 9 September 2015, Juncker in his State of the Union speech “Time for honesty, Unity and Solidarity” to the European Parliament (EP)¹³⁴ announced his desire to develop a European Pillar of Social Rights. “We have to step up the work for a fair and truly pan-European labour market. Fairness in this context means promoting and safeguarding the free movement of citizens as a fundamental right of our Union, while avoiding cases of abuses and risks of social dumping. (...) As part of these efforts, I will want to develop a European pillar of social rights, which takes account

133. Pye, R., Owen, P. “The unfulfilled promise of social rights in crisis EU”, *SPERI, Sheffield Political Economy Research Institute*, n° 26, 2016, pp. 1-20. VV.AA. *Social Rights in Times of Crisis in the Eurozone: the role of fundamental rights’ challenges*. Kilpatrick, K. De Witte, B (ed.) *EUI Working Papers Law*, n° 5, 2014, pp. 1-126. Giubboni, S. “European citizenship and social rights in times of crisis”, Centro Einaudi • Laboratorio di Politica Comparata e Filosofia Pubblica, Working Paper-LPF, n° 2, 2013, p. 1-34.

134. Available at: http://europa.eu/rapid/press-release_SPEECH-15-5614_en.htm (last retrieved 25/04/2016)

of the changing realities of Europe’s societies and the world of work. And which can serve as a compass for the renewed convergence within the euro area. This European pillar of social rights should complement what we have already jointly achieved when it comes to the protection of workers in the EU. I will expect social partners to play a central role in this process”.

The draft Pillar focuses on the binomial indirect regulation-social safeguards covering three areas of social rights¹³⁵:

- *“Equal opportunities and access to the labour market, including skills development and life-long learning and active support for employment, to increase employment opportunities, facilitate transitions between different statuses and improve the employability of individuals.*
- *Fair working conditions, setting an adequate and reliable balance of rights and obligations between workers and employers, as well as between flexibility and security elements, to facilitate job creation, take-up and the adaptability of firms, and promoting social dialogue.*
- *Adequate and sustainable social protection and access to high quality essential services, including childcare, healthcare and long-term care, to ensure dignified living and protection against risks and to enable individuals to participate fully in employment and more generally in society.”*

This initiative is targeted to the euro area. Therefore, this means that it has to take into account the grounds around which EMU is built. Moreover, the Pillar takes as reference and complements the EU social “*acquis*”. Therefore, the body of social rules recognize by the sources of European Union Law. The social field sets out in EU primary law (the Treaty

135. Moreover, the draft identifies 20 policy domains within these three areas, included in the public consultation as we will see in the next chapter.

on European Union¹³⁶/TEU, the Treaty on the Functioning of the European Union¹³⁷/TFEU, and the European Charter of Fundamental Rights¹³⁸ / CFREU), and in the secondary EU law (particularly, through Directives¹³⁹).

136. Article 3 TEU, to work for the sustainable development based on a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection. The EU shall combat social exclusion and discrimination, promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall also promote economic, social and territorial cohesion, and solidarity among Member States.

137. Article 9 TFEU that prescribes a social ‘mainstreaming’ obligation, stating that in defining and implementing its policies and activities, the EU shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection and the fight against social exclusion. Articles 145, 148, 162, 165 and 168 TFEU on employment guidelines, the European Social Fund, education and health. Article 153 TFEU, the Social Policy Title X. to improve working conditions, social security and social protection, workers’ health and safety, information and consultation of workers, and the integration of persons excluded from the labour market. Articles 152, 154 and 155 TFEU provide the legal framework for this European-level social dialogue.

138. The prohibition of forced labour (Article 5), respect for private and family life (Article 7), freedom of association (Article 12), the freedom to choose an occupation and right to engage in work in any Member State (Article 15), the right not to be discriminated on only ground (Article 21), the equality between men and women in all areas, including employment, work and pay (Article 23), the right to information and consultation within the undertaking (Article 27), the right of collective bargaining and action (Article 28), the right to a free placement service (Article 29), the right to protection in the event of unjustified dismissal (Article 30), the right to fair and just working conditions, to maximum working hours, breaks and holiday (Article 31), the prohibition of child labour and protection of young people at work (Article 32), and the entitlement to social security and assistance (Article 34).

139. Among others: on worker’s health and safety (Framework Directive 89/391/EEC), and working conditions: Directive 91/533/EEC (Written Statement); Directive 94/33/EC (Young People at Work); Directive 2008/104/EC (Temporary Agency Work); Directive 2008/94/EC (protection of employees in the event of the insolvency of their employer); Directive 1997/81/EC (Part-time work); Directive 1999/70/EC (Fixed-term work); 2002/14/EC (Information and Consultation Directive); Directive 2003/88/EC (Working Time) and Directives 2000/78/EC (non-discrimination on the grounds of religion or belief, disability, age or sexual orientation) and 2000/43/EC (racial equality).

As we have observed, the normative basis to implement social “*acquis*”, namely social and employment policy, are sterile to provide regulatory safeguards. This joint to the transfer of the effects of positive integration-social model into the field of EMU-negative integration, limits the legal effect of the social provisions. The same approach to the EU Charter. The generic forwarding to national and European legislation puts the direct source of these provisions in the market constitutionalism area, and above all, reduces social rights to a lower bond than the one derived from the debate on the programmatic rules¹⁴⁰. It is also relevant the emphasis on social partners, when their voices have remained “in pause” during the management of the euro zone’s crisis.

Finally, as the European Commission informs in its fact sheet “Towards a European Pillar of Social Rights – Questions and Answers¹⁴¹”, “the principles proposed do not replace existing rights but offer a way to assess and in future, approximate for the better the performance of national employment and social policies”. The final target, once established the Pillar, is to act as the reference framework to drive the process of reforms at national level, or what is the same, to consolidate a minimum social floor of standards to promote sustainable deregulation in order to make convergent the renewed EMU and the social and employment policy of market constitutionalism.

III. The Public Consultation on the Pillar

Following Juncker’s guidelines, the European Commission launched a broad consultation on European Pillar, on 8 March 2016¹⁴². It is open to

140. Lasa López, A., *Los derechos sociales en el constitucionalismo de mercado: aporías de la dimensión social en la Unión Europea*, Servicio Editorial Universidad del País Vasco, 2012, pp. 113-118.

141. Available at: http://europa.eu/rapid/press-release_MEMO-16-545_en.htm (last retrieved 25/04/2016).

142. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Launching a

not only to other EU institutions and MS, but also to social partners, civil society, academics and citizens. The main goal is to generate an open and polyhedral debate to reflect on its scope, content and role. The consultation process will conclude by 31 December 2016. Considering the results the Commission will present a proposal on the Pillar of Social Rights early 2017.

The consultation is structured through the next questions¹⁴³:

*“On the social situation and EU social “acquis”*¹⁴⁴

1. What do you see as most pressing employment and social priorities?
2. How can we account for different employment and social situations across Europe?

consultation on a European Pillar of Social Rights. Strasbourg, 8.3.2016, COM (2016) 127 final. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1457706909489&uri=COM:2016:127:FIN> (last retrieved 25/04/2016). See also: ANNEX First preliminary outline of a European Pillar of Social Rights. Accompanying to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Launching a consultation on a European Pillar of Social Rights {SWD (2016) 50 final}{SWD(2016) 51 final}. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2016:127:FIN#document2> (last retrieved 25/04/2016). Commission staff working document. Key economic, employment and social trends behind a European Pillar of Social Rights. Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Launching a consultation on a European Pillar of Social Rights. Strasbourg, 8.3.2016. SWD(2016) 51 final. Available at: <http://ec.europa.eu/social/main.jsp?catId=89&langId=es&newsId=2487&moreDocuments>, (last retrieved 25/04/2016).

143. As the European Commission specifies in its Communication (See note 15, page 11), apart from this general consultation, there is a more specific on-line questionnaire available at the webpage of the consultation: <http://ec.europa.eu/social/main.jsp?langId=en&catId=699&consultId=22&visib=0&furtherConsult=yes> (last retrieved 25/04/2016).

144. The main objective of this first group of questions is to make an assessment of the present EU “acquis”. In particular, the consultation should help to determine the extent to which existing rights are practiced and remain relevant for today’s and tomorrow’s challenges, and/or whether new ways to deliver on these rights should be considered.

3. Is the EU “*acquis*” up to date and do you see scope for further EU action?

*On the future of work and welfare systems*¹⁴⁵

4. What trends would you see as most transformative?

5. What would be the main risks and opportunities linked to such trends?

6. Are there policies, institutions or firm practices – existing or emerging – which you would recommend as references?

*On the European Pillar of Social Rights*¹⁴⁶

7. Do you agree with the approach outlined here for the establishment of a European Pillar of Social Rights?

8. Do you agree with the scope of the Pillar, domains and principles proposed here? Are there aspects that are not adequately expressed or covered so far?

9. What domains and principles would be most important as part of a renewed convergence for the euro area?

10. How should these be expressed and made operational? In particular, do you see the scope and added value of minimum standards or reference benchmarks in certain areas and if so, which ones?”

In addition to this official questionnaire, I would like to introduce my own questions in order to highlight the thesis adopted along these pages. The minority status of social rights has more to see with the crisis of the EU’s constitutional model, market constitutionalism, than with the

145. This second group of questions attempt to reflect on new trends in work patterns and societies, due to the impact of demographic trends, new technologies and other factors of importance for working life and social conditions. The identification of best practices and lessons from social innovation should be actively encouraged.

146. Finally, the third group of questions has as aim to gather views and get feedback on the outline of the European Pillar of Social Rights itself.

heterogeneity of situations among euro area MS. From this point of view the “unofficial” questionnaire is:

European social model: Is it possible a European social model without a European economic government?

Work and welfare systems: according to Article 145 TFEU, there is a redirection of the employment policies to the broad guidelines of the economic policies of the MS (Article 146.1 TFEU), but why this redirection does not operate conversely?

European Pillar of Social Rights: Can we talk of “real” social rights at European level?

IV. Final Remarks

The European Pillar of Social Rights is a sterile mechanism to achieve the objectives described. Fundamentally, because the crisis of the EEG is the crisis of the legal and political model articulated around the fundamental political decision of the Treaties: an open market economy with free competition. This legal and political model characterized as “market constitutionalism”, redefines each of the structural principles that have grounded the constitutional regimes of the Member States (Social and Democratic State of Law).

Regarding the third element, the Social State, it has, undoubtedly, been the most affected by the prerogatives of the European market constitutionalism. The unconditioned centrality of the market and its correlates, the maximization of the competition and the guarantee of the economic bond, all pursue the deregulation of the system of political restraints to the market, envisaged by the constitutional texts of the II post-world war. The result has been the elimination of the economic bond as a limit to financialised capitalism and as factor of economic and social cohesion.

Consequently, the references to the so-called “fair and truly pan-European labour market” through the supervision of the European social dimension in the European Semester are not suitable to address the systemic social crisis. Mainly, because the alternative to the current EEG is to

build a stronger governance, that implies to expand the current economic model of the Union. The European social crisis is a constitutional crisis that needs to be addressed as such. The key is to break and to overcome the current model of governance against those amendments proposals or controlled corrections that disregard alternation of models. The real debate is the contradiction between indirect market regulation and democracy, between the social dimension and the institutionalization of a hyper rigidity market guarantor.

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The Work-Family Reconciliation in the European Union: Better Practices?

JULIA MARÍA DÍAZ CALVARRO

1. Introduction

Equality between men and women, even though it is considered a highly topical issue in the European Union, it is not a new concept, because it is included in the Treaty of Rome since 1957 under the principle 'equal pay for equal work'. Obviously, its regulation and presence in the European Communities at that moment, nowadays European Union, has developed at the same time the changes produced in the supranational organization.

In these pages, we are going to do a short review about the concern of the European Union (from now on EU) related to the equality between men and women and the different measures that are developing in this field, addressing then the work-family conciliation, which mainly affects the female population, being an obstacle for her integration in the labor market. Delving into this idea, we will talk about the roadmap introduced by the Commission 'A new start facing the challenges in people's work and

private life.¹⁴⁷ and the effectiveness of the challenges proposed by the Labor Union Institutions in order to get the gender equality that it is not only formal. The equity between men and women is still a pending task in the European Union.

2. The Work-Family Conciliation. The New Challenges Proposed by the European Commission: ‘A New Start Facing the Challenges in People’s Working and Private Life Conciliation

Although we have pointed out it is a founding European Union principle and it is included since 1957 in the ‘*acquis communautaire*’, nowadays among these tenets, we have to highlight art.6 EU treaty¹⁴⁸, which it refers to the European Convention on Human Rights, as well as the European Union’s Charter of Fundamental Rights, where the gender equality is included as a fundamental right within the European Union and in each one of the Members States of the European Union. It will distinguish between the equality in law¹⁴⁹ and the principle of non-discrimination¹⁵⁰, without forgetting art. 8 TFEU which has a EU legal mandate in order to eliminate inequalities between men and women, by fostering the full equality

147. http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_xxx_maternity_leave.en.pdf

148. Art.6 UE treaty: 1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 (LAW16/1950) and as they result from the constitutional traditions common to the Member States, as general principles of Community law. 3. The Union shall respect the national identities of its Member States. 4. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.

149. Art.20 The EU Charter of Fundamental Rights

150. Art.21 The EU Charter of Fundamental Rights

through their actions¹⁵¹ without taking into account the settled case-law of the TFEU which considers equality as a fundamental principle of the Community Law agreement requires that comparable situations must not be treated differently, and that different situations must not be treated in the same way, unless such treatment is objectively justified.¹⁵²

Also, in the labor market, we must point out art.153 TFEU¹⁵³ and art. 157 TFEU¹⁵⁴ and highlighted second law rules such as the ones related to the maternity protection, the pregnancy, the nursing and the family and labor life conciliation of working women¹⁵⁵¹⁵⁶ and the important role of some European Union institutions expansion of very different plans.¹⁵⁷ We cannot forget the importance of the European Institutions and in particular, the European Parliament.¹⁵⁸

151. Art.8 TFEU: The EU Community shall aim to eliminate inequalities and promote equality between men and women in all its activities and promote their equality.

152. Judgements Gillespie (C342/93), Brown (C-394/96), Karlsson (C-292/97) y Brunnhofer (C-381/99) etc.

153. Art.153.1 TFEU: With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields: i) equality between men and women with regard to labour market opportunities and treatment at work.

154. Art.157 TFEU: Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

155. EUR.lex 92/85, October 19th 1982, related to the application of the measures to promote the improvement of security and health for the worker pregnant woman who has given born or she is through the nursing period.

156. EUR-lex 96/34/CE Commission of June 3rd 1996, related to the Agreement about the parental permission celebrated by the UNICEF, CEEP and CES which concedes an individual parental right (to take care of the children) for workers, men and women "because of a newborn baby, to take care of him/her for at least three months until the age of eight years old.

157. Like the Woman Charter and the Strategic Engagement for Gender Equality 2016-2019 which prioritises five key areas for action, first equal economic independence for women and men; equal pay for work of equal value; equality in decision-making; dignity, integrity and ending gender-based violence; and promoting gender equality beyond the EU.

158. Through the Commission of the women Rights and gender equality which focuses, among other actions, first it was compulsory the paternity leave and enlarge it in

Today the commitment is stressed on the transversality of the actions and politics in different ways¹⁵⁹, particularly with the work-family conciliation issue. The reason why we stress this item is because it is an important clue to solve some problems which are substantial in our society and in the EU and on the one hand it contributes to improve the gender equality in the labor world and at the same time will improve their quality, on the other hand, it helps to reduce the different birth rates among all the countries in the European Union¹⁶⁰. One curious point is that those Member States that take into account the conciliation politics in a serious way, the percentage of working women is very high and the birth rates are more sustainable¹⁶¹.

By using an utilitarian¹⁶² approach, when we talk about conciliation, we are talking about coresponsibility in doing domestic tasks and giving attention to the family. That means to share and assume family tasks by both parents. The clue is coresponsibility first and second an enough services offer.

We will analyze the current situation. We will start a positive fact that is the women jobs level expanded in the last decade up to 62.5%¹⁶³. From this large participation of women in the labour market has derived some

time; second, the need of building day care centers, infant schools and dependant care centers, situated in areas near the factories subsidized by the Government.

159. ORTIZ LALLANA, C.; "Igualdad de oportunidades entre el hombre y la mujer en la UE"; *Revista del Ministerio de Trabajo y Asuntos Sociales* nº 47; 2003; p. 103

160. ARROYO, A. y CORREA, E.; "Políticas de equidad de género: UE" en GIRON, A.; *Género y globalización*; CLACSO; p. 280

161. For example, in Sweden the female employment rate is the highest in the EU, 76% above the European average. In ZUAZU BERMEJO, I; "Análisis de las Políticas para la Igualdad de género en la Unión Europea"; p. 5

162. ALONSO-OLEA GARCIA, B.; "La igualdad entre hombres y mujeres y de género en la Unión Europea"; *IV Congreso Complutense de Derecho del Trabajo organizado en homenaje al Profesor Dr. Alfredo Montoya*; p. 1

163. 57.3% to 62.5% between 2000 and 2009 (from 20 to 64 years); *Estrategia para la igualdad entre mujeres y hombres 2010-2015*; En <http://eur-lex.europa.eu/legal-content/ES/TXT/?uri=URISERV%3Aem0037>; p. 4

positive consequences, firstly it has provoked an economical growth in the EU, and secondly, it has helped to compensate the effects of a population of a labour age in regression. We are able to understand that part of the increasing of the women jobs become greater than conciliation and we wouldn't be a mistake, however, we don't make a mistake, the impact of our children on the labour market participation is much more different for women than for men¹⁶⁴. When we mean children, it can be extended to seniors, dependants, etc. Women are still assuming the role of caretakers and they embrace they are the ones who have to choose between their family or their professional degrees.

This is an eminently multidisciplinary topic, and trying to focus on one part of it, doesn't solve the problem. For this reason, it is very interesting the different actions which have been included in the last EU¹⁶⁵ Equality Plans and it includes a high political commitment of implication among the States Members in order to be more than good intentions without any track. Which has been addressed in an intense way has been related to the labour plan where it is ensured a time flexibility at the same time an offert of services which help to conciliate the work life with taking care of the dependants (wide sense)¹⁶⁶

Nowadays, the time flexibility is understood as a reduction of number of working hours, it is related to the work and payrol scarcity. As a consequence, women, who are the real applicants for this kind of contract, are in the tessitura of chosing between the care of her family and the labour activity. With a deficit of the public offert of welfare services, the choice doesn't show any doubt. This idea has been confirmed with the European Institute for Equality Gender (EIGE) which shows that one of the most rugged inequalities is about the use of the time¹⁶⁷ and especifi-

164. Strategy for the equality ob.cit; p. 5

165. Equality Genre Plan 2010-2015 y 2016-2020 de la Comisión Europea

166. like day care centers at work

167. EIGE; Primer Índice de Igualdad de Género para la Unión Europea, pp. 22 y ss; <http://eige.europa.eu/sites/default/files/documents/MH0213275ESC.pdf>

cally, the time that men and women use for taking care minors, seniors and dependants. In this report highlights the need to intensify efforts to increase parents participation in taking care the children and it has priority the need to equalize the birth permissions, which for now, has not had a positive host by the Community Insitutions¹⁶⁸.

Under another point of view, it is necessary, for those cases in which, by their own choice, or by necessity, the workman or the workwoman, had abandoned his/her job because of the family dependants members, they could have the possibility, once the situation is solved, of coming back to the active life, and the fact of not have been integrated in the labour life for a period of time, this wasn't mean an insurmountable barrier. The Comission, being concerned of this situation, has tried to boost firstly, the revision of the regulation of the paternity and maternity permissions through the notification from Lex 92/85/CEE, however there wasn't any agreement by the Parliament or the Council. This lack of agreement provoked to boost a roadmap about a "new start to face the conciliation challenges in the labour and private life for the working families", which we think is interesting to analyze and value in a criticism way which followed the multidisciplinary line into the Equality Plans. The expectations are "improving the participation of the women in the labour market through a modern and current legal framework and the the EU acts and to adap them to the labour market today with the purpose of allowing to the family with children of dependants to balance the working and labour life. At the same time help them to share family responsibilities among men and women and finally to reinforce the genre equality in the labour market."¹⁶⁹

168. CASTRO, C.; "Índice de Igualdad de Género para la UE"; <http://singenerodedudas.com/blog/indice-de-igualdad-de-genero-para-la-ue/>

169. En http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_xxx_maternity_leave.en.pdf

3. The Work-Family Conciliation in the EU. The Comission New Roadmap: A Step Forward?

As we have explained before, this document was not the Comission Plan, before the legislative line blockage, this is the chosen way to address, in a global way, the problem for the wok-family conciliation, which it is not considered a peaceful topic in the different States Members. Our objective, from these pages, is to see if it is true that there is an advance line of work between the equality of men and women trthrough the conciliation or if only it is a good intentions statement without any legal support of the State Mmembers and the European citizens. Let's analyze their more important aspects.

Among several claims, this document points out that while women qualification is equal or even though better than the men, there isn't any matching with their representation in the labour market. This fact, that shows incoherence at first, it has its explanation in the negative understanding of the maternity in the proffessional progress of the women. The role of the women, once is mother, limit themselves in an high percentage, to the assistential non-paid job and her participation in the labour market is limited. In the best of cases part-time and low-skilled jobs, under her professional capacity.

On one hand, it does no arise that the father was the person who assume this role. But the equality isn't a women issue, it concerns to all society¹⁷⁰; on the other hand, the underutilisation of the female capacities provokes a lack of resources for the European economy. In buoyant times, it is inadmissible, and in crisis times it cannot be qualified. However, it is a mistake, in our current crisis scenario, trying to draw conclusions that could be moved to a different economical situation. The equality genre index, which we mentioned above, confirms that it has happened a re-

170. ALLIANCE OF ORGANIZATIONS FOR THE FAMILY ORGANIZATIONS IN THE EU; Conciliation european pack 2014: *conciliation year in the labour and family life in Europe*; 2015; p. 11

duction in some inequalities between men and women because the conditions have declined for everybody¹⁷¹

To switch this situation, The European Union pretends to establish some rules to standardize the code of Laws in the States Members; first of all, better definition of the retributed permissions for taking care of children and dependants, not only with equality of the father and mother permissions, but also to prevent women, which are the main users of this kind of measures, to weaken her labour situation¹⁷²; then, best offer of assistance public services; thirdly, the omission of taxes that, now they are a burden, or at least taxes reductions for the work of that member of the couple, whose compensation was less, usually the woman¹⁷³. And finally, the idea of the informal caretaker which implies the proof of acquired competences in order to find a future job¹⁷⁴, that means to recognize its legal recognition.

But the Commission is aware of it is not enough and it considers that it has to take into account a wide context and it must analyze different measures to avoid bad effects.

4. Conclusions

The family-work conciliation has to be addressed from different issues, before that, it is necessary to start from a premise, or with other words, to avoid this preconceived idea, that the conciliation is a "woman problem", because, then we are anticipating that her role is a caretaker, and even worse, that it is external to the male world. In other words, some sex-

171. EIGE; ob.cit. Índice de Igualdad de Género; p. 37

172. Not only looking for a job but also all that it is related to the professional capacity.

173. As an example we can add the taxation in the Spanish IRPF. It means, in practice the incentive to work for the woman, who at the tessitura, may choose not to be in the labor market because they do not compensate you

174. CONFEDERATION OF FAMILY ORGANIZATIONS IN THE EU; ob.cit. *Paquete europeo de conciliación 2014*; p. 21

ist stereotypes must be overtaken. The conciliation is a family approach, and for this reason the man roles needs to be boost in the household field. Once it is explained, It is inadequate to reduce this idea to the application of a series of measures related to the labour field, even though is necessary, such as the revision of the parental permission or more paid permissions for taking care the children or dependants. We cannot avoid the other part in the equation, the enterprises whose principal objective is being productive and get more benefits, so both interests should be together. As we have mentined before, different actions should be taken into account which include legal, sociological, fields or the role of the Public Administrations... Finally, no less important, these measures have to be moved from the paper to the real life. We have to stop the intentions statements which are repeated from one to another program, year after year and we should accept serious responsibilities to address firstly and with a clear political attitude. Unfortunately, the new roadmap of the Comission has not any idea of being transformed in something revolutionary. Among other things, because it has not any law power rules and it has not any correlation to the State Members. On the other part, from the ideas we have exposed here, we have to say that the on the way of this equality between men and women has to be reached more than by a mandatory order. Only time will tell.

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The Transatlantic Protection of Fundamental Rights of European Citizens: From the Harbor to the Shield

MÓNICA ARENAS RAMIRO

The title of the work presented here, besides looking like a Disney movie and not just because it offers a happy and hopeful ending, anticipates the problems that we will analyze: the protection of fundamental rights of European citizens beyond the borders of Europe and the necessary European integration of the rights to compete economically with the United States. For a better understanding we will take as example the analysis of a judgment of the Court of Justice of the European Union (hereinafter, CJEU) annulling a decision of the Commission (known as *Schrems* ruling, of October 6, 2015).

I. Introduction. The Guarantee of an European Right as a Backdrop of the Problem

Since the creation of, now, European Union, the recognition and guarantee of fundamental rights of European citizens has been an essential objective

of Europe, although framed within the process of economic integration.¹⁷⁵ With the entry into force of the Treaty of Lisbon and the inclusion therein of the Charter of Fundamental Rights of the European Union (hereinafter, CFREU), the European integration process went a step further and exceeded the economic field.¹⁷⁶ But the reality seems not to want to separate both processes, and in times of crisis, such as the European Union is going through, seems that market wins against the interests of citizens and the protection of their rights. However we'll see how the European Union on several occasions has come out in defense of the fundamental rights of its citizens.

An example of the guarantee of a fundamental right contained in the CFREU we can take the *Schrems against Facebook* case (CJEU ruling of 6 October 2015), which answers the question of whether a European fundamental right such as the right to the protection of personal data, guaranteed by art. 8 CFREU,¹⁷⁷ is protected when personal data are transferred across the Atlantic, to US.

175. On this issue, with a critical approach, RUBIO LLORENTE, F., "Los derechos fundamentales en la Unión Europea y el estatuto de la Carta", *EuropaFutura.org*, nº 4, 2004, p. 17.

176. For all, RODRÍGUEZ, A., *Integración europea y derechos fundamentales*, Civitas, Madrid, 2001; and TAJADURA TEJADA, J., "Derechos fundamentales e integración europea", *Estudios de Deusto*, vol. 58, nº 1, 2010, pp. 265-286.

177. Art. 8 CFREU "Protection of personal data. 1. Everyone has the right to the protection of personal data concerning him or her. 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. 3. Compliance with these rules shall be subject to control by an independent authority". This is also recognized in the art. 16 Treaty on the Functioning of the European Union, TFEU (ex art. 286 TEC): "Everyone has the right to the protection of personal data concerning them. 2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities. The rules adopted on the basis of this Article shall be without prejudice to the specific rules laid down in Article 39 of the Treaty on European Union".

The CJEU answers a problem that is crucial in the globalized and interconnected world in which we live. Technological advances, the development of new technologies and the increased use of new networks such as the Internet led to collection massive amounts of data relating to a person with many purposes. With simple process we can store and use huge amounts of personal data, even illegal purposes. In the economic field this is not an exception. So, the question is why we talk about protection of personal data in this case? And, why we need to protect personal data in Europe? The relationship is clear: it is unthinkable a society without personal information. Any activity that we perform in our daily life involves processing of personal data, and therefore any economic activity undertaken will involve the processing of personal data. The transfer of personal data is an essential element in transatlantic relations. The exchange of information and cross-border flow of personal data of European citizens with the US is unquestionable and necessary if we want a competitive Europe.¹⁷⁸

But the bottom line is, in reality –it is what the CJEU judgment intend to make clear–, the need to guarantee the fundamental rights of European citizens, and in the case analyzed, the right to protection of personal data in and by the United States. This, coupled with the economic implications that carries with, causes that in a context of social, economic and political crisis, the decisions taken by the European Union must reaffirm its sovereignty.

As the fundamental right at stake is the fundamental right to protection of personal data and, in particular, the international transfer of such data, the first thing we need to understand is the European rules of this right, their principles. Thus, we must begin by identifying the rules at European level governing the processing of personal data, to know what is a personal data,

178. Thus we speak of a “connected digital single market” that knows no borders. See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Digital Single Market Strategy for Europe*”, adopted on 6 May 2015 [COM(2015) 192 final].

the requirements for processing it lawfully and, therefore, the requirements for transfer it to other States outside the European Union, like United States.

In the European Union the need for citizens to have a right to dispose of their personal information, their personal data, soon became apparent. It was obvious that European citizens should be able to control their personal information and that this should be recognized as a fundamental right. In last term this power represents the respect of privacy and dignity of the citizen. So after a long journey of rules and CJEU rulings –where the reference standard is the Directive 95/46/EC of Personal Data Protection–,¹⁷⁹ the processing of personal data was recognized as a fundamental right, as it has been said, in the art. 8 CFREU.

The need to strengthen the right of citizens to control their personal information remains like one of the premises of the European Union, who at the social, economic and technological changes in recent years, on the evidence of the obsolescence of the Data Protection Directive of 1995, decided to adopt a new framework regulating the processing of personal data. The new regulatory package is aimed at correcting the shortcomings of the current rules, to adapt it to the times in which we live and to empower European citizens in the processing of their personal data. The European Union knows that if wants to generate confidence in the citizens, regarding the use of their personal data and thus generate market and wealth, the Union must go through strengthening its powers in this area.¹⁸⁰ Thus, after a long and difficult process of developing and drafting

179. Directive 95/46/EC of the European Parliament and of the Council, of 24 October 1995, on the protection of individuals with regard to the processing of personal data and on the free movement of such data (*Official Journal* L 281, 23/11/1995).

180. In this regard, see Communication from the Commission to the European Parliament and the Council on “*Rebuilding Trust in EU-US Data Flows*”, adopted on 27 November 2013 [COM/2013/846 final]. And, more specifically, after the problems arising with *Schrems* case in 2015, see Communication from the Commission to the European Parliament and the Council on “*Transatlantic Data Flows: Restoring Trust through Strong Safeguards*”, adopted on 29 February 2016 [COM/2016/117 final].

that began in 2010, in 2016 they approved the EU Regulation 2016/679, on General Data Protection,¹⁸¹ and the EU Directive 2016/680, on processing personal data for purposes of prevention, investigation, detection or prosecution of criminal offenses or the execution of criminal penalties.¹⁸² Both rules will come into force –the Regulation will be applied and the Directive should have been transposed– in May 2018. The General Data Protection Regulation will replace the current Directive 95/46/EC, thereby creating a uniform legal framework avoiding the current fragmentation and lack of policy coherence between European States in this area.

So, to answer the question about the guarantee of the European right of protection of personal data outside Europe, starting with the current European regulations, we must begin by recalling that personal data is any information relating to an individual, identified or identifiable, that is, from a name and a surname, even a phone number, an IP address, an image or biometric data such as fingerprint or iris of our eyes;¹⁸³ and a processing of personal data is any activity that is done with such personal data.¹⁸⁴

181. Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27 April 2016, on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (*Official Journal* L 119, 6/05/2016).

182. Directive (EU) 2016/680 of the European Parliament and of the Council, of 27 April 2016, on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (*Official Journal* L 119, 6/05/2016).

183. Art. 2. a) Directive 95/46/EC: “‘personal data’ shall mean any information relating to an identified or identifiable natural person (‘data subject’); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity”.

184. Art. 2. b) Directive 95/46/EC: “‘processing of personal data’ (‘processing’) shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or

European legislation on protection of personal data is governed by a series of legitimizing principles for the processing of such data. That is, to process personal data of European citizens, both public and private subjects who wish to do it must comply essentially with two principles: consent and purpose. Except for the exceptions provided by law, any processing of personal data requires the consent of the subject affected,¹⁸⁵ as well as the fact that the personal data collected must be adequate, relevant and not excessive to fulfill a determined purpose, explicit and legitimate.¹⁸⁶ Also, if an international transfer of personal data occurs, the transfer outside the European Union must be addressed to a State that guarantees an adequate level of data protection, a level equivalent to that provided by the European Union closer to its citizens,¹⁸⁷ or the transfer should have the consent of the data transferred, among other requirements.¹⁸⁸

alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction”.

185. Article 7 Directive 95/46/EC: “Member States shall provide that personal data may be processed only if: (a) the data subject has unambiguously given his consent; (...)”.

186. Art. 6.1 Directive 95/46/EC: “Member States shall provide that personal data must be: (a) processed fairly and lawfully; (b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States provide appropriate safeguards; (c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed; (...)”.

187. Art. 25.1 Directive 95/46/EC: “The Member States shall provide that the transfer to a third country of personal data which are undergoing processing or are intended for processing after transfer may take place only if, without prejudice to compliance with the national provisions adopted pursuant to the other provisions of this Directive, the third country in question ensures an adequate level of protection”.

188. Art. 26 Directive 95/46/EC: “By way of derogation from Article 25 and save where otherwise provided by domestic law governing particular cases, Member States shall provide that a transfer or a set of transfers of personal data to a third country which does not ensure an adequate level of protection within the meaning of Article 25(2) may take place on condi-

Beyond this general framework for processing of personal data, in connection with the transfer of personal data, in order to facilitate the exchange of data with United States, the European Union recognized that this country guaranteed an adequate level of protection of personal data. European Union guarantees to European citizens –who see their personal data crossed the pond for commercial purposes, basically– that their right to dispose of their personal information, that is, their right to protection of personal data, would not be injured and, on the other hand, that they would have the same guarantees that if such data were treated

tion that: (a) the data subject has given his consent unambiguously to the proposed transfer; (b) the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of precontractual measures taken in response to the data subject's request; or (c) the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and a third party; or (d) the transfer is necessary or legally required on important public interest grounds, or for the establishment, exercise or defence of legal claims; or (e) the transfer is necessary in order to protect the vital interests of the data subject; or (f) the transfer is made from a register which according to laws or regulations is intended to provide information to the public and which is open to consultation either by the public in general or by any person who can demonstrate legitimate interest, to the extent that the conditions laid down in law for consultation are fulfilled in the particular case. 2. Without prejudice to paragraph 1, a Member State may authorize a transfer or a set of transfers of personal data to a third country which does not ensure an adequate level of protection within the meaning of Article 25 (2), where the controller adduces adequate safeguards with respect to the protection of the privacy and fundamental rights and freedoms of individuals and as regards the exercise of the corresponding rights; such safeguards may in particular result from appropriate contractual clauses. 3. The Member State shall inform the Commission and the other Member States of the authorizations it grants pursuant to paragraph 2. If a Member State or the Commission objects on justified grounds involving the protection of the privacy and fundamental rights and freedoms of individuals, the Commission shall take appropriate measures in accordance with the procedure laid down in Article 31 (2). Member States shall take the necessary measures to comply with the Commission's decision. 4. Where the Commission decides, in accordance with the procedure referred to in Article 31 (2), that certain standard contractual clauses offer sufficient safeguards as required by paragraph 2, Member States shall take the necessary measures to comply with the Commission's decision".

on European ground. The recognition of this adequate level occurred in 2000 by a decision of the Commission, the called Decision “Safe Harbor”.¹⁸⁹

II. The Problem: The Exchange of Information with United States. The Safe Harbor Agreement

Focusing on the source of the problem which caused the ruling of the CJEU, the next question that we must ask is what is the problem if personal data of European citizens are transferred to the United States? What is the problem for the fundamental rights of European citizens?

Clearly there is a fundamental right at stake: the right to protection of personal data. In this sense, any data processing must comply with the general principles established by the European regulations to process the personal data of its citizens. But we must also take into account, in the specific case arises here (the international transfer of data to the United States), that the rules that govern this matter are: Directive 95/46/EC and the Decision of Safe Harbor.

The question that caused that the European Union arises whether, indeed, the United States has an adequate level of protection of the right to protection of personal data arises when an Austrian citizen, Maximilliam Schrems, decides that despite having a profile on *Facebook* since 2008, he does not agree with the fact that their data to be transferred to United States, to be registered for the data server of *Facebook*. Mr. Schrems believes that the country does not guarantee the privacy of European citizens in the same way they are guaranteed in Europe. Mr. Schrems mis-

189. Commission Decision 2000/520/EC of 26 July 2000, pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the Safe Harbor privacy principles and related frequently asked questions issued by the US Department of Commerce (*Official Journal* L 215, 25/08/2000). For a more in-depth overview, see Communication from the Commission to the European Parliament and the Council of the Functioning of the Safe Harbor from the Perspective of EU Citizens and Companies Established in the EU, adopted on 27 November 2013 [COM/2013/847 final].

givings were the result of statements that in 2013 Mr. Edward Snowden had made confirming that the security services and the public authorities of the United States, especially the National Security Agency (NSA), were spying on European citizens with data that themselves had transferred to its territory. In this context, the competent European national Agencies expressed to the request of Mr. Schrems that transfers to United States were lawful while there was a Commission Decision (the Safe Harbor Decision) stating that the United States complied properly with the protection of personal data, the level of protection was adequate and they offered a level of adequate and sufficient security. However, the national Courts did not have it so clear and posed a question to the CJEU.

The question before the CJEU was intended to determine whether the Safe Harbor Decision of year 2000 –which recognized that the United States had an adequate level of data protection– was in line with the European data protection legislation, and even more, if it respected the fundamental right to data protection guaranteed by the Charter of Fundamental Rights of the European Union.

The CJEU finally ruled on October 6, 2015 and ruled that Mr. Schrems was right and that international transfers to the United States based on the principles of Safe Harbor did not confer an adequate level of data protection equivalent to that offered by Community legislation.¹⁹⁰ And for this reason, it annulled the decision of Safe Harbor based on its imprecision.

For the Court, the decision was based on a set of principles that did not correspond with the general principles established by Community rules because, on the one hand, no limitation is provided to the data processing performed if it was alleged by the US authorities security reasons, public interest or it was established by a Law. And on the other hand, under the Decision of Safe Harbor does not exist some mechanism or judicial process to allow European citizens to complain to an illegal treat-

190. CJEU Judgment of 6 October 2015, *Schrems* case [C-362/14]

ment of their data by American entities or agencies in the case of such international transfers. These, among other shortcomings of the Decision of Safe Harbor led the CJEU to declare the nullity of the Decision and, therefore, to declare that international transfers made to United States did not meet with an adequate level of protection to ensure the right to data protection of European citizens in that country.

III. The Solution: Strengthen European Fundamental Rights

Following the annulment of the Safe Harbor Decision, the question is practical and has a purely economic background: what does an European company which wants and need to transfer personal data to the United States? We want a competitive European market? We have to decide between single market and protection of fundamental rights? The decision is not easy because the decision taken will affect ultimately the fundamental rights of Europeans.

The Court concluded that international transfers of personal data from Europe to the United States had no legal coverage and could not be justified by the existence of the so-called Safe Harbor Decision. What makes the CJEU is stand up to the American market and going to the defense of the rights of European citizens. And is not the first time that the guarantor of fundamental rights of European citizens confronts the US market and its giants. In this sense we remember here the famous CJEU ruling about the Spanish Data Protection Agency (AEPD) against *Google*, famed as the ruling of the right to oblivion or the *Google* case.¹⁹¹ In this case, a Spanish citizen, Mr. Costeja, had requested *Google* to erase from their data servers information on his person related to a judicial foreclosure process in which he had been part since more than fifteen years ago and was already solved. Due to the refusal of *Google*, the case reached to the Spanish courts, which before the interpretative doubts of Community

191. CJEU Judgment of 13 May 2014, *Google* case [C-131/12].

legislation on rules for processing personal data and the right to forget, went to the Court of Justice of the European Union. In this case, the CJEU concluded affirming the existence of a right to oblivion on the Internet as one of the faculties that make up the fundamental right to protection of personal data of European citizens, guaranteed by art. 8 CFREU; and also the CJEU states that *Google* was responsible for making possible the mentioned right, provided that the interests or rights of the applicant were worthy of protection and when these rights or interests prevail over any other interest in game.

The Court evidently commitment to ensure the fundamental rights of European citizens against the power of the market. It seems that integrating rights prevails against the sovereignty of the market. But we will demonstrate that is not necessary a confrontation between both of them. And it is showed by the latest approved rules on the protection of personal data.

Turning to the specific problem of the transfer of personal data of European citizens to the United States, once it annulled the Safe Harbor Decision, a door to legal uncertainty is opened: what happens in practice with the necessary international transfers to this country?

Since the European Union, in collaboration with the US authorities, in particular with the United States Department of Commerce (DoC) were able to work to replace the deficient regulations of Safe Harbor for achieving a more accurate European principles. Thus, the result of intense negotiations appeared in February 2016: a new framework for transatlantic transfer of personal data, a new draft decision entitled “Privacy Shield”.¹⁹² However, this new regulatory framework, at June 2016 fails to convince the agencies in charge of guaranteeing the fun-

192. *Political Agreement on a New framework for transatlantic exchanges of personal data for commercial purposes: the EU-US Privacy Shield*, adopted on 2 February 2016. And, including the underlying Privacy Shield documents, see Communication from the Commission to the European Parliament and the Council on “*Transatlantic Data Flows: Restoring Trust through Strong Safeguards*”, adopted on 29 February 2016 [COM/2016/117 final].

damental right to data protection in Europe, and has not yet seen the light.¹⁹³

The solution in this area goes through intergovernmental agreements, such as the aforementioned Privacy Shield, but enhanced: an agreement that really seek to ensure the fundamental rights of Europeans and offer greater guarantees for them, restoring the lost confidence in the role of the European Union. Decisions that will regulate the processing of data across the Atlantic should, inter alia: to collect clear and binding measures ensuring that all processing of personal data occurs based on the principles of clarity, accuracy and accessibility; establish specific obligations of supervision and repression to the Authorities responsible for ensuring compliance with the right to data protection (the Data Protection Agencies), for what is also necessary to grant not only personal but also economic resources; establish mechanisms for redress of rights in administrative proceedings, but also in legal proceedings; and, above all, ensure compliance with the principles of transparency and proportionality –in relation to the legitimate purpose– when performing any processing of personal data.¹⁹⁴

193. Critics therewith, see Opinion 01/2016, adopted on 13 April 2016, by the Article 29 Data Protection Working Party, on the EU-US Privacy Shield draft adequacy decision [WP 238]; And Opinion 4/2016, adopted on 30 May 2016, by the European Data Protection Supervisor (EDPS), on the EU-US Privacy Shield draft adequacy decision.

194. Communication from the Commission to the European Parliament and the Council on “*Transatlantic Data Flows: Restoring Trust through Strong Safeguards*”, adopted on 29 February 2016 [COM/2016/117 final]. In this sense, see Working Document 01/2016, adopted on 13 April 2016, by the Article 29 Data Protection Working Party, on the justification of interferences with the fundamental rights to privacy and data protection through surveillance measures when transferring personal data (European Essential Guarantees) [WP 237].

IV. Conclusions

We must start from the premise that economic integration in the European Union passes and goes hand in hand with an integration of fundamental rights of European citizens. Are we faced with the choice single market vs. fundamental rights? While it is true that the strategy designed by Europe is aimed at a “digital single market” where priorities are, at last, maximize the growth of the digital economy, the rulings of the Court of Justice of the European Union like *Schrems* case (even, like *Google* case) show that the Union does not forget to guarantee the rights of its citizens.

In this sense, the new European legislation adopted on May 2016, especially the Regulation, goes along these lines: recognizes new principles and new rights in order to empower European citizens and strengthen their right to protection of personal data: principles such as privacy by design or privacy by default, the accountability, and impact assessments on data protection; or rights such as the right to portability of personal data, the right to limitation on the processing of personal data in order to avoid profiles processing, and the right to oblivion, become an example of how from a greater guarantee of the fundamental rights of European citizens can build confidence in Europe.

The role of the Union as a guarantor of the fundamental rights of its citizens must be the starting point and the *leitmotif* of European integration, not the goal.

EU-POLICIES

Exit of a Member State from the European Union: *Brexit*

SILVIA SORIANO MORENO

1. Introduction: Nature of the European Union and Withdrawal of a Member State

The eternal question about the territorial model that fit the European Union has its eternal answer: not fully fits into the classical type of international organization, neither a confederation, neither a federation, although has elements of each of these categories. We will briefly discuss this issue before addressing the possibility of secession of a Member State from the European Union.

Originally, with the Treaty establishing the European Coal and Steel Community (ECSC) of 1951, it could be identified as an international organization, because it was a union of sovereign states ruled by a Treaty as such subject matter is concerned. However, this changes with the following treaties, called Founding, Rome in 1957 (EEC and Euratom) and its subsequent developments. The unification of institutions created by the three Founding Treaties with the Brussels Treaty in 1965; the election of members of Parliament by suffrage since 1979; the extension of powers by subsequent Treaties to matters that go far beyond the concrete of the

original Treaties; and, especially, the mechanisms of creation of what is known as secondary law, makes the European Union already what is known as “*unidentified political object*”¹⁹⁵. Therefore, we can conclude that although the origin of the current European Union was similar as an international organization, we can state that does not resemble this type of organization today. Unable to speak of an international organization, it has been said by the doctrine the terms *integration* and *supranationality*¹⁹⁶ as concepts that can explain the characters of the Union.

Moreover, the European Union has distinctive elements of a federal model and also of a confederal model, but not enough to frame it in any of the two models. If we accept the doctrinal position that affirms the existence of a European Constitution, based on the legal and constitutional framework of the European Union¹⁹⁷; the fact that the Union law produce direct impact on citizens; or political subjectivity of European citizenship, among other

195. Delors, J., President of the European Commission, Speech at the first Intergovernmental Conference (IGC), Luxembourg, 9 September 1985, available at http://www.cvce.eu/content/publication/2001/10/19/423d6913-b4e2-4395-9157-fe70b3ca8521/publishable_en.pdf. “For we must face the fact that in 30 or 40 years Europe will constitute a UPO—a sort of unidentified political object—unless we weld it into an entity enabling each of our countries to benefit from the European dimension and to prosper internally as well as hold its own externally.”

196. Martín y Pérez de Nanclares, J., “La posición de los Estados Miembros ante la evolución de la Unión Europea: comprometidos con el proceso de integración, convencidos de la necesidad de reforzar los rasgos de intergubernamentalidad”, *Revista de Derecho Comunitario Europeo*, nº 50, Madrid, enero/abril (2015), págs. 125-171. Self translation.

197. Camisón Yagüe, J.A., “Sobre la “Constitución Europea” y otros mitos del constitucionalismo europeo”, *Anuario de la Facultad de Derecho de la Universidad de Extremadura*, vol. XXVIII, 2010, págs. 69-85; Piriš, J. C., *Does the European Union have a Constitution? Does it need one?*, Harvard Jean Monnet Working Paper 5/00, Harvard Law School, 2000; Häberle, P., “El Estado Constitucional Europeo”, *Revista de Derecho Constitucional Europeo*, año 6, nº 11, enero-junio de 2009, available at <http://www.ugr.es/~redce/REDCE11/articulos/14PeterHaberle.htm>; Pernice, I., “Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?”, *Common Market Law Review*, 1999, núm. 36, págs. 703-750; entre otros. Self translation.

things, can make us thinking of the similarity to a federal model. However, there are elements of a confederation, such as Member States of the Union are subjects of international law, or the possibility of the withdraw of a Member State which expresses its willingness to leave the Union.

This possibility was not recognized in earlier versions of the Treaties, but that was introduced by the Lisbon Treaty of 2007, regulating this possibility in art. 50 of the Treaty on European Union.

2. Raising the Issue

On June the 23 of 2016, took place the *Referendum on the permanence of the UK in the European Union*, more commonly known as “Brexit”. In this query, the option of leaving the European Union won with the 51.9% of votes, while the remain in the European Union obtained 48.1%¹⁹⁸. Several outstanding issues are given with this result, beyond the opening of the possibility of departure the United Kingdom from the European Union. The outcome of the consultation has been a gap between territories, as in Scotland, Northern Ireland and Gibraltar as well as most of London, won the option of permanence. Moreover it has been a generation gap, between educational levels and between rural and urban areas.

This opens a number of unknowns in a situation never before seen in the integration process of the European Union.

3. Next Steps

From this moment, there are several questions that should be raised. On this occasion, we will treat only those relating to the output and options for subsequent relationships.

198. Detailed results in <http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/upcoming-elections-and-referendums/eu-referendum/electorate-and-count-information>

First, regarding the procedure to follow from now:

- First of all, the British Parliament will have to repeal a set of rules, especially the *European Communities Act* of 1972. This could lead to the stoppage of process chambers for a time, even indefinitely.
- The procedure established in the art. 50 TEU sets out the following steps:
 - + “Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements”. This means that the decision must be taken in accordance with the domestic law of the Member State which wants to leave the Union. As already discussed above, this internal procedure does not end with the referendum. In the United Kingdom sovereignty resides in Parliament and not in the people or in the nation, so this decision should be taken by Parliament because the referendum was purely consultative¹⁹⁹.
 - + “A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union²⁰⁰. It shall be concluded on behalf of the Union

199. Freixes, T. y Mondéjar, S., “Implicaciones constitucionales y geoestratégicas del Brexit. Su repercusión en España”, *Revista Catalana de Dret Públic – Blog*, julio 2016, available at <https://eapc-rcdp.blog.gencat.cat/2016/07/13/implicaciones-constitucionales-y-geoestrategicas-del-brexite-su-repercusion-en-espana-teresa-freixes-y-santi-mondejar/>

200. Article 218 (3) TFEU: “The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union’s negotiating team.”

by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament”. For now, this notification is announced that will not happen until the end of 2016. Thus the European Council –formed by the Heads of State of Member States–, gives the necessary guide lines for the implementation of the treaty with the arrangements for departure orientations. In this Treaty the terms of the output and the form of relationship the United Kingdom with the European Union after its term should be regulated. On the issue of subsequent relationships we will become later.

- + *“The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period”*. That is that if the agreement is not concluded before and a certain date of entry into force is agreed, this will be two years after notification of the wish to leave the Union, unless an extension between the parties will be agreed.
- + *“For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it”*. It is important to note that the United Kingdom will not participate in meetings or decisions relating to the agreement governing its withdraw. Not so in the approval of the agreement by the European Parliament in which case British parliamentarians would be present and part of the decision.
- + *“A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union”*. The qualified majority established in this article shall be defined as at least 72% of the members of the Council representing the participating Member States, comprising at least 65 % of the popula-

tion of these States. If this majority is not achieved, the agreement must be negotiated again. Also, before this time the agreement must be approved by the European Parliament. If the European Parliament rejects the agreement, this must be negotiated again.

- + *“If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49”.* That is, in the negotiations for a possible re-entry into the Union it will be made as what is required for the incorporation of any other third country.

Once treated the issue of the formal departure of the United Kingdom of the European Union, the question which arises is how will govern relations between the two parts once the output is effective. To this question we can think in different possibilities:

- The integration of the United Kingdom in the European Economic Area, which already include Norway, Iceland and Liechtenstein. This space allows members states to participate in the common market of the Union without being part of it.
- Negotiate separate agreements between the European Union and the United Kingdom for different sectors, such as with the case of Switzerland.
- Negotiate an exclusive customs union, as the agreement with Turkey.
- Negotiate a free trade agreement between the two parts, such as Canada or the TTIP which is being negotiated with the United States.
- Finally, the possibility of not choosing any of the above options and govern trade relations as any other third country, only following the rules of the World Trade Organization.

Beyond the points raised, other important political questions would be opened to the effective output of the United Kingdom of the European Union: the progress of anti-European nationalist and xenophobic attitudes; the application of advances in the process in Scottish indepen-

dence looming on the British horizon because of the decision; the situation in the financial heart and trade relations located in London; and a long list of troubling questions that are projected on a European Union in economical, legitimacy, institutional and values crisis.

4. Conclusions

The possibility that a Member State had the possibility to leave the European Union has been recent in the treaties, introduced by the Lisbon Treaty. It seemed unlikely during the campaign of the British referendum that the option “*Leave*” beat in the query if we focused on the Government’s position and the surveys, as well as the heads of the parties, although they are found visibly divided.

Without going into the positive or negative of the fact that a Member State leaves the European Union, the truth is that it is a fact that has not happened before, so we must be attentive to the evolution of events: how the internal decision occurs in the United Kingdom to leave the Union; when official communication to the European Council is made; how to evolve the negotiations; what will be the terms of an agreement that will focus all its strength on economic issues; how will be determined later relations between the United Kingdom and the Union; and what will happen to the internal political situation in the United Kingdom, among others, will be issues that will make today of the European Union from now until several years later.

Paying attention to all this and analyze how to solve each of the issues will be of particular interest to the European Union and for the citizens of the Member States that compose it.

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POLÍTICAS PÚBLICAS DE LA UNIÓN EUROPEA EN MEDIO AMBIENTE: ESTRATEGIAS Y COMPROMISO

JULIÁN CHAVES PALACIOS

1. Introducción

La cuestión ambiental es un contenido de actualidad, de clara resonancia mediática y social. Y es que en pleno siglo XXI la conservación del medio ambiente constituye un compromiso que implica a todos los países. Y es que las líneas divisorias de las aguas internacionales, las reservas pesqueras, la contaminación y el cambio climático plantean desafíos a las políticas ambientales a los que los Estados deben responder trabajando en común, pues las acciones de unos afectan al bienestar de los otros. Esa interrelación debe obligarles a cooperar entre ellos para mitigar las consecuencias de los atentados ambientales. Bien entendido que entre países industrializados, los contenidos a tratar deberían ser los formalizados a través de convenios o el cumplimiento de lo acordado en Cumbres y Conferencias internacionales; mientras que los en los que se encuentran

en vías de desarrollo las cuestiones ambientales entre países deben potenciar los programas de cooperación²⁰¹.

Igualmente, las relaciones comerciales entre los diferentes Estados deben contemplar las preocupaciones ambientales, bien entendido que las empresas internacionales tienen que potenciar contenidos como transferencias tecnológicas limpias y la realización de estudios de impacto. Cuestiones de innegable importancia dentro de un mundo globalizado, en que las iniciativas deben partir de los mismos países desarrollados como ejemplo de buenas prácticas para los restantes.

Todos los países deberían comprometerse a vigilar y evaluar su propio ecosistema e integrar la información social, económica y ambiental para sustentar en esa información los procesos de adopción de decisiones. Es preciso potenciar políticas de cooperación tecnológica entre los países que sobre todo benefician a los que se encuentran en vías de desarrollo, siendo necesario encontrar el modo de suministrar estas tecnologías a quienes más las necesitan.

Cooperación sobre la necesidad de fomentar la obtención de datos ambientales fiables y creíbles en que citamos el ejemplo de la Unión Europea (UE) Institución internacional que en el convencimiento de que la información pública sobre el entorno natural es de una importancia creciente, además de una obligación, conforme a su Directiva Marco sobre la calidad del aire se ha creado el proyecto CITEAIR (Información Común sobre el Aire en Europa), que comenzó en marzo de 2004 y apoya a ciudades y regiones en el desarrollo de medios eficientes de recogida, presentación y comparación del estado de la atmósfera²⁰². El resultado de esta iniciativa ha sido exitoso, con la incorporación de un gran número de regiones y municipios que unen sus datos ambientales a tiempo real.

201. Sánchez Bravo, A., "Derecho humano al medio ambiente y políticas públicas ambientales", Sánchez Bravo, A. (Ed.), *Políticas públicas ambientales*, Sevilla, ArCibel Editores, 2008, pp. 81-94 (página 91 para esta cita).

202. www.airqualitinow.eu/es/index.php

Ejemplo, y ello nos sitúa en el contenido que deseamos desarrollar en el presente trabajo, que pone de manifiesto que la Unión Europea (UE) está cumpliendo responsablemente con los objetivos anteriormente reseñados. No en vano desde el año 2001 cuenta con la *Estrategia Europea para el Desarrollo Sostenible* (EEDS)²⁰³, aprobada por el Consejo Europeo de Gotemburgo, habiendo sido revisada en 2006²⁰⁴. Documento que constituye el ámbito idóneo para establecer acciones prospectivas de sostenibilidad, en las que el crecimiento económico, la cohesión social y la protección del medio ambiente discurren por caminos paralelos y se implementan de forma recíproca.

Planteamientos sobre los que abundaremos en el presente trabajo con el deseo de ofrecer, dentro de un contenido didáctico y comprensible, en primer lugar una panorámica sobre la evolución histórica ambiental desde el último tercio del pasado siglo, para después abundar en las Conferencias Internacionales que desde entonces auspiciadas por la Organización de Naciones Unidas; y, finalmente, la incidencia en la UE de esas iniciativas y su participación en los diferentes compromisos acordados. Contenidos que teniendo en cuenta la interrelación entre medio ambiente y calidad de vida de los ciudadanos estimamos de indudable interés.

2. Acuerdos internacionales y medio ambiente: Necesidad de legislar y hacer políticas públicas conjuntas

Las consideraciones sobre variables tan significativas en el desarrollo de la humanidad como crecimiento económico, desarrollo social y medio ambiente han registrado un cambio sustancial en los últimos años.

203. Comunicación de la Comisión de 15 de mayo de 2001 “Desarrollo sostenible en Europa para un mundo mejor: estrategia de la Unión Europea para un desarrollo sostenible (Consejo Europeo de Gotemburgo)” [COM (2001) 264 final].

204. En 2007 fue publicado un informe de progreso que puede ser consultado en la página Web de desarrollo sostenible en: ec.europa.eu/sustainable/

En el cuadro que exponemos sobre su evolución histórica podemos apreciar que fue en la década de los noventa del pasado siglo cuando se consolidó un cambio sustancial al situar al ser humano como centro del proceso de desarrollo y no como medio para logro de otros objetivos. También, y es una cuestión primordial, porque el desarrollo social pasa a ser un proceso referente a las personas y no a los países, como defendió en sus concepciones sobre el desarrollo, a finales del siglo XVIII, Adam Smith²⁰⁵.

205. Smith, A., *Investigación sobre la naturaleza y causas de la riqueza de las naciones*, Madrid, Alianza Editorial, 2012.

Crecimiento económico, desarrollo y medio ambiente en los últimos 50 años

DÉCADA	TENDENCIA	EVOLUCIÓN
Años 60	Expansión económica sin importar sus efectos	El crecimiento material era sinónimo de desarrollo, progreso e incluso bienestar. se llegaba a identificar crecimiento con desarrollo, relegando a un segundo plano las transformaciones estructurales
Años 70	Primeras consideraciones sobre los costes del crecimiento en el medio ambiente	Voz de alarma sobre los límites ecológicos para la expansión económica, introdujeron un nuevo planteamiento del desarrollo humano (Naciones Unidas, 1972) y las relaciones internacionales
Años 80	El crecimiento económico debe ser “sostenible” (no sólo sostenido)	Necesidad de mantener de forma perdurable la base de los recursos naturales y ambientales sobre los que descansan los procesos socioeconómicos. Equilibrio entre crecimiento económico y desarrollo social ambientalmente sostenible
Años 90	Binomio indisoluble: desarrollo económico y medio ambiente	Necesidad de integrar plenamente crecimiento económico y medio ambiente en la toma de decisiones a todos los niveles. Del resultado de esta integración surge el concepto de “desarrollo sostenible”.
Primera década del siglo XXI	Alianza mundial desarrollo y medio ambiente	Nuevos acuerdos internacionales buscan la ejecución de compromisos, orientaciones y planes de acción para la “governabilidad planetaria”. El concepto de desarrollo sostenible se consolida y se abandona la identificación crecimiento económico/ desarrollo y bienestar

Y en esa misma década, la Conferencia Mundial de los Derechos Humanos que tuvo lugar en Viena el 25 de junio de 1993 estableció lo siguiente:

Todos los derechos humanos son universales, indivisibles e interdependientes y están relacionados entre sí. La comunidad internacional debe tratar los derechos humanos de forma global y de manera justa y equitativa, en pie de igualdad y dándoles a todos el mismo peso. Debe tenerse en cuenta la importancia de las particularidades nacionales y regionales, así como los diversos patrimonios históricos, culturales y religiosos, pero los Estados tienen el deber, sean cuales fueren sus sistemas políticos, económicos y culturales, de promover y proteger todos los derechos humanos y las libertades fundamentales (...).

Derecho universal e inalienable y como parte integrante de los derechos humanos fundamentales se establece que el desarrollo propicia el disfrute de todos los derechos humanos, pero la falta de desarrollo no puede invocarse como justificación para limitar los derechos humanos internacionalmente reconocidos²⁰⁶.

Como se puede apreciar se vincula adelanto social con los derechos humanos y la existencia de un sistema democrático. Conceptos, pues, interrelacionados, que deben estar presentes para conseguir un desarrollo social armónico y equilibrado, que satisfaga adecuadamente las necesidades humanas. Proceso que ha supuesto la existencia de una evolución económica y sostenibilidad ensambladas y acordes con las necesidades, que ha dado lugar, ya en el siglo actual, a una alianza planetaria entre bienestar social y medio ambiente.

206. PNUD, *Declaración y Programa de Acción de Viena: 20 años trabajando por tus derechos*, New York, Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos y el Departamento de Información Pública de las Naciones Unidas, 2013, p. 18 y ss.

Conferencias Naciones Unidas sobre medios ambiente

AÑO	CIUDAD	CONSECUENCIAS
1972	Conferencia de las Naciones Unidas sobre el Medio Ambiente Humano (Estocolmo, 1972)	Se toma por primera vez conciencia sobre la problemática medioambiental en un foro internacional avalado por la ONU
1992	Conferencia de las Naciones Unidas sobre el Medio Ambiente y el Desarrollo (Río de Janeiro, 1992)	Programa de Acción de la Conferencia de las Naciones Unidas sobre el Medio Ambiente y el Desarrollo: Programa 21
2002	Conferencia de las Naciones Unidas: Cumbre Mundial Sobre Desarrollo Sostenible (Johannesburgo, 2002)	Se trataron temas como al acceso al agua y a la energía, la salud, la agricultura, la gestión de la biodiversidad y el ecosistema, y las finanzas, el comercio y la globalización
2012	Conferencia de las Naciones Unidas en Río de Janeiro (Río+20), junio 2012	Documento <i>el futuro que queremos</i> , necesidad de construir alianzas para promover la toma de conciencia en la sociedad civil, sobre la necesidad de defender el planeta y sus habitantes

Y si esa es constituye la etapa final del proceso histórico ambiental, consideramos que a ese modelo han contribuido de forma notable las cinco conferencias internacionales que bajo los auspicios de la Organización de las Naciones Unidas se han venido celebrando desde 1972. Según se indica en el cuadro que se expone al respecto. Éstas se iniciaron en Europa, concretamente en Estocolmo en referido año, para continuar veinte años después en Río de Janeiro. La siguiente fue en Johannesburgo, en 2002, para celebrarse la última de nuevo en Río de Janeiro.

En todas, como puede apreciarse, se fueron consiguiendo avances en materia ambiental, que pasaron desde la toma de conciencia de esta problemática en un plano internacional a la creación, en el mismo 1972, del Programa de las Naciones Unidas para el Medio Ambiente (PNUMA), que en la actualidad

continúa siendo la referencia mundial sobre esta cuestión. Asimismo destaca la creación en 1992 del denominado Programa de Acción de la Conferencia de las Naciones Unidas sobre el Medio Ambiente y Desarrollo: Programa o Agenda 21²⁰⁷, consensuado por las 178 naciones participantes y con el compromiso político sobre el desarrollo y cooperación en la esfera ambiental.

Cumbre Río+20: principales contenidos de la declaración: “el futuro que queremos”

CONCEPTO	CONTENIDO
Erradicación de la pobreza	Por primera vez en una conferencia de la ONU, el documento apunta la erradicación de la pobreza como el principal desafío global y como una condición misma para alcanzar el desarrollo sostenible.
Foro político de alto nivel	Se propone crear un foro político de alto nivel para el desarrollo sostenible en el ámbito de las Naciones Unidas, que en el futuro reemplazará al Consejo de Desarrollo Sostenible creado en la Cumbre de la Tierra de Río 1992.
Objetivos de desarrollo sostenible (ODS)	Se aprueba la adopción de una lista de ODS que será definida por una comisión a crear en la próxima Asamblea General de la ONU y que presentará sus conclusiones en la cita siguiente, la de 2013. Las metas deberán ser perseguidas a partir de 2015 –cuando finaliza el plazo de implementación de los Objetivos del Milenio– y hasta 2030.
Mecanismos de implementación	Ante la ausencia de compromisos de los países para financiar los ODS, se creará otra comisión de 30 miembros que buscará definir mecanismos de financiamiento y de transferencia tecnológica para implementar la transición hacia la “economía verde”. Dicha comisión será nominada en la próxima Asamblea General de la ONU y tiene plazo hasta 2014 para presentar sus conclusiones.
Programa de las Naciones Unidas sobre medio ambiente (PNUMA)	Propone fortalecer y elevar a un nuevo nivel el Programa de las Naciones Unidas sobre Medio Ambiente (PNUMA), con el objetivo de lograr una participación universal en el organismo que también pasará a tener una fuente de financiamiento estable a través del presupuesto de la ONU, en lugar de tener que financiarse sólo con aportes voluntarios, como hasta ahora.

207. <http://www.un.org/spanish/esa/sustdev/agenda21/riodeclaration.htm>

CONCEPTO	CONTENIDO
Cambio de modelo de producción y consumo	Se aprueba un plan de diez años para modificar los actuales patrones de producción y consumo y adoptar un modelo sostenible.
Índice de medición de desarrollo	Se propone abandonar el actual sistema de medición del nivel de desarrollo de los países, basado exclusivamente en el desempeño económico (el Producto Bruto Interno) por un nuevo índice, que tome en cuenta los criterios de desarrollo social y de protección ambiental
Economía verde	Los 193 países aceptaron adoptar el concepto de “economía verde”. Aunque el documento no establece una definición única y universal para el concepto, se trata de perseguir un cambio en el modelo de desarrollo que reduzca la presión sobre los recursos naturales.
Reiteración de los “principios de Río 92	Pese a que no se trató de una nueva resolución, la reafirmación de los principios adoptados en la Cumbre de la Tierra de 1992, en especial el de las Responsabilidades Comunes pero Diferenciadas entre países desarrollados y en desarrollo fue apuntada por Brasil como una de las principales conquistas de los negociadores.

En la 2002 se efectuó un balance positivo del cumplimiento de la Agenda 21 y se impulsaron nuevas iniciativas que quedaron recogidas en el documento conocido como Declaración de Johannesburgo sobre Desarrollo Sostenible²⁰⁸, en que se reafirma el compromiso a favor del medio ambiente, potenciándose la necesidad de promover y fortalecer el desarrollo económico, social y la protección ambiental. Finalmente, en la última celebrada en 2012, en plena crisis económica del mundo occidental, se publicó un documento final: *el futuro que queremos*²⁰⁹, del que publicamos una síntesis en el cuadro sobre ese contenido. Eventos en los que ha tenido una participación determinante la UE, según analizamos a continuación.

208. Véase: <http://www.culturalrights.net/es/documentos.php?c=18&p=196>

209. https://rio20.un.org/sites/rio20.un.org/files/a-conf.216-l-1_spanish.pdf

3. La Unión Europea y su compromiso con el Desarrollo Sostenible

La UE ha tenido una implicación activa en esas políticas ambientales. En el cuadro que se expone sobre su evolución histórica podemos comprobar que ya en 1994 tuvo lugar la aprobación de la Carta de las Ciudades Europeas hacia la sostenibilidad o Carta de Aalborg, que compromete a las ciudades firmantes a trabajar juntas para un *desarrollo sostenible* y establecer planes de acción local a largo plazo (Programa/Agenda 21), reforzando la *cooperación entre autoridades locales*, fomentando la *participación ciudadana* e integrando este proceso en las iniciativas de la Unión Europea en materia de medio ambiente urbano (Comisión Europea, 1994).

Medio ambiente y la UE: evolución histórica

AÑO	CONFERENCIAS	CONSECUENCIAS
1994	Primera Conferencia Europea de Pueblos y Ciudades Sostenibles (Aalborg, 1994): Carta de las ciudades europeas hacia la sostenibilidad o Carta de Aalborg	La Carta de las ciudades europeas hacia la sostenibilidad o Carta de Aalborg, compromete a las ciudades que la firman a trabajar juntas para un <i>desarrollo sostenible</i> (Programa/Agenda 21)
1996	Segunda Conferencia sobre Ciudades Europeas Sostenibles: de la Carta a la Acción (Lisboa, 1996): Carta de Lisboa o Plan de Acción de Lisboa	Preparación de los gobiernos locales para el proceso de la Agenda Local 21. Intercambio de ideas y experiencias de prácticas locales.
1999	Conferencia Euro-mediterránea de Ciudades Sostenibles (Sevilla, 1999): Declaración de Sevilla	Declaración de Sevilla se hace un llamamiento a los ciudadanos de la región euro-mediterránea y a sus asociaciones para una mayor implicación en la Agenda 21

AÑO	CONFERENCIAS	CONSECUENCIAS
2000	Tercera Conferencia Europea de Ciudades Sostenibles (Hannover, 2000); Declaración de Hannover	Declaración de Hannover: se evalúan los progresos de las ciudades y municipios europeos en el <i>camino hacia la sostenibilidad</i> , y se pide una mayor implicación de las instituciones en la agenda política
2004	Cuarta Conferencia Europea de Ciudades Sostenibles, Inspiración para el Futuro (Aalborg, 2004): Aalborg+10	Compromiso Aalborg+10: asegurar un desarrollo sostenible a la vez que responder a los retos en cooperación con cualquier ámbito gubernamental

Era el punto de partida, en la crucial década de los noventa según hemos señalado con anterioridad, que se vio después acompañado por otras Conferencias celebradas con posterioridad. En éstas se produjeron avances como dar voz oficial a los representantes de la sociedad civil, o llamamientos como el efectuado en Sevilla en 1999 a los ciudadanos de la región euro-mediterránea y a sus asociaciones para una mayor implicación en el Programa o Agenda 21. En suma, que los trabajos en esta dirección han sido intensos y han tenido importantes consecuencias.

En línea con esa dinámica de protección ambiental de la UE cabe ubicar lo establecido en el Tratado de Lisboa de diciembre de 2007²¹⁰, de considerar el Desarrollo Sostenible un el objetivo fundamental de la Unión Europea a largo plazo. Aseveración que se efectúa cuando, como ya hemos indicado desde 2001 la UE cuenta con una *Estrategia Europea de Desarrollo Sostenible (EEDS)*, que desde su publicación ha visto consolidarse importantes avances en estas materias. En ese contexto cabe encuadrar las reformas realizadas en la PAC y política pesquera y la iniciativa de implementar un sistema de comercio de derechos de emisión de gases de efecto invernadero para obligar a las industrias a reducir sus emisiones, limitando su coste. Igualmente la puesta en marcha de me-

210. Véase lo acordado en este Tratado en *Diario Oficial de la Unión Europea*, C 306/1, 17-XII-2007.

canismos capaces de evaluar el impacto ambiental de todas las medidas de cierta entidad a iniciativa de la UE a fin de cotejar y analizar su contribución al desarrollo sostenible.

Retos planteados en la revisión de la estrategia europea de desarrollo sostenible en 2006

CONCEPTO	OBJETIVO
Cambio climático y energía limpia	Limitar el cambio climático y sus costes y efectos negativos para la sociedad y el medio ambiente
Transportes sostenibles	Garantizar que nuestros sistemas de transporte respondan a las necesidades económicas, sociales y medioambientales de la sociedad y, al mismo tiempo, reducir al mínimo las repercusiones negativas sobre la economía, la sociedad y el medio ambiente.
Consumo y producción sostenibles	Fomentar patrones de consumo y producción sostenibles
Conservación y gestión de los recursos naturales	Mejorar la gestión y evitar la explotación excesiva de los recursos naturales, reconociendo el valor de los servicios del ecosistema
Salud pública	Fomentar la buena salud pública en igualdad de condiciones y mejorar la protección frente a las amenazas sanitarias
Inclusión social, demografía y flujos migratorios	Crear una sociedad socialmente inclusiva mediante la toma en consideración de la solidaridad intergeneracional y asegurar y mejorar la calidad de vida de los ciudadanos como condición previa para un bienestar individual duradero
Pobreza en el mundo y retos en materia de desarrollo sostenible	Fomentar de forma activa el desarrollo sostenible en el mundo y garantizar que las políticas internas y externas de la Unión Europea sean coherentes con el desarrollo sostenible mundial y con sus compromisos internacionales

Decisiones que posteriormente condujeron, con el fin de optimizar

estas iniciativas y eliminar las consecuencias adversas, a revisar, en el año 2006 la EEDS²¹¹. Las razones de esta revisión residían en el compromiso por crear comunidades sostenibles capaces de gestionar y utilizar los recursos de manera eficaz, y aprovechar el potencial de innovación ecológica y social que ofrece la economía, garantizando la prosperidad, la protección del medio ambiente y la cohesión social. Y para conseguir esos fines, esta revisión contemplaba una serie de retos a cumplir que se recogen en el cuadro que exponemos al respecto.

Importantes retos que actualizaban y ponían en valor la EEDS, que con posterioridad serían objeto de los preceptivos controles para comprobar que, efectivamente, se iban cumpliendo los objetivos propuestos²¹². Informes que confirmaban avances significativos en las diferentes materias, destacando las medidas relacionadas con el cambio climático, eficiencia energética de los edificios, optimización transportes, etc. En contrapartida se han podido comprobar desviaciones preocupantes en la demanda creciente de recursos naturales y la pérdida de biodiversidad, o el ingente consumo de energía en los transportes.

211. Este acuerdo está contenido en el documento: Estrategia Revisada de la UE para un Desarrollo Sostenible, siendo expedido por el Consejo de Europa con fecha 9.VI.2006. Véase su contenido: <http://register.consilium.europa.eu/doc/srv?l=ES&f=ST%2010117%202006%20INIT>

212. Eurostat (oficina estadística de la UE) elabora cada dos años un *informe de seguimiento de la Estrategia de Desarrollo Sostenible*, basado en el conjunto de indicadores de desarrollo sostenible de la UE.

Principales propuestas defendidas por la Unión Europea en Río+20 (2012)

(Las tres primeras irrenunciables y las otras tres para tiempo de crisis)

PROPUESTAS	CONTENIDOS
Objetivos concretos	El establecimiento de una hoja de ruta con objetivos concretos , evitando expresiones vagas o ambiguas, que establezca una relación específica de contribuciones significantes.
Emisiones CO ₂	Marcar un objetivo vinculante de reducción de emisiones de CO₂ que sea respetado por la comunidad internacional.
Nuevos Indicadores	Establecer indicadores de crecimiento que vayan más allá del PIB , dado que éste sólo refleja la producción y no tiene en cuenta otras variables como la sostenibilidad medioambiental, el uso del capital humano, la inclusión social o la eficiencia de los recursos.
Participación privada	Necesidad de que el sector privado contribuya a estos objetivos en un momento en que las arcas públicas están vacías .
Innovación financiación	Generar fuentes de financiación innovadoras. Un impuesto mundial sobre las transacciones financieras no solo garantizaría que el sector financiero pagase una contribución equitativa a la economía, sino que podría proporcionar además recursos valiosos para financiar el desarrollo
Partenariados internacionales	Promoción de partenariados internacionales que mejoren el acceso a las fuentes de energía, el uso del agua y la seguridad alimentaria. Precisamente en este punto la UE puede aportar sus conocimientos sobre colaboración transfronteriza .

Iniciativas que asimismo no han estado exentas de compromiso internacional de la UE para promover la sostenibilidad mundial, hasta el punto de convertirse en el principal donante de ayuda. Y si bien la UE necesita mejorar en algunos contenidos, entendemos que no se le puede criticar que haya tenido dejación a la hora de afrontar los desafíos que en materia ambiental se enfrenta el planeta.

En ese sentido, y sin deseo de abundar en otros ejemplos recientes, ponemos como ejemplo las propuestas planteadas por la UE en la ya referida Conferencia de las Naciones Unidas de Río+20. Su presencia en este encuentro, en medio de una crisis económica de graves consecuencias en los países comunitarios, no impidió la defensa de sus propuestas

sobre un medio ambiente sostenible, según recogemos en el cuadro que se expone sobre este contenido.

En esas propuestas se pone de manifiesto la necesidad de potenciar planes de sostenibilidad llevaderos y eficaces, que establezcan unos objetivos alcanzables y sustentados económicamente. Materias tan sensibles como la reducción de emisiones de CO₂ o incentivar la participación del empresariado en la financiación de iniciativas ambientales sustentables, o la promoción de partenariados internacionales capaces de optimizar los recursos hídricos o el uso de fuentes renovables para el transporte constituyen iniciativas que muestran fehacientemente el compromiso de la UE en esta materia.

No obstante, y dentro de un ámbito internacional la voz de la UE no se puede considerar determinante, ni incluso lo suficientemente influyente para establecer una agenda a cumplir. Un claro ejemplo es lo sucedido en esa Cumbre de 2012, en que la declaración resultante recoge medidas de interés, pero no concreta cómo se van a financiar, y sin recursos para ejecutarlas difícilmente se pueden cumplir, como se ha demostrado con posterioridad. Era uno de los puntos lo exigidos por la UE: compromiso de financiación, buenos propósitos en una comunidad internacional que sin embargo prima la variable crecimiento por encima de la variable sostenibilidad. Y es que las propuestas de Bruselas han originado el preceptivo debate sobre el futuro sostenible del planeta, han enriquecido notablemente las discusiones sobre esta cuestión, pero apenas se han visto refrendadas en cuanto a su cumplimiento.

En conclusión, la UE ha llevado a cabo en las últimas décadas una política clara de defensa del Desarrollo Sostenible y ha demostrado con hechos su firme compromiso con la preservación del medio ambiente, como lo demuestra ser uno de los principales donantes mundiales en asistencia al desarrollo y a la sostenibilidad ambiental. Cuestión distinta es su capacidad de liderazgo para hacer prevalecer esos principios en un plano internacional, que mucho nos tememos no es lo suficientemente relevante para hacer valer sus criterios. Pero independientemente de ese contexto exterior, consideramos que la UE ha dado prioridad en sus

políticas públicas a la sostenibilidad ambiental y esas iniciativas se han traducido en una mejor conservación y defensa del medio ambiente.

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The New Quantitative Expansion Program Approved by the ECB in March 2016: Scope of New Auctions TLTRO II and Expanded Programme of Purchase of Assets (APP)

JUAN CALVO VÉRGEZ

1. Introduction

With effect from the beginning of the implementation of the Public Sector Program Purchase Program (PSPP) in March 2015 and until March 2016 the European Central Bank (ECB) injected into the system a total of 720,000 million euros, a pace of purchases of around 60,000 million euros per month. Although one of the main objectives pursued by the implementation of that Program was to combat the downward price inertia, inflation in the Eurozone had reentered February 2016 in negative territory, recording its lowest level in a year. Indeed, inflation and

prospects had declined, while the macro data had improved less than expected. Moreover, while when the ECB activated the start of its debt purchase program on March 9, 2015 the euro was moving at \$ 1.08, at the end of the first week of March 2016 European currency stood at \$ 1.10. Consequently the implementation of that Program had failed to depreciate the euro, which could have help raise inflation and thus reduce the burden of debt of European economies, making imports more expensive, and facilitating external competitiveness of European companies.

Moreover the States of the Eurozone had failed to reduce its financial sector, since they obtained significant benefits thereof, being banks the main buyers of public debt. As a result of that assets of financial institutions located in their balance sheets had come to represent more than 300% of Gross Domestic Product (GDP) in the Eurozone. In short, high liquidity provided by the ECB had not improved solvent demand for credit, leading instead to an increase in debt by the States.

In return, the ECB had reduced interest rates on public debt placing nearly half of sovereign bonds in negative territory, which had enabled turn generating incentives for banks to assume more risk in lending. The profitability of the public debt had also dragged the corporate bonds, thereby reducing the cost of financing in the markets. This trend downward rate had enabled a greater willingness of private sector credit from banks and from the capital market.

In general the real growth can be stimulated by increasing loans. However that phenomenon was not being produced in this case because the negative rates were affecting bank profitability and their income statements²¹³. And, to that end, the longer they remained the negative interest rates more damaging could become the effect of that measure on bank

213. Indeed, just as indicated DAVIES, PJ and BARLEY, R., "This Is the Real Point of Europe's Negative Rates", www.europe.wsj.com (accessed March 9, 2016), "*Largely northern Europe, negative rates are not cutting the cost of loans because banks are unable to transfer the costs arising from negative rates to small savers*".

profits, as profits on their bond portfolios would drop and may even represent a cost²¹⁴.

2. The New Quantitative Expansion Program Approved by the ECB in March 2016: Scope of New Auctions TLTRO II and Expanded Programme of Purchase of Assets (APP)

On the occasion of the meeting of the ECB Governing Council held on March 10, 2016 the first supervisor agreed to lower the interest rates of 0.05% set in September 2014 to 0%. In that way, from the operation that was settled on March 16, 2016 the interest rate on the main refinancing operations of the Eurosystem is placed at 0.00%. In our opinion inevitably this first step will lead to a further depreciation of the euro (with the incentive therefore exports of European products and rising imports by the weakness of the European currency) affecting also, at least indirectly, to euríbor to 12 months (benchmark for calculating most mortgages).

Secondly, the ECB decided to raise the volume of purchases of government debt 60000-80000 million per month with effects from the beginning of April 2016. Since the program of quantitative easing PSPP should be operational until March 2017 adoption of that decision meant an added stimulus of 240,000 million on what was already planned. Consequently that Program, initially endowed with a total amount of 1.14 billion euros, grew now to a size of 1.74 billion euros.

For the first time the ECB included in the aforementioned Purchase Program the acquisition of corporate debt (particularly non-financial corporate bonds) in its asset purchase plan. Undoubtedly the latter measure was of greater significance, since implied that the supervisor directly lend to companies by buying their debt, assuming credit risk. Please note

214. In this regard warn DAVIES, P. J. and BARLEY, R., “This Is the Real Point of Europe’s Negative Rates”, op. cit., that “*Their funding costs –The authors are referring to financing costs of the financial institutions– on the junior debt and some forms of bank capital may increase if growing investor concern over the loss of dividends or of coupon payments*”.

also that the corporate debt market has considerably lower than the sovereign debt market size, so that the entry of a buyer with the characteristics of the ECB would have a greater impact on prices.

Also for the first time the ECB approved the acquisition of bonds denominated in euros with a rating investment grade issued by non-bank companies established in the Eurozone, announcing its intention to buy, from the end of the second half of 2016, high quality corporate bonds. The adoption of this measure was intended to try to ensure the transmission of accommodative monetary policy to the real economy.

Continuing our analysis of the package approved by the ECB at its meeting in March 2016 the supervisor raised from 33% to 50% limit outstanding debt that can buy from Government agencies and multilateral financing institutions. The weight of these securities within the PSPP Program was reduced from 12% to 10%, which meant that the ECB would buy 6,000 billion to 5,000 billion euros per month in debt of these organizations. In addition the ECB contemplated that the Asset Purchase Program could reach extended beyond March 2017 in the event that necessary.

Moreover, the ECB agreed to further penalize the deposit facility (Deposit Facility Rate), to raise from -0.3% to -0.4% (the lowest level in its history) in order to pressure Banks to lend money. And also decided to cut the Marginal Lending Facility (which is the rate in order to pay the overnight money). That rate was going to 0.25% from 0.30% with effect from 16 March 2016.

Also, as a new line of action, the supervisor announced from June 2016 the start of a new series of monetary auctions called Targeted Long-Term Refinancing Operation (TLTRO II) or liquidity loans to banks very long term, each one with a duration of four years, whose interest could eventually be reduced to a minimum of -0.4% . In other words, the loan conditions of these operations (limited to 30% of total credit extended by the bank to non-financial corporations and households, excluding mortgages) could be as low as the rate on the deposit facility.

The ECB could provide 30% of loans that banks had granted dated January 31, 2016 to businesses and households –excluding housing mortgage

granted to individuals– less money that banks still had outstanding lending from the two operations TLTRO I made in 2014 as long as entities increase their credits at least 2.5% ahead of January 2018, to benefit from the 0.4% bonus promised by the monetary authority. Meanwhile those financial institutions that provide more credits from being awarded when they went to the monetary auction but did not reach that minimum set would be financed at 0%. Finally, those entities whose credit balance is negative would have to compensate by 0.4% to ECB because of the financing granted.

The main refinancing rate would be the output type applied in these operations. Those banks whose net lending exceeded the benchmark period from February 1, 2016 until January 31, 2018 would be charged a lower rate over the entire term of the transaction, so that those entities that provide more credit to the real economy could come to have the same type as that of the deposit facility (–0.4%). In any case this interest rate would vary according to the rate at which banks exceeded the amount of ‘reference’ credit granted. In this sense those financial entities which provided higher percentage of credit to the real economy could benefit from this type of –0.4%, while those others who grant a lower amount could opt to –0.3% (for example), and so on until the main refinancing rate set at the 0%.

The last of these auctions will take place in March 2017 and therefore expire in 2021. As a result of holding these new auctions entities that lend larger sums of money to the real economy could, in turn, ask for a higher amount to ECB through them. These auctions of long-term financing would be offered at an interest rate of 0% likely to be improved for the most active banks as lenders to reach –0.4%. And this in order to compensate, at least in part, the penalty would suffer banks reducing deposit rate a tenth to –0.4%. On the occasion of the adoption of this measure banks could increase their profitability, ensuring availability of abundant funding and, at least, free. The measure also could be especially beneficial for banks of peripheral countries to counter the effects on the profitability of negative interest rates, and seeing substantially reduced risk in a context of economic slowdown.

3. Key Issues for Reflection

In general the ECB has been justifying the adoption of this set of monetary policy measures framed in the field of quantitative easing arguing that if these measures were not taken it would have reached a situation of deflation that would increase the real value of Debt.

First of all, in the light of this new package of measures approved by the Governing Council of the ECB in March 2016 is undeniable that the initial target set by the supervisor to raise the balance to highs of 2012 has been abandoned, being necessary to increase it further.

The adoption of this set of new measures has the usual aim to further facilitate financing conditions, stimulate new provision of credit and strengthen the momentum of economic recovery in the Eurozone, accelerating the return of inflation to levels below but about 2% and preventing the existing environment of low inflation can reach foothold in side effects on wages and prices. Certainly the main reason why the ECB again returns to intensify its policy of monetary expansion lies in the fact that the basic parameters of the European economy (growth and inflation) have not improved. The growth achieved is reduced, with low rates of job creation, besides being present the risk of falling into deflation.

However, from our point of view inevitably such measures could eventually lead again to increase the negative real interest rates, specifically producing an alignment of the rates of interbank market rates negatively offered by European government debt and the negative type that ECB charges banks when they placed in the institution their excess liquidity. And, as it's known, through the application of these negative types penalizes savings, forcing financial agents to pay more to operators, who will stop to save the cost of it and prefer to invest. Do not forget that the negative types require banks to have to pay for deposit money at the ECB and to pay States for the acquisition of its public debt. Additionally banks can not fully translate these negative rates to savers for fear potential capital flight or, in certain cases, by banning the applicable regulations. As a result of the above actions and bank bonds have been suffering mas-

sive sales to existing doubts about the profitability of the sector and the effects on dividends and coupon payments from the so-called junior debt. In short, it would be endangering the banking model consisting of safeguard deposits and charge interest on loans.

It should be borne in mind that the negative types cause a drop in share price and bonds of banks, infecting the rest of the titles and generating even more uncertainty, which hurts the credit and thus to economic growth²¹⁵. In short, these measures could lead to increase a sufficiently serious situation of overcapacity and excess debt, not lack of credit. Low interest rates also tend to increase the level of debt.

However from the ECB has been arguing that although interest rates of bank loans fall linearly, their financing costs are not linear because the interest rates on retail deposits are static, wich it's affecting net interest margins, so that financial institutions can offset the decline in interest income with higher volumes of loans, lower interest expenses and lower provisions for risks and capital gains. The ECB also defends the positive effects on asset prices as well as credit risk and trading volumes of purchases of public and private debt made by the supervisor. In short, according to the ECB's experience negative rates have helped to ease financing conditions and to facilitate the transfer of such conditions funding to the real economy, thus not damaging aggregate banking sector profitability.

4. Conclusions

In order to enter to value the success of these measures will be necessary to check the evolution of credit to banks (which, so far, spent much of the

215. As regards the specific case of public debt markets, negative returns represent a barrier to investment in terms of absolute value, although they are not an obstacle to negotiating the shape of the yield curve or prices on bonds. However, as noted BARLEY, R., "How Retreading German Bonds Are a Dangerous Path", www.europe.wsj.com (accessed March 2, 2016) "A ten-year bonds that offer virtually no return seem very expensive and government bond markets are conditioned by the extraordinary monetary policy. "

credit available for the purchase of public debt that the ECB keeps artificially low interest rates) and the corporate bond issues. The ECB expected that the effect arising from the purchase of corporate bonds with investment grade go moving to other assets and markets as liquidity from the sale of such bonds are invested in other assets.

In principle, the effects of these refinancing operations with longer term specific objective (TLTRO II) and the expanded Asset Purchase Program (APP) would have to contribute to improving monetary and credit developments. Instead, unlike what happened with previous auctions LTRO, there would be less chance for banks to use new funds to buy sovereign debt and make carry trade, given the lower yields than currently offered government bonds and the possibility increasingly true that European authorities allocate a greater risk to sovereign debt.

Either way once the ECB leave its current policy of quantitative easing with subsequent normalization of interest rates it will be increased significantly the cost of debt service, ie interest payments. This will require necessarily adjustments to reduce the public deficit and, therefore, the level of public debt, abandoning the policy of issuing more debt with the sole purpose of paying interest.

It must also undertake expansionary fiscal policies articulated through tax cuts in those States with higher tax margins and structural reforms as a boost to the cyclical recovery in progress and take into consideration the fact that the depressed demand it is corrected when the private return is low, with public investment.

This fiscal consolidation policy must allow to ensure that the public debt ratio is placed on a firm downward path. It should try to reduce the tax burden on citizens and businesses to achieve increase consumption while avoiding growing public spending, developing a policy of international coordination to prevent competitive devaluations of currencies. It could also be appropriate to return the project of European long-term bonds backed by EU in order to finance investment in Europe.

In any case one month after the adoption by the ECB of its new monetary policy of measures European banks had fallen by 10.2%. The debt of

southern Europe had also registered a worse outcome than expected and the spread between the yield on Spanish bonds and German ten-year had risen from 1.33 to 1.47 percentage points. In addition, the euro continued to rise from the ECB meeting March 2016 by 3.6% against the dollar and 4.5% against the pound sterling. Although the oscillation weighted terms was less, the single currency remained 1.8% higher than the dollar.

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EU Works in Latin America in Bolivia Specifically

YULY TATIANA CHOQUE ORDÓÑEZ

1. Introduction

This paper addresses systematically the work of the European Union in Latin America under Title V of European Union Treaty and Parts I to III and V (common commercial policy, development cooperation and humanitarian aid; international agreements) of the Treaty Functioning of the European Union (TFEU). Work specifically developed in Bolivia.

The Constitution of Bolivia is taken as a reference of the new Latin American constitutionalism, especially regarding protection of minorities and equality and the new constitution as Plurinational State. In this sense the work of the European Union is essential to achieve these objectives, that's why it is necessary to analyze how effective they are.

2. European Union in Latin America and Bolivia

The work of the European Union in Latin America comprises different areas and projects. The external action of the European Union 2014-2020 distributes various financial instruments, each governed by its own rules

where the scope, principles and objectives may be geographical or thematic set. The financial instrument covering Latin America is the DCI (Development Cooperation Instrument) with a budget of 19.661.639.000 €²¹⁶. This instrument contains a geographical dimension to regional and bilateral levels, and the thematic side.

The work of the European Union in Bolivia is divided into several areas, these are: Regional, humanitarian aid ECHO, bilateral cooperation issues. Developing economic areas of political, trade, technical and financial cooperation and humanitarian aid.

With regard to regional cooperation, it covers the entire geographical area of Latin America. The same is part of the EU / LAC Latin America and the Caribbean and the EU agreement. Multiyear known as Regional Indicative Programme, security and development nexus; good governance, accountability and social equity; inclusive and sustainable growth for human development; environmental sustainability and climate change; and higher education (Erasmus +). Moreover the development of exchange activities in various sectors that require cooperation between these two regions, such as science, technology (Horizon 2020), commerce and education (Erasmus + program) is also promote. The DG-ECHO (Department of Humanitarian Aid and Civil Protection of the European Commission) is responsible for the development of humanitarian aid has been working in Bolivia since 1994. This department has two modes. First respond quickly to the needs created by emergencies and disasters manner. During 2014 it was financed three projects for Bolivia in response to the flooding of the Rio Mamore in the Department of Beni. Second program called DIPECHO (Disaster Preparedness Program) enhances the capabilities of preparation and risk prevention and disaster resilience before. In the latter mode Bolivia is a beneficiary of three

216. Secretary of State for the European Union. *The External Action of the European Union 2014-2020. financing practice guide*. 2015 Ministry of Foreign Affairs and Cooperation. General Secretary.

projects. One of them has a duration of 18 months, the other two are 20 months. In order to increase resilience in the basins of the rivers Beni and Mamore²¹⁷ implementation in 17 municipalities.

Thematic cooperation takes place through direct connection with civil society organizations and local authorities. The importance of thematic cooperation lies in giving more prominence to these civil actors directly involved. Strengthening and expanding democratic participation. 18 current thematic cooperation projects in Bolivia are being developed. By Multiannual Indicative Programme PIM, it is agreed bilateral cooperation with the Government. Currently running the PIM I 2014-2016, on the financial and technical assistance and lines of action that expected are: Judicial Reform Sector, Industry counternarcotics alternative development and food security. C. Water Management Sector. Mainly bilateral cooperation is given by the AP (Budget Support) is a direct financial tool, once completed the results, which is paid in local currency, the General Treasury of the Nation. This budget support can be an APG (General Budget Support) represents a transfer to the national treasury to support a national policy or strategy or APS (Sector Budget Support) represents a transfer to the national treasury to support a policy or sector strategy. The features of this transfer fungibility is expressed that cooperation resources become one with the resources of the General Treasury of the Nation. On the other hand non-traceability refers to the impossibility of making a specific monitoring. Countries wishing to receive budget support must meet certain requirements. In this country there must be national and sectoral policies and reforms that support the objectives of poverty reduction, sustainable and inclusive growth and democratic governance. If there is a stable macroeconomic framework, Bolivia increase real GDP by 3.0% in the first half of the previous decade to 4.6% in the sec-

217. Delegation of the European Union in Bolivia. Bulletin Management Group Disaster Risk GRUS 2015. (Available in) http://www.eeas.europa.eu/delegations/bolivia/documents/eu_bolivia/20150703_bolgrus_es.pdf [Accessed: May 20, 2016]

ond half, registering in 2012 a growth of 5.2% and 6.5% in 2013. there must be transparency and oversight of the budget, approved budget publication and public availability of accessible, timely, complete and budgetary information. bilateral cooperation programs also develops budgets programs.

3. Budget Support Program and Budget Program

Bolivia currently has nine programs APS

Nº	NOMBRE DEL APS	MONTO AYUDA PRESUPUESTARIA	AYUDA COMPLEMENTARIA	ESTADO
1	Apoyo Plan Nacional de Saneamiento Básico – PASAP Periurbano	28,5	3,5	En ejecución
2	Programa de Apoyo al Plan Sectorial de Desarrollo de Saneamiento Básico de Áreas Rurales – PASAR	19	5	En ejecución
3	Programa para la Mejora del Entorno Financiero Fiscal de la MyPIME – PAMEFF	33	2	En ejecución
4	Programa de Apoyo a la Conservación sostenible de la Biodiversidad – PACSBIO	14	4	En ejecución
5	Programa de Apoyo a la Implementación de la Estrategia Nacional de Desarrollo Integral con Coca –PAPS II	23	1	En ejecución
6	Apoyo Sectorial al Plan Nacional de Cuencas II – ASPNC II	8	0	En ejecución
7	Apoyo a la Estrategia Nacional de Lucha contra el Narcotráfico y Reducción de Cultivos Excedentarios de Coca	50	10	En ejecución

Nº	NOMBRE DEL APS	MONTO AYUDA PRESUPUESTARIA	AYUDA COMPLEMENTARIA	ESTADO
8	Apoyo Sectorial al Plan Nacional de Cuencas II – Fase II BID	17	0	En ejecución
9	Fortalecimiento de la ejecución de las políticas sectoriales de Desarrollo Rural en las zonas impulsoras de mano de obra a zonas productoras de coca (2016-2018)	19	1	En preparación
TOTAL (euros)		211,5	26,5	

Source: Delegation of the European Union. *EU cooperation in Bolivia. Bolivia, 2015*

As an example the “Support Program Sector Policy to implement the National Strategy for Integrated Development with Coca-PAPS II (DCI-ALA Convention / 2013-024 / 438) aims to reduce coca leaf plantations or alternative development. A comprehensive study of coca that are required 14,705 hectares for legal consumption in Bolivia there is currently 25,300 hectares²¹⁸. The direct beneficiary is the Ministry of Rural Development and Land (MDRyT), which reports directly to the delegation of the European Union on the progress of the sectoral policy, and as indirect beneficiaries are the Vice Minister of Coca and Integral Development (VCDI) and the National Alternative Development Fund (FONADAL). As for the evaluation and audit, this is included in the regular monitoring exercise Monitoring-Results Oriented ROM. However, the program does not reach 100 percent for failing condos indicators related to the eradication of coca in national parks and their reduction in areas referred to as legal. Therefore.

218. UNODC *Plurinational State of Bolivia Coca Crop Monitoring 2014*. La Paz. Bolivia, 2015.

Budgets programs carried out in Bolivia are five

Nº	NOMBRES DEL PP	PRESU- PUESTO PP	CONTRI- BUCIÓN UE	CONTRI- BUCIÓN BOLIVIA	CONTRI- BUCIÓN OTROS	CONVENIO	ESTADO
1	Programa de gestión sostenible de los recursos naturales de la cuenca del Lago Poopó	14,21	10,935	3,275	N/A	Convenio DCI- ALA / 2009 / 021-614	En ejecución
2	Programa de Institucionalización del Consejo Nacional de Lucha contra el Tráfico Ilícito de Drogas, CONALTID	11,2	9	1	1,2	Convenio DCI- ALA / 2009 / 021-936	En ejecución
3	Programa de Apoyo al Plan Sectorial de Desarrollo Productivo con Empleo Digno	14,5	12	2,5	N/A	Convenio DCI- ALA / 2009 / 019-774	En ejecución
4	Proyecto de apoyo a las mejoras de las condiciones de trabajo y a la generación de empleo en las áreas mineras de Bolivia, EMPLEOMIN	13	10	3	N/A	Convenio DCI- ALA / 2009 / 021-615	En ejecución
5	Proyecto de Apoyo a la Promoción del Crecimiento y la Diversificación de las Exportaciones	14	13	1	N/A	Convenio DCI- ALA / 2009 / 022-125	En ejecución
TOTAL (euros)		66,91	54,935	10,775	1,2		

Source: Delegation of the European Union. EU cooperation in Bolivia. Bolivia, 2015.

In this case we see that was implemented a program for sustainable management of natural resources in the Lake Poopó developed between 2009-2013. But this did not prevent 2015 the lake was finished drying up due to environmental pollution This was the main resource for indigenous people Uru the lake Poopo.

4. Conclusions

The cooperation of the European Union in Bolivia is important for the economic development of the state. Economic vulnerability that exists in the country due to the dependence of their income derived from hydrocarbons and mining. But to really be effective long-term development necessary to make more impact to social vulnerability, within the political dialogue set for bilateral cooperation. It is important to find a solid economic strategy and not depend on foreign aid.

The Constitution of 2009 proposes an ambitious agenda oriented social equality and inclusion of indigenous peoples and comprehensive reorganization of the state. For this is necessary strengthening administrations.

Moreover systems project evaluation is in general do not make an assessment of the real validity of the program. For this is necessary more dialogue and coordination. Progress in decentralization and state organization. For example in what is refer to environmental pollution and social rights and equality.

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‘Uexit’ Shadow within the Rejection of the Referendum

JUAN FRANCISCO BARROSO MÁRQUEZ

1. Introduction

Recently do we all wonder about the future of the European Union, not only for the external problems, such as refugees or terrorism, but for the internal issues that the twenty-eight countries have to face within their common frontiers.

Due to that reason, the words of Jean Claude Juncker (President of the European Commission) are quite illustrative; about the possibility of a negative response, he literally said about the referendum against the European Treaties: ‘take care, this can change the balance of Europe illustrative’.

At last, to analyze the real meaning of the referendum, it is necessary to look through the intentions and interests behind it.

2. Juridic Context and Results

In order to contextualize this problem, a reference to the laws that play the main role is needed.

Firstly, we have to mention the 12nd article of the Treaty on European Union, whose importance lies on the participation of the National Parliaments throughout the topics expressed across its six points; literally, it says that National Parliaments contribute actively to the good functioning of the Union.

As a result, we have focus our attention on Dutch's Constitution, specially its 91st article:

1. *The Kingdom shall not be bound by treaties, nor shall such treaties be denounced without the prior approval of the States General. The cases in which approval is not required shall be specified by Act of Parliament.*
2. *The manner in which approval shall be granted shall be laid down by Act of Parliament, which may provide for the possibility of tacit approval.*
3. *Any provisions of a treaty that conflict with the Constitution or which lead to conflicts with it may be approved by the houses of the States General only if at least two-thirds of the votes cast are in favour.*

After having said that, we have to link that constitutional article with the dutch law that regulates the referendum process, about which we must stress some of its aspects:

- The referendum does not have binding results. In spite of that, Mark Rutte (Prime Minister of Holland) has said that the 'no' camp had won convincingly, so he was forced to concede that if the turnout was above the margin (30 percent), then, that accord could not be ratified as it was.
- It is divided into two stages: the first one acts as a test of the relevance of the topic, so 10.000 signs are needed to get trough the next stage,

which really shows the public participation, so 300.000 signs and a thirty percent of participation are needed.

- About the ability to participate, it is equivalent to the voting requirements, so every Dutch over 18 years old is able to vote; each of them may only submit one preliminary and one final request for the referendum.

Having said that, we must reflect the results of the referendum, as the 32,2 percent of the population have sent their requests and the 61,1 percent of those votes said no.

3. Questions

- Which problems are related to the results of the referendum?
- Which influences have made the negative result come out?
- Does the referendum really show the Dutch intentions?
- Could it be the first step of the 'Nexit'?
- Finally, could this result affect other countries, as the 'Brexit' on the United Kingdom?

4. Conclusions

In order to answer the questions above this paragraph, we must face, in first place, the context where the referendum has been created and lately developed.

The campaign for the referéndum was released by the blog 'Geenstijl', the studies center 'Forum voor Democratie' and the association 'Burgercomite UE', on September of 2015.

We have to mention Geert Wilders (leader of Dutch Party for Freedom, eurosceptic and anti-islam), who has made a 'no' campaign on the referendum; after the results were shown, he literally said: 'It looks like the Dutch people said NO to the European elite and NO to the treaty with Ukraine. The beginning of the end of the European Union far-right politician'.

As a response, Rutte said: 'Opponents of this treaty say that it is a step towards European Union membership. That is not what it is about'.

Although the vote is non-binding, it could mean that the coalition government, already under fire because of the refugee crisis, will look for some advantages on the European Union in order to satisfy its voters.

Some voices claim that the referendum does not really have importance, as population assumed that it was only capitalized on Euroscepticism, besides that, its non-binding value reinforce that fact; related to that, we could mention the Pepijn Schmitz's Facebook post²¹⁹ entitled 'Dear Ukrainians', where these influences are clearly explained.

In Holland, the rural voters are which have decided the 'no' result, as the participation on the four biggest cities hardly reached twenty percent; however, the commercial part of the Treaty came into effect the past first of January of 2016 and has been already passed by the Dutch Parliament.

By the moment, we have only analyzed the context and the previous facts related to the results, but now we have to wonder about its possible effects, not only within Holland frontiers, but in other countries where the Euroscepticism is acquiring a notable role, such as the United Kingdom.

As it has already been said, the consequences in Holland would mean a change on the conditions of the Treaty respective to the country, as a method to make it more popular across the Dutch, in order to have the Treaty accepted in the future. Moreover, we would have to talk about the consequences relating to the European Union, where we would need to make a distinction between the pro-Europeans, who think it means nothing in the grounds of what was already explained, and the Eurosceptics,

219. I'm not worried that I'm doing you a disservice, as I fully expect our government to ignore the result, whatever it is. The referendum is not binding. Even if the turnout is high enough to make the result valid (more than 30%; it certainly won't be much higher) and slightly more than half the people vote against ratification, that's still only 15% of the population, and the government will say that's far too few to block such an important and beneficial treaty.

headed by Geert Wilders, who claims that the result will lead the country out of the European Union, as well known as 'Nexit'.

Taking both opinions into account, it is a matter of time to see which one of the options will overcome, as there is nothing clear already.

About the effects abroad, the United Kingdom, where a referendum is going to be held the next 23 of June, is the country that focus all our attention on, as the shadow of the 'Brexit' is clearer than the one in Holland.

Nigel Farage, Wilders' friend and head of 'Ukip', a eurosceptic party on Great Britain, sent a message while he was having a meeting on Amsterdam, where he assured: 'actually the result of a no vote in this referendum will send a big message to the British electorate that we are not alone in thinking something has fundamentally gone wrong in the direction of the European Union and the freedom and self-government of our country'.

Later he added: 'Most people in the UK don't even know it's happening, and although it's on a technical point, if the Dutch vote decisively in a 'no' direction, it will have an impact on the UK referendum'.

In conclusion, not only those referendums reveal the dissatisfaction of several countries about the European Union politics, but really made us wonder should the integration process that made this organization what it really is, is starting to crack or leak, so we finally will have to hope for the results on the 23 of June.

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