

The growing influence of topical issues in legislative activity: limited political, but innovative and responsive, initiative.

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It is now a well established fact that the immediacy of information and close connections between one point of the planet and another are forcing governments to act instantly. The European Union does not escape this rule. As a Union of law its response leads to legislative activity that suffers the tight constraint of topical issues. For example before the “Six Pack” had even entered into force on 13th December 2011,¹ in a bid to settle the euro crisis, the European Union and its Member States were organising the introduction of a new Treaty to restore the States’ budgetary credibility.

Legislative production declined below previous levels in 2012. Indeed around forty acts were adopted in comparison with 60 in 2010 and 2011, which was already less than in 2009 (the last year of the previous legislature). Unsurprisingly the main areas of legislative activity in the time of crisis were in the following order: economy and finance, the fight to counter terrorism, the environment, the area of freedom, security and justice and the internal market.

Furthermore this assessment of legislative activity leads to some observations about the development of institutional balance in a context of crisis which naturally tends towards an accentuation of the position Member States occupy in the Union’s decision making process. Hence the European Council continues its ascension, with the support of the Council, which is working ever faster whilst the European Parliament is now

1. Thus named because it comprises six legislative acts: five regulations (2011/1173/EU on the effective implementation of budgetary supervision in the eurozone; 2011/1174/EU establishing implementation measures in view of remedying excessive macro-economic imbalances in the eurozone; 2011/1175/EU modifying the Council’s regulation 97/1466/EC on tightening supervision of budgetary positions as well as the supervision and coordination of economic policies; 2011/1176/EU on the prevention and correction of macro-economic imbalances; 2011/1177/EU modifying regulation 97/1467/EC that aims to speed up and clarify the implementation of the procedure governing excessive deficits) and one directive (2011/85/EU on the requirements applicable to Member States’ budgetary frameworks).

playing a full role in legislative activity. Conversely the European Commission's monopoly over initiative seems to be under heavy pressure and is mainly exercised to achieve, except in terms of the major topical issues, minimalist proposals to adapt or consolidate existing legislation, bar a few interesting exceptions however.

Normative production mainly oriented towards settling the eurozone crisis

On 27th September 2012, the Treaty on the European Stability Mechanism (ESM) entered into force with Germany's ratification of it – following the conditional green-light given by its Constitutional Court in Karlsruhe on 12th September. This was a treaty specific to the eurozone Member States, the goal being to raise funds (up to 700 billion €) on the financial markets in order to help the States experiencing problems.

But 2012 was marked above all by the adoption in March of a new intergovernmental treaty, the Treaty on Stability, Coordination and Governance (TSCG, also called the Budgetary Pact or “fiscal compact”), at present under ratification. It was signed by all of the Member States except for the UK and the Czech Republic. This treaty, in exchange for a commitment by the States to limit their structural deficit (the famous “golden rule”) and to reduce their public debt, allows them to benefit if necessary from the European Stability Mechanism. It notably sets up the creation of an independent internal organ² to guarantee the sincerity of public accounts and the dispatch of draft budgets to the Commission so that it can analyse their conformity with the goals set out in the TSCG.

Furthermore the European Council of 18th and 19th October 2012 decided on guidelines in view of a banking union basing itself on a Commission proposal which the European Council initiated itself. This sets up granting the European Central Bank (ECB) the control of the banking establishments in the eurozone as well as within other Member States if they want to take part. On this basis the distribution of roles between the ECB and the national regulatory authorities is the focus of a great deal of discussion and in all likelihood it will lead to a reduction in the prerogatives planned for the ECB in this proposal in order to facilitate the integration of non-eurozone Member States, which do not have a representative within the ECB.

Hence a new enhanced cooperation agreement, the third in European history after the divorce and the patent, was launched on the establishment of a tax on financial transactions³ receiving the approval of the Commission on 23rd October 2012. This example illustrates the States' concern of working together as much as possible, but to move forwards even though not everyone follows, in response to both budgetary and economic imperatives.

Other proposals are being discussed at the moment; for example the creation of a “Super Commissioner” who would have the right to veto over national budgets. The next few years will quite likely witness a continuation in the introduction of the instruments necessary for the stabilisation of the eurozone.

2. In France, this role will be given to the “Haut Conseil des Finances Publiques” (High Council for Public Finance).

3. France, Germany, Italy, Spain, Belgium, Portugal, Slovenia, Austria, Greece, Slovakia, Estonia. The Netherlands have said that they want to join the enhanced cooperation agreement.

The international environment also puts pressure on the EU's legislative activity:

Iran⁴, Syria⁵, Belarus⁶, Eritrea⁷, Somalia⁸, Afghanistan⁹, Côte d'Ivoire¹⁰, all of these countries have witnessed conflict, which in 2012, justified the restrictive measures taken against certain authorities¹¹.

Indeed the Member States are working together within the European Union so that they have an even more detailed legislative arsenal to use against organisations or people who undertake activities that harm populations and threaten international peace. This cooperation generally finds support in the recommendations made by the UN Security Council.

The Union is thus trying to be seen as a responsible player in the international arena committed to the maintenance of peace.

Legislative production concerned with protecting the environment as well as the well being and health of citizens, workers and consumers.

The European Union continues to undertake an ambitious environmental policy. It has adopted three important directives: on the assessment of the impact of certain public and private projects on the environment¹², on electrical equipment waste¹³ and on energy efficiency¹⁴. One directive has been proposed to respond to the risk of accidents involving dangerous substances¹⁵. Finally the Union has established minimal security prescriptions regarding workers' exposure to magnetic fields¹⁶.

However, most of these texts are just the re-arrangement of existing documents, whether this takes the shape of codification, the recast or the more ambitious revision of certain parts of a previous text. The time of major legislative projects in the area of the environment or healthcare seems to be over or on hold at least: the Commission, and undoubtedly it is wise at this time – has preferred to place emphasis on consolidating

4. Regulation 2012/1067/EU by the Council on 14th November 2012 modifying regulation 2012/267/EU on the adoption of restrictive measures against Iran.

5. Implementing Regulation 2012/944/EU by the Council on 15th October 2012 implementing article 32, paragraph 1, of regulation 2012/36/EU on restrictive measures because of the situation in Syria.

6. Implementing Regulation 2012/1017/EU by the Council on 6th November 2012 implementing article 8 bis, paragraph 1, of regulation 2006/765/CE on restrictive measures against Belarus.

7. Implementing Regulation 2012/943/EU by the Council on 15th October 2012 implementing article 12, paragraph 1, and article 13 of regulation 2010/356/EU introducing some specific restrictive measures against some physical or moral people, entities or organisations because of the situation in Somalia.

8. Regulation 2012/942/EU by the Council on 15th October 2012 modifying regulation 2010/667/EU on certain restrictive measures against Eritrea.

9. Implementing Regulation 2012/705/EU by the Council on 1st August 2012 implementing article 11, paragraph 4, of regulation 2011/753/EU on restrictive measures introduced against certain groups and certain people, businesses, and entities in view of the situation in Afghanistan.

10. Regulation 2012/617/EU by the Council on 10th July 2012 modifying regulation 2005/174/EC by the Council imposing restrictive measures in view of the assistance associated with military activities in Côte d'Ivoire.

11. Sanctions adopted at European Union level against person or organisations which undertake activities that can damage international peace or security.

12. Directive 2011/92/EU by the European Parliament and the Council of 13th December 2011.

13. Directive 2012/19/EU by the European Parliament and the Council of 4th July 2012.

14. Directive 2012/27/EU by the European Parliament and the Council of 25th October 2012.

15. Directive 2012/18/EU by the European Parliament and the Council of 4th July 2012.

16. Directive 2012/11/EU by the European Parliament and the Council of 19th April 2012.

what exists already, and its action is oriented more to the supervision of the application of the law, notably via the prosecution of alleged infringements rather than towards new legislative proposals.

The drive to redesign the area of Freedom, Security and Justice

Two directives (on the minimal norms concerning the rights, support and protection of victims of crime¹⁷ and on the fight to counter the sexual abuse and sexual exploitation of children¹⁸) were adopted in 2012, notably replacing two of the Council's framework decisions.¹⁹

This trend is due to grow in 2013 in anticipation of the changes caused in 2014 by the Lisbon Treaty within the area of freedom, security and justice. Indeed as of 2014 the area of freedom, security and justice will be fully subject to the supervision of the Commission, which will be able to launch infringement procedures against Member States. It will also be subject to the supervision of the Court of Justice in terms of interpretation and validity; the Court will also be able to condemn the States which fail in their duty even if this involves pre-2009 framework decisions. The vital issue of the UK's "opt-out" in this area should also have major consequences on legislative activity in 2013 but this was not the case in 2012, even though we can see that the Commission takes great care regarding its proposals.

Some significant progress for the internal market²⁰

This year the legislator has mainly targeted businesses – hoping to strengthen common standards to promote trade and activities within the internal market. Hence three directives were adopted to facilitate business management²¹.

Moreover the Union intervened in the area of intellectual property. A directive was adopted regarding orphan works²², whilst a draft directive is under discussion at present within the European Parliament and the Council on collective rights management and multi-territorial licencing of rights in musical works for online uses. We should note that these are new initiatives which are not just the re-organisation of existing texts and deemed both desirable by professionals as well as the States so that the harmonisation of the internal market moves forwards in areas where it is felt necessary.

Hence negotiations on the finalisation of an enhanced cooperation agreement regarding a unitary European patent have moved forwards since the conclusions of the June 2012 European Council and have led us to think that a compromise between the Council and the European Parliament will soon be possible²³; this should then enable the delivery of the first patents in 2014. We should note that it was on this issue that the European

17. Directive 2012/29/EU by the European Parliament and the Council of 25th October 2012.

18. Directive 2011/92/EU by the European Parliament and the Council of 13th December 2011.

19. The framework decisions 2001/220/JAI and 2004/68/JAI by the Council respectively.

20. As Michel Barnier recalled, "the internal market is the basement" of European integration".

21. Directive 2012/6/EU of 14th March 2012 on the annual accounts of micro-businesses, Directive 2012/17/EU of 13th June 2012 on the interconnection of central trade and businesses registers, Directive 2012/30/EU of 25th October 2012 on the coordination of guarantees demanded by the States.

22. Directive 2012/28/EU by the European Parliament and the Council on 25th October on certain authorised uses of orphan works; these are works for which it has been impossible to find the copyright owner. This directive should lead to a use of these works.

23. The Patent Package was the focus of a political agreement during the Council on 10th December and a favourable vote by the European Parliament on 11th December 2012.

Council intervened for the very first time in a legislative process to suggest – on the request of a Member State – a significant modification to the draft text, which had been the focus of an agreement between the Commission, the Council and Parliament. The European Council's involvement was discussed by the Parliament and delayed the entire enhanced cooperation agreement by several months.

Finally in February 2013 the Commission should be able to publish its re-written proposals on the regulation on brand law.

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The crisis has clearly led the European Union to re-focus since 2010 on issues vital to the euro's survival; hence there has been reduced legislative activity, which is not necessarily to be regretted if it helps towards simplifying law. Nevertheless the political constraint exercised on the Commission's power of initiative at present may weigh on the smooth functioning of the Union a long term. A change to the treaties may be anticipated around 2015 and this will possibly be the opportunity to address delicate institutional issues²⁴. It is the time for change but as Jean Monnet said "*men only accept change when necessary and they only see necessity in times of crisis.*"

24. The merger of the posts of President of the Commission and of the European Council – his election would be direct, universal suffrage, reform of the Eurogroup, etc.