JCMS Journal of Common Market Studies UACES

JCMS 2014 Volume 52. Number 6. pp. 1216–1223 DOI: 10.1111/jcms.12190

From Regulatory State to a Democratic Default

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Abstract

For more than half a century Euro elites succeeded in presenting integration as a positive-sum game, with economic benefits more than compensating for the limitations of supranational democracy. Since the beginning of the euro crisis, however, even the most inattentive citizen of the EU realizes that integration entails serious normative costs as well as some economic benefits. As the crisis intensifies, all proposed ad hoc solutions tend to aggravate the democratic deficit of the Union. It is not only the citizens that are being excluded from the debate about the future of the eurozone; most national governments are forced to accept solutions proposed by a few leaders representing the major stockholders of the European Central Bank. Thus, the risk of a total normative loss – a default rather than a simple deficit of democracy at the European level – is now quite concrete.

I. The Roots of the Legitimacy Problem

Less than twenty years ago it was still possible to argue that a problem of democratic legitimacy in the EC/EU did not really exist. In *Regulating Europe*, published in 1996, for example, I pointed out that the EU exhibited state-like features only in limited areas of economic and social regulation – policy fields where the preferred instruments of governance in all contemporary democracies are non-majoritarian institutions: bodies that exercise important public functions, such as economic or social regulation, but are not directly accountable to the voters or to their elected representatives. Non-majoritarian institutions, I pointed out, raise relatively minor legitimacy problems since their independence is usually limited, while their tasks are narrowly defined. Even the powerful independent regulatory commissions in the United States 'are independent only in the sense that they operate outside the presidential hierarchy and that commissioners cannot be removed from office for disagreement with presidential policy' (Majone, 1996, p. 287). Moreover, the regulatory discretion of the American commissions and of other regulatory bodies is limited by the enabling statutes, by general statutes such as the Administrative Procedures Act, and by the courts. In Europe, the discretion of national regulatory bodies is, in general, even more restricted. I concluded that as far as the European Community was concerned, the indirect legitimacy provided by the democratic character of the Member States was sufficient to legitimate the delegation of such limited competences to the supranational level. I did point out, however, that 'doubts as to the legitimacy of nonmajoritarian institutions [. . .] increase in direct proportion to the expanding role of these institutions' (Majone, 1996, p. 287).

The significance of this qualification became evident with the steady expansion of supranational competences brought about by the Single European Act, by the Maastricht Treaty and by the jurisprudence of the European Court of Justice (ECJ). By the year 2005,

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when my *Dilemmas of European Integration* was published, I was forced to face the question: Why is the legitimacy problem of non-majoritarian institutions now felt to be more serious at the European than at the national level? My answer was twofold. First, the regulatory function had become much more important in the EU than in all the Member States, where redistribution and macroeconomic stabilization are considered economically and politically more significant. The second, and more important reason, was that the main European regulator, the Commission, by now was doing many things besides regulating. As a consequence, this body would have required more normative resources that were not forthcoming. Also the European Central Bank (ECB), I pointed out, is a non-majoritarian institution, but its legitimacy problems 'seem to be circumscribed and manageable, more similar to those of the ECJ than to those of the Commission' (Majone, 2005, p. 38). The reason is that the ECB enjoys a 'distinctive institutional competence' – that is, it plays a role that no other institution could play as effectively. Because price stability is supposed to be the single overriding objective of the ECB, the performance of the Bank can be measured unambiguously against the rod provided by regular statistical assessments of inflation. It is much more difficult to identify the distinctive institutional competence of the Commission that, in addition to its regulatory tasks over the years, has been assigned a variety of other functions. This multiplicity of functions expands the scope of the Commission's discretionary choice, greatly complicating the task of evaluating the overall quality of its performance. The resulting difficulty of enforcing political accountability, I concluded, means that at least since the 1990s the problem of the democratic deficit could no longer be ignored or minimized.

At the same time, it was becoming evident that the legitimacy problem of the EU had not been solved by the direct election of the European Parliament. The EP differs from the legislatures of parliamentary democracies not only because it lacks their power to tax and spend and to initiate legislation. More fundamentally, it does not represent a (nonexistent) European people in the same sense in which a national parliament represents an historically defined demos, and thus it cannot represent, even in theory, a generally recognized European interest that is something more than the sum of the various national interests. All this explains why European elections are 'second-order elections': useful perhaps to gauge the popularity of the incumbent *national* government, but largely irrelevant as an arena where European issues would be debated and settled. It also explains why voter participation in European elections has been constantly decreasing since 1979, the year of the first direct European elections, and why the EP does not enjoy sufficient democratic legitimacy to be able, in turn, to legitimate other European institutions, such as the Commission.

It is important to keep in mind that the steady expansion of regulatory policy-making at the European level and the corresponding growth of the democratic deficit are possible because the costs of regulations are born not by the supranational regulators, but by the national regulatees. In fact, it is not only the economic but also the political and administrative costs of implementing European rules that are borne, directly or indirectly, by the Member States. Since free goods tend to be used inefficiently, it is not surprising that the volume, detail and complexity of European regulations are often out of proportion to the benefits they may reasonably be expected to produce. Cases of outright regulatory failures, on the other hand, are seldom advertised (for evidence, see Majone, 2009, pp. 81–7).

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It is also true that at the national level public policy is often made less to solve concrete problems than to serve party political or other special interests. Most political scientists assume that the main goal of elected politicians is to maximize the probability of being re-elected. Hence, politicians tend to care little for actual policy results, and in any case prefer to support distributive rather than efficiency-oriented policies. However, citizens' preferences can constrain legislators' actions provided issues are framed in a way that allows citizens to reward or punish their representatives for specific policy decisions. If legislators are forced to take public positions on specific programmes, voters can hold their legislators accountable for the positions they take and for the effects they produce. Too wide a gap between stated objectives and actual results invites punishment at the polls (Arnold, 1990). Unfortunately, no such democratic controls exist at the EU level, where ineffective policies can persist, unscrutinized and unchallenged, for decades. And policy ineffectiveness not only has practical implications, it also has normative ones.

II. Effectiveness, Legitimacy and Systemic Stability

In public discourse, but also in the academic literature, much more attention is given to the issue of the democratic deficit than to the question of the effectiveness of EU policies. In fact, the traditional emphasis on process (rather than actual results) as the main criterion of evaluation tends to discourage any serious discussion concerning the effectiveness and efficiency of European institutions and policy-making methods (Majone, 2014, Chapter 6). In the case of a new polity, however, effectiveness and legitimacy, although conceptually distinct, are intimately related, as Martin Lipset clearly understood many years ago. Legitimacy, Lipset (1963) noted, involves the capacity of a political system to engender and maintain the belief that its institutions are capable of resolving the major problems facing society. He went on to explain that even though effectiveness is a pragmatic criterion while legitimacy is evaluative, the two concepts are linked:

> After a new social structure is established, if the new system is unable to sustain the expectations of major groups (on the ground of 'effectiveness') for a long enough period to develop legitimacy upon the new basis, a new crisis may develop. [. . .] On the other hand, a breakdown of effectiveness, repeatedly or for a long period, will endanger even a legitimate system's stability. (Lipset, 1963, pp. 67–8)

It is this connection between effectiveness, legitimacy and systemic stability that makes so worrisome the unsatisfactory economic performance of the EU in the last decades, and especially the present crisis of the monetary union. Indeed, the basic reason why public debate and hostile public reactions have replaced the permissive consensus of the past is precisely the fact that monetary union has put an end to the primacy of process as *the* criterion of policy evaluation. Michael Shackleton (2012) has rightly pointed out that it is not necessary for the EU to meet the same level of legitimacy as its Member States, provided the Union delivers a reasonable level of benefits in terms of effectiveness. But this is precisely the problem. All the available evidence suggests that even before the crisis in the eurozone, disappointed expectations were one important reason why the EU and its institutions, instead of progressively attracting the loyalty of European citizens, were becoming less popular and less trustworthy with the years. The essence of the Monnet's method of 'integration by stealth' consists in pursuing political integration under the guise of economic integration. The major risk inherent in this approach is

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precisely that unsatisfactory economic performance over a period of years may impede the emergence of new sources of legitimacy, and thus further undermine the normative foundations of an elite-driven integration process.

This risk was not sufficiently appreciated in the early stages of the process because the foundational period of the European Communities largely overlapped with the three 'glorious decades' of 1945–75, when Europe – all of Europe, east and west, north and south – experienced an unprecedented period of growth, macroeconomic stability and increasing levels of social protection. But then the 'economic miracle' came to an end, and the first doubts about the effectiveness of Monnet's method began to emerge. For more than half a century, Euro elites largely succeeded in presenting integration as a positive-sum game; but since the beginning of the euro crisis even the most inattentive citizen realizes that integration entails costs as well as benefits. In fact, the political culture of total optimism that used to inspire all official statements concerning the achievements of EU-style integration has been the first casualty of the euro crisis (Majone, 2014, Chapter 2).

III. Monetary Union and Democratic Legitimacy: The Big Trade-off?

In January 2011, the magazine *Der Spiegel* revealed that the German Chancellor was working out plans for an 'economic government' of the eurozone. The first step in the new strategy was to be the 'Pact for Competitiveness' – a long-term plan intended to provide a permanent solution for the ongoing euro crisis. In short, Chancellor Merkel proposed that the countries of the eurozone, and later perhaps all the Member States, should 'dovetail' their economic and social policies. Biting criticism of the Pact came from across the EU: from long-time members of the Union and from the new members of central and eastern Europe; from small and large countries; from debt-ridden southern countries and fiscally virtuous northern countries; even from the head of the European Commission. The latter expressed fears that the Pact would undermine the single market – a concern shared by the British Prime Minister. Because of such widespread opposition to attempts to use the crisis of the euro to bend the social policies of the Member States to the needs of monetary union, the proposal had to be shelved – but not the goal of greater centralization, or tighter harmonization, of national economic, fiscal and social policies.

The fact that only one year later most national leaders were prepared to accept even more stringent conditions than those foreseen by the Merkel Pact is a clear indication of the steady worsening of the crisis. A new, much stricter, regime of regulation and control of national budgetary and economic policy-making was established in 2012 by the Treaty on Stability, Co-ordination and Governance in the Economic and Monetary Union (the 'Stability Treaty', signed as an *international* treaty by all EU Member States other than the UK and the Czech Republic), together with a group of regulations, issued in 2011, concerning enforcement of budgetary surveillance in the eurozone; enforcement measures to correct excessive macroeconomic imbalances; strengthening of the surveillance and co-ordination of economic policies; and the prevention and correction of macroeconomic imbalances. The aim of the new regime is to ensure that the members of the eurozone fulfil three main duties: to achieve a balanced budget; to avoid an excessive government deficit; and to prevent or correct macroeconomic imbalances – the latter duty being in fact a general obligation of all Member States since it concerns general economic policy rather than monetary and fiscal policy.

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Under the first duty each eurozone member must submit a stability programme to ECOFIN and to the Commission, setting out, among other things, the budgetary and economic policy measures being taken, government liabilities and the assumptions made about economic developments. However, the key task of each national government is to set a medium-term budgetary objective (MTBO), with a realistic target and a plan to realize it. This is assessed by the Council, which can 'invite' a government to adjust its programme if it is unhappy with it. The Stability Treaty states that the budget of all of its signatories must be balanced or in surplus. In fact, the balanced budget rule is considered so central that it is to be set in a binding and permanent national law, preferably of a constitutional character. Hence, the MTBO is the main norm for all states. Countries that do not have a balanced budget must set out adjustment plans towards reaching their MTBO, and make sufficient progress each year towards achieving this goal. The adjustment plan will set out what needs to be done each year in a very exacting way: '[I]t is the adjustment plan which moves States into a regime where their budgetary planning is co-governed by the EU institutions' (Chalmers, 2012, p. 679).

The second duty of the Member States – to avoid an excessive public deficit – that is, a situation where there is a planned or actual budget deficit of more than 3 per cent of gross domestic product or total government debt of more than 60 per cent of GDP – requires debt reductions for the majority of eurozone states that do not satisfy these parameters. For states with large public debts this may amount to repaying several percentage points of GDP each year. The Stability Treaty requires each member found to have an excessive deficit to put in place a 'budget and economic partnership' – to be approved by the Council and the Commission – setting out structural reforms to ensure a durable correction of its deficit. Thus

> co-government is not simply [. . .] about debt reduction but about extensive reform which will limit the State's need to borrow, either because it has smaller expenditure requirements (i.e., a smaller welfare state) or has secured higher tax receipts. The partnership will, therefore, go to the structure and rationale of a State's fiscal and welfare systems. (Chalmers, 2012, p. 680)

Concerning the final duty of Member States – to correct macroeconomic imbalances, defined as developments that may potentially affect the proper functioning of the economy of a Member State, of the eurozone or of the entire EU – an alert mechanism is established to facilitate early identification and monitoring of such conditions. States identified as experiencing excessive imbalances have to agree a corrective action plan with the Council, spelling out detailed policies, provisions for surveillance and a timetable: again, a regime of co-management between national governments and European institutions – notably the Commission and ECOFIN. The Commission assesses the possibility of an excessive imbalance (or of an excessive deficit) and ECOFIN then decides about the presence of these conditions. During these procedures, the state under investigation is subject to monitoring by the Commission and is expected to provide regular reports on its progress in correcting the imbalances. It should be noted that ECOFIN includes the finance ministers of both debtor and creditor countries, with the latter being consistently in favour of a strict disciplinary approach so as to minimize the risk of having to offer more financial support to the countries in financial difficulties.

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The traditional role of the national parliaments is significantly constrained by these new regimes. Thus Member States are supposed to present their budgetary plans to the Commission and to the group of finance ministers of the eurozone no later than 15 October, with the Commission giving its opinion before 30 November; the opinion is then discussed by the Euro Group. In other words, the Commission – not the national parliament – is the first institution where the proposed budget of a country in financial difficulties is examined. Moreover, the national legislature has only one month to adopt the budgetary law after the Commission opinion. This is because budgetary laws are supposed to be synchronized across the eurozone so that they are adopted no later than 31 December. The final outcome may well be that

> [a] zone of influence dominated by the Commission and ECOFIN is established, with political conflicts taking place within these, but the atrophying of local democracy leads to a hollowing out of domestic processes so that these become little more than administrative containers. (Chalmers, 2012, p. 693)

At that point the democratic deficit of the EU would turn into a democratic default.

Even under present arrangements the political and legitimacy costs of financial aid are extremely high for the countries receiving the aid. The detailed conditions that must be satisfied by these countries are specified in a 'memorandum of understanding', which is usually updated quarterly. These memoranda and their updates cut ever more deeply into details of national legislation. According to Fritz Scharpf (2011, p. 19): '[O]nce an EMU member state has applied for the protection of the European rescue funds, its government will be operating under a form of "receivership".' This explains the reluctance of countries like Spain and Italy to apply for such funds, despite the insistence of the ECB and the Commission. Actually, 'receivership' might be too mild a term for the conditions imposed on the borrowers. Max Keiser, a British television presenter and former Wall Street broker, spoke instead of an 'occupation regime' imposed by the troika (cited in Scharpf, 2011, p. 20), and if some recent reports are correct, the reference to the consequence of military defeat is not inappropriate. For example, in 2011, the Irish budget was sent first to Germany for approval before it was even seen by the Irish parliament. According to well-informed observers, the 40-page document detailing Ireland's budget plans for 2012 and 2013, and the covering letters of intent from Minister of Finance Michael Noonan were sent to ECOFIN by the 'troika' (Commission, ECB and International Monetary Fund) following its third quarterly review of the implementation of the austerity measures prescribed by the memorandum of understanding. This material was then made available to the finance committee of the German parliament where it was discussed – presumably to satisfy the requirement of the German Constitutional Court that the Bundestag must be aware of Germany's financial commitments and risks. The paradox is that in order to satisfy its own constitutional obligations, the German parliament had to infringe a basic right of the equally sovereign parliament of a fellow Member State.

As the crisis intensifies, all the proposed ad hoc solutions tend to aggravate the democratic deficit of the EU. It is not only the citizens that are being excluded from the debate about the future of the eurozone; most national governments are forced to accept the solutions proposed by a few leaders representing the major stockholders of the ECB. Thus, the risk of a complete normative failure – a default rather than a simple deficit of

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democracy at the European level – is by now quite concrete. Indeed, the mechanisms recently set up in the hope of resolving the eurozone crisis clearly reveal a willingness to sacrifice democratic legitimacy in order to rescue the monetary union. More than this, the very idea of European integration, as conceived by the founding fathers, is threatened by the latest developments.

IV. Goodbye EU?

The latest responses to the crisis of monetary union have set in motion a number of processes that are radically transforming the EU. One of the key features of the new institutional developments is a minimization of the role of the Community method, and even of intergovernmental co-operation in the form laid down by the Lisbon Treaty, in favour of 'legal and institutional arrangements that are not purely internal to the EU framework, but combine EU law instruments with public international law instruments' (Chiti and Teixeira, 2013, p. 689). As these authors point out, monetary union had been designed in such a way so as to fit harmoniously with the institutional framework of the EU, as shown in particular by the fact that no new institutions were thought to be necessary for monetary union other than the ECB. The way the EU has responded to the crisis, however, challenges such expectations. EMU is becoming an autonomous policy domain increasingly detached from other areas of EU policy-making, including the single market. The fear is that the members of the eurozone may be pushed to develop their own system of economic and social policy-making, irrespective of any common framework provided by the European treaties.

In addition to the division internal to the eurozone between creditor and debtor members, a broader differentiation is emerging between euro and non-euro Member States. The priority given to the rescue of the euro implies that the interests of monetary union will increasingly prevail over those of other central aspects of integration such as market integration. Monetary union was initially conceived as a collective good to be shared by all the Member States, but it was quickly transformed into a 'club good' by the British and Danish *de jure* opt-outs and Sweden's *de facto* opt-out. A 'club good' is a collective good from whose benefits individuals may be (or may choose to be) excluded; an association established to provide an excludable public good is a 'club' (Buchanan, 1965). The same definitions apply if instead of individuals, we consider independent states. In such a case, the club goods may be collective security, policy co-ordination, common technical standards – or a monetary union limited to a subset of members of a larger association. The important point is that as an association of states expands, becoming more diverse in its preferences and socioeconomic conditions, the cost of uniformity in the provision of collective goods can escalate dramatically. Buchanan's economic theory of clubs predicts an increase in the number of voluntary associations to meet the increased demand of collective goods more precisely tailored to the different requirements of various subsets of reasonably homogeneous states. Aggregate welfare is maximized when the variety in preferences is matched by a corresponding variety of institutional arrangements. Hence a plausible scenario is the progressive transformation of the present EU into a 'club of clubs'. This was, after all, the view of Mitrany, Dahrendorf and other advocates of functional, rather than territorial, integration.

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