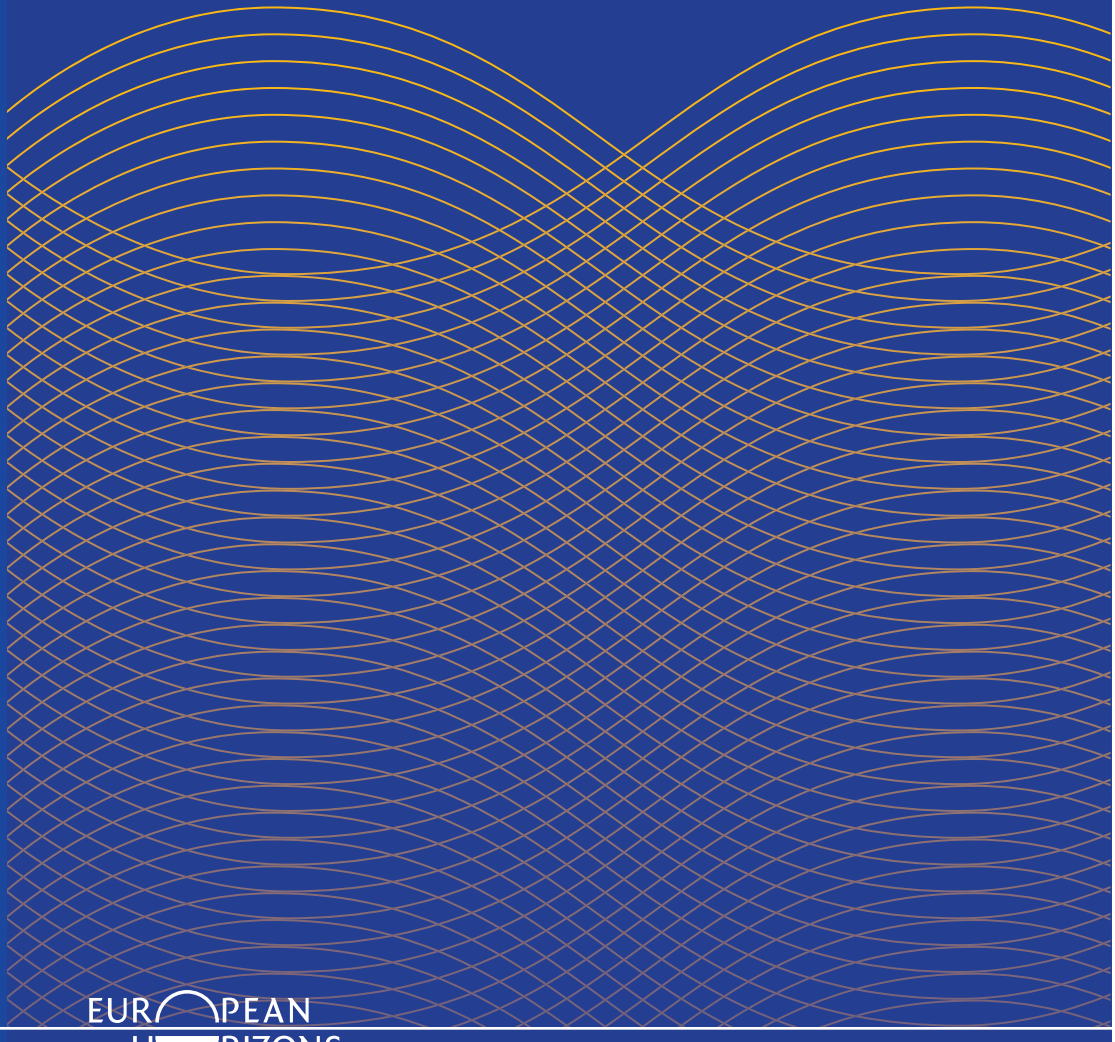
REVIEW OF

European & Transatlantic Affairs



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Introductory Remarks

1. 1. Letter from the Editors-in-Chief

Christian Neubacher and Diego Rojas Salvador
Editors-in-Chief

It is with distinct pleasure that we introduce the Fall 2017 issue of the Review of European & Transatlantic Affairs (RETA).

In order to weave a more integrated social fabric in Europe and to strengthen the confidence of our Union, European Horizons has set out to establish a network of students, professors, and policymakers to engage in a constructive dialogue about the future of Europe, and put forth a platform of ideas for reforming the European Union. Through our conferences, such as the European Student Conference and the Digital Economy Youth Summit, European Horizons has set out to develop a new policy vision for Europe, focusing on crucial issues that include identity, legitimacy, migration and foreign policy. To present these ideas to broader audiences, we publish the bi-annual Review of European and Transatlantic Affairs.

Since its inception, the goal of RETA has been to foster and encourage a critical debate about the many challenges facing Europe and the world, and to raise innovative and original solutions to them. This aim has become more relevant given the increasingly polarized political and social environment that has characterized 2017. Domestic political difficulties in Germany and Italy have threatened to destabilize two of Europe's most important actors, the ongoing Brexit negotiations have begun in earnest with it becoming clear that the British decision to leave the

European Union will not be painless for either partner, and the continued success of populist movements has caused a fracture within Europe.

These defining developments are likely to continue to shape the European project in 2018. As Sebastian Zeitzmann demonstrates in his introductory letter, elections played a paramount role in 2017. The forthcoming elections in Italy, Russia, and Sweden will likely reflect the aforementioned contradictions existing within European societies.

This edition of the RETA includes a variety of papers which reflect the diversity in thought and topic apparent in academic debates about the European Union. In their paper, Patrick Mesenbrock and Dominika Rihova discuss demoicracy and how it can lead to the development of a new mode of thinking about European citizenship as independent of national citizenships, and therefore helping solidify European integration. Ariane Aumaitre discusses the demographic pressures existing within European society and the impact this has on the sustainability of welfare states in the wake of the Euro crisis. Europe's other defining challenge of recent years is further analyzed by Amanda McAllister in her paper about fragile conditions existing within Northern Ireland, which have resurfaced as a result of the Brexit referendum and the British government's pledge to pull out of the Single Market and the Customs Union.

European Horizons aims to discuss issues at the cutting-edge of European policy debate. In her paper whistle-blowing, Morgane Terres discusses the need of supranational solutions to the problems emerging in the digital era within the fields of whistle-blowing and activism. Christian Hörbelt discusses the debates within Europe's Raw Earth Metal policy, given the importance of the sector on the continent's economy and the 30 million jobs it supports. Moreover, Ilya Akdemir analyzes the theory of the collectivization of recognition, and how this relates to the case of Kosovo and the International Court of Justice. Finally, Guillermo Tosca Díaz makes a profound case for the European Innovation Council, and how this institution serves as a prime example of how policies with long-term effects can make it onto the European Commission's agenda.

While it is evidently clear that significant challenges remain, it is also becoming increasingly apparent that new

movements, organizations, and initiatives are emerging to capture and further the growing pro-European sentiment which is evident across the continent. European Horizons continues to play an active and influential role within this movement, with our conferences and this edition of the Review of European & Transatlantic Affairs capturing our belief in the future of Europe.

Christian Neubacher is a senior at the University of Michigan studying economics and international studies. As a dual Swedish-American citizen, he has experienced both sides of the Atlantic ocean, which has propelled his interest in European politics and transatlantic affairs. Christian serves as the Deputy Head of Journal for European Horizons, and as the treasurer of the University of Michigan chapter of European Horizons.

Diego Rojas Salvador is the Head of Journal on the Executive Board of European Horizons and Co-Editor-in-Chief of the Review of European and Transatlantic Affairs (RETA). Diego is originally from Quito, Ecuador. He is a senior at the University of Michigan studying computer science and drama, and is hoping to pursue graduate studies with a focus on the intersection of public policy and technology. As part of his interest in interdisciplinary technological projects, he has worked as a software engineering intern and fellow at the Paideia Institute for Humanistic Study. Diego believes the European project represents a model of cooperation and integration which other regions of the world should try to emulate.

1. 2. Letter from Director of Studies at Europäische Akademie Otzenhausen

Sebastian Zeitzmann
Director of Studies and Academic Coordinator at Europäische Akademie Otzenhausen

If 2016 was a year of crises, as Peter Wittig held in that year's edition of RETA, then 2017 has been the EU's year of elections.

Hold on, one could say, what about the tragic Brexit negotiations, the situation in Catalonia, the ongoing wars in our neighbourhood, the refugees, the nationalism, the burning of Israeli flags, the fake news, the high youth unemployment in certain EU Member States, the lack of adherence as to basic EU values in certain other EU States, the erosion of solidarity between EU members, the anti-EU-ism in any given Member State, and so on?

That is all correct; the polycrisis still has us firmly in its grasp, although that would apply to any year since 2009. But has Europe ever before paid as much attention to general elections in its countries, as was the case of the Netherlands or Austria in 2017? Did we ever before care as much about a regional referendum as the Catalonian one on October 1st (Scotland 2014 being the exception)?

Elections, ordinary or snap ones, happened in a number of EU Member States, including some of the big EU powerhouses. How many of us stayed up all night to wait for the results of the UK snap elections in June, in the hope that the results could somehow change Brexit's outcome (which is still uncertain, half a year later)? Who did not keep their fingers crossed for Emmanuel Macron and his La Republique en Marche! party during the presidential and parliamentary elections (unless you supported the far right)? Were we not afraid the far right could do successfully in The Hague, Berlin, Vienna or Prague? General elections were also held in Bulgaria, Malta and EFTA members Norway and Iceland. Important regional elections took place in Northern Ireland and in Catalonia; the latter based on the illegal (yet legitimate) Cata-

lonian independence referendum. Similar referenda were held a few weeks later in northern Italy, however unnoticed by many.

This multitude of elections has the potential to shape Europe and beyond, especially in conjunction with the new US administration, which took office in early 2017. But in which way will Europe develop? I'd be frivolous claiming I could give a definite answer here. Nevertheless, let's take a look at some of the cases mentioned above.

As for Britain, I am afraid no one, not even inside a government torn apart without precedent, has a clue of what will happen in 2018 and 2019, and that includes whether Brexit will actually happen, and, assuming it will, what it will look like. I may be wrong, but anything other than what I dub a "bogus Brexit" (the UK leaving the EU in nothing but name) would be a surprise. The British, however, have managed to surprise us (and themselves) on at least a weekly basis in 2017, so I would not bet much on my own prediction.

In the Netherlands, the far right was defeated in elections. However, forming a government subsequently proved highly difficult, and the four party coalition might not last the full legislative term. This was exactly the reason for snap elections in Austria this fall and we now know for sure that the far right has made it into what could be one of Europe's most conservative governments for the years to come. Its impact on the EU might be grave, given their more than tough position on matters such as immigration.

Not just the Netherlands has seen difficult coalition building. The same holds true for Czechia and Germany. Having held elections in late September, three months on, we still don't know whether we will end up with another GroKo (Grand Coalition of conservatives and Social Democrats); a Jamaica alliance of conservatives, Liberals and Greens; a conservative minority government; or a snap election with unknown results (apart from further strengthening the far right, I am afraid).

Catalonia? They tried and failed. I doubt they will end up an independent State, let alone inside the EU. Neither will mystical Padania, which is basically a vast part of northern Italy. It is right to ask people their opinion on what they want for their region. This could be a greater share of autonomy or so, but in the interest of a peaceful continent, this should not be about secession.

Let me turn to France. Fortunately, Macron's popularity has bounced back from a post-election slump. Take a look at his Sorbonne or Frankfurt speeches this fall. Here is the leader France and Europe has been waiting for, probably ever since Jacques Delors, the man with a vision for Europe, brave enough to make it the center of his political agenda. Jean-Claude Juncker and many others will not be happy to hear this but Macron is absolutely right in advocating a multi-speed Europe: let Member States move ahead where necessary, unhindered by those which can't or don't want to be part of the avant-garde. Keep any step in integration open for them but do not let them block Europe from moving on. 25 EU States have finally agreed to set up PESCO, Permanent Structured Cooperation in the field of CFSP/CSDP, in 2017, and also this year 20 EU members finally established the European Public Prosecutor's Office. A multi-speed Europe, already the reality of European integration, is the future of an ever more heterogeneous EU (even without the British).

How much is France in need of a well-functioning German government right now to move Europe further, strengthen it, and win citizens back to this unique, magnificent project! Let's hope the Franco-German engine will very soon be running at full speed again. It would be the first time in many years. Look again at the second paragraph of my remarks: there is more to be done than can be tackled straight away.

To make Europe work, not just its states but also its citizens are needed more than ever. In times of increasingly EU-sceptic national governments and discrepancies between the European Commission and the most Europhile EU Head of State on how to move ahead, organizations such as European Horizons can and do provide the impetus to move Europe further.

I have had the honor and the pleasure to attend three European Horizons' conferences in the US and in Europe this year. I was surprised and amazed to see that an exclusively student-run think tank does, in terms of organization and academic output, as well as or even better than many of the professional events one has the pleasure, duty or pain to attend with the years. I enjoyed numerous talks with EuH members from all over the US, Europe and beyond. It is with pleasure that I hear that the European chapters have grown some tenfold in numbers in 2017.

Taking into account that European Horizons is still a very young think tank, you guys have already achieved lots. Having

said this, I want to urge you not to slow down at this point but to even accelerate: Set up more chapters throughout the US and Europe, ideally beyond EU borders! Come up with creative formats and ideas on how to promote European integration and make it visible and understandable! Take every opportunity to reach out with your academic work!

Some outstanding examples of the latter are contained in this edition of RETA: Ariane Aumaitre focuses on social policy, writing about the age orientation of the Euro crisis. Social policy, the evolution of welfare states and respective solidarity between EU members is something we tend to turn a blind eye to but it will arguably feature amongst the important topics of the nearer future in EU politics. Christian Hörbelt deals with a topic that equally touches upon industry, environment and economic policies, the policy vis-à-vis raw earth metals. Patrick Mesenbrock and Dominika Rihova touch upon one of the substantive issues as regards European Integration, the democratic deficit: they describe the term of "demoicracy" and discuss whether it can serve as appropriate standard to evaluate EU legitimacy. Morgane Terres analyzes whistle-blowing in the online age and political hacktivism, a topic which has kept EU lawmakers busy in 2017 and will certainly continue to do so. The case of the European Innovation Council, addressed by Guillermo Tosca Díaz, takes into account polycrisis, whereas Amanda McAllister's work on the inner-Irish border deals with one of the most complex and complicated issues in Brexit negotiations between the EU and the UK. Last but not least, Ilya Akdemir's paper goes beyond Europe by taking a look at the ICJ's 2010 Advisory Opinion on Kosovo, asking whether there is a case for quasi-collectivisation of recognition in international law.

I may be wrong with any of my general observations above. As Benjamin Disraeli held in the 1800s already, and nothing could be truer as to Brexit, finality is not the language of politics. I am quite optimistic, however, that I can rightfully claim that this edition of RETA will provide its readers with excellent thoughts, high-profile observations and refreshing findings.

I am wishing European Horizons all the best with anything you plan in 2018 and beyond. Your motivation, dedication and passion is what Europe needs.

Sebastian Zeitzmann the is Director of Studies and Academic Coordinator at Europäische Akademie Otzenhausen.

Democracy as an Appropriate Standard to Evaluate the Legitimacy of the European Union

SUBMITTED BY

Patrick Mesenbrock and Dominika Rihova

Abstract

In this paper, we turn to the basis of the mainstream narratives of the democratic deficit, which we believe unwisely hold the European Union to the standards of a nation-state in the making or a federal nation-state democracy (the first of which it is not, the second of which it does not necessarily have to become). The EU should rather be conceived from, for the time being, a democracy of different demoi, or a "demoicracy", and ought to be evaluated as such. According to the demoicratic framework, there are two normative subjects identified in the EU: the statespeople and the citizens as individuals. Therefore, the EU's institutional and social set up ought to protect and promote both the values and interests of the member states (MS) as self-governing entities and citizens as autonomous individuals. To allow for a nuanced analysis of the extent to which the EU succeeds in doing this, and therefore of the quality of the EU's demoicratic legitimacy, we subsequently develop appropriate evaluation standards by adjusting Vivien Schmidt's criteria for input-, throughput-, and output legitimacy to the model of demoicracy.

I. Introduction

For the last two decades we have witnessed an almost continuous debate over the democratic legitimacy of the European Union (EU) and it's perceived "democratic deficit" (Majone 1998; Hix 2008; Bellamy and Castiglione 2013). Quite naturally, the debate on the democratic deficit of the EU reflects considerations on the fundamental nature of democracy as such. While some scholars have defined democracy in normative terms, focusing on idealistic or utopian definitions of democracy, others have focused rather on descriptive, institutional, empirical or procedural definitions. This explains why the localization of the democratic deficit of the EU differs; while some criticize the weak role of the European Parliament or a lack of direct democracy (Frey 1996), others disapprove of the absence of a European public sphere (Downey and Koenig 2006), a lack of majoritarian democracy (Lord and Beetham 2001), and a lack of pre-political community (Miller 2000). Consequently, the debate on the democratic deficit of the EU is far from conclusive.

However, in most cases of evaluation of the democratic legitimacy of the EU, "comparisons are drawn between the EU and an ancient, Westminster-style, or frankly utopian form of deliberative democracy" (Moravcsik 2002: 605). The problem with such an evaluation of democratic legitimacy of the Union is that it does not do justice to political and social reality. As a result of this, many scholars have overlooked the procedural developments of modern national democracies in terms of delegation and insulation. Furthermore, and crucially for this paper, many have neglected the possibility that an evaluation of the democratic legitimacy of a multi-national entity might require a different yardstick from the one used for evaluating of a single-nation entity. The consequence of this flaw is severe and the remedies suggested for the identified limitations of the EU's democratic deficit are misplaced.

In this paper, we argue that the EU is not totally being evaluated by an adequate yardstick. As a multi-national political entity (Wallace 1983), it should not be evaluated using the standards used for evaluation of single nation-states. In other words, it is necessary to re-think the appropriate model and criteria of the democratic legitimacy of the EU.

In doing this, we reject the idea that European democracy can only be fully realized through a single European demos, thereby departing from both the supranationalist and intergovernmentalist understandings of the Union. Instead, we assert that the EU is a demoicracy; a polity of multiple demoi, and that it should be evaluated as such. In this paper, we therefore aspire to further contribute to the theoretical and normative exploration of demoicracy, so that it can serve as a model and criteria for empirical evaluations of the legitimacy of the EU.

With respect to the structure of the paper, after outlining the theoretical concept of demoicracy and its normative underpinnings, we proceed to adjust Vivien Schmidt's criteria for input-, throughput-, and output- legitimacy to the framework of demoicracy, thereby developing appropriate standards for the evaluation of the EU's demoicratic quality.

II. The Mainstream Narrative of the Democratic Deficit

This section discusses the shortfalls of the mainstream narrative(s) of the EU's democratic deficit, how they relate to the question of European demos and it explains why demoicracy is a more appropriate yardstick for EU democracy than nation-state democracy.

2.1 The Limitations of the Mainstream Narratives on the EU's Democratic deficit

The "democratic deficit" is not a single line of argumentation, but rather a collection of different arguments and claims on what and why the European Union's democratic legitimacy is lacking (cf. Follesdal and Hix 2006, Schmidt 2012). According to Follesdal and Hix (2006), the "standard version" of the democratic deficit encompasses five (sometimes overlapping) claims (cf. Weiler et al. 1995). First, European integration is said to (1) mean "an increase in executive power and a decrease in national parliamentary control" in the sense that European politics are dominated by executive actors through national heads of state and ministers in the European Council (EC) and the Council and government appointees in the European Commission (Follesdal and Hix 2006: 535). Furthermore, it is believed that (2) relative to the EC and the Commission, the institutional role of the European Parliament (EP) has been too weak. In addition, it is lamented

that (3) there were no real "European" elections in the sense that (3a) European issues have only played a minor role in the election of national governments (which are represented in the Council and nominate Commissioners) while (3b) elections to the EP have remained "second-order contests" which are decided rather by domestic than European issues. There is also criticism that (4) the European Union as a whole has been "too distant" from voters, in (4a) an institutional sense regarding the electoral control of the Council and the Commission and in (4b) a cognitive sense since the EU system was too different from domestic democratic institutions in the EU, making it hard for citizens to understand and identify with the Union. Last, critics hold that (5) due to the above factors, as well as the unduly large influence of private interests in EU decision-making, EU policies have often not corresponded to voter's preferences (Follesdal and Hix 2006: 534-537).

As Schmidt summarizes, 'output legitimacy requires policies to work effectively while resonating with citizens' values and identity. Input legitimacy depends on citizens expressing demands institutionally and deliberatively through representative politics while providing constructive support via their sense of identity and community. Throughput legitimacy demands institutional and constructive governance processes that work with efficacy, accountability, transparency, inclusiveness and openness' (2012: 7-8). Therefore, classified in terms of input, throughput, and output, points 1 and 2 of Follesdal and Hix's account of the democratic deficit concern the "throughput"-dimension, 3, 4a and 4b the "input"-dimensions and 5 both the throughput and the output-dimensions of EU democracy.

Furthermore, it is important to note that some of these claims about the EU's democratic deficit can (in theory at least) be at least partially addressed through treaty and institutional reform (certainly in the cases of 1, 2, 4a and 5). In contrast, claims 3a and 3b as well 4b point to a deeper problem of European democracy, namely the lack of a European demos that is comparable to the demoi we find in all European nation-states. If one subscribes, as the authors do, to the idea that at the core of democracy is the principle of self-determination or self-legislation of a people, it is crucial to specify who "the people" are and what the self-legislating subject of European democracy is supposed to be.

2.2. The Non-Demos Thesis and its Implications

This is even more important since by most accounts, what we mean by "demos" is more than the formal members of an electoral constituency, and more than the aggregate term for the citizens of a state. As Cederman points out, "there has to be a sense of community, a we-feeling, however 'thinly' expressed, for democracy to have any meaning" (Cederman 2001: 144f.; cf. Besson 2008: 188). As a working definition for this paper, a "demos" shall be defined as "a group of people the vast majority of which feels sufficiently attached to each other to be willing to engage in democratic discourse and binding decision-making" (Cederman 2001: 144; cf. Innerarity 2014: 1)[1]. Concerning the conditions necessary for this "sufficient attachment", for individuals to regard themselves (and, perhaps more importantly, others) as members of a specific demos, scholars point to certain degree of shared or collective identities – rooted, for instance, in a common language or culture –, a common public sphere, and intermediary political institutions (cf. Besson 2008: 188; Cederman 2001: 144f.; Cheneval and Schimmelfennig 2013: 336; Cheneval et al. 2015: 1f.; Innerarity 2014: 2f.; Nicolaïdis 2003: 4f.). Whether or not – in addition to the above mentioned factors –a corresponding ethnos is a necessary condition for the existence or development of a demos, or merely a supportive factor, is one of the most controversial issues in the debate (cf. Besson 2008: 189; Habermas 1995: 305; Nicolaïdis 2003: 4; Weiler et al. 1995: 17).

The litmus test for whether or not a political community is tightly enough interwoven to form a "robust demos" might then ultimately be (1) the sense of solidarity necessary for citizens "to pay for their compatriots' bad luck" (with regard to redistributive policies) and (2) the "consent of the losers" (with regard to majoritarian decisions) (Innerarity 2014: 2f.; Nicolaïdis 2003: 4). Without these two elements, it is unlikely that a polity will be democratically functional in that it can agree on common policies which are not regarded as Pareto-efficient (and therefore does not create losers, Cheneval et al. 2015: 5f.; Follesdal and Hix 2006: 537).

1. Innerarty refers to and builds on Cedermans definition, but quotes it slightly incorrectly (cf. Innerarty 2014: 1; Cederman 2001: 144).

Here, most scholars would contend that a robust European demos has yet to emerge, making the indirect representation of national demoi the primary (and some would argue only) source of the EU's democratic legitimacy (Besson 2008: 187f.; Cederman 2001: 139f.; Grimm 1995: 290f.; Habermas 1998: 149-151; cf. Bellamy and Castiglione 2013:207; Innerarity 2014: 2-4; 149-151; Nicolaïdis 2003: 4) and leading to the conclusion that – all institutional tinkering aside – "the European democracy deficit is structurally determined" (Grimm 1995: 297). Since the majority of European citizens do not, as of now, regard themselves primarily as Europeans, there are limits to the degree of solidarity among the people of Europe and the willingness to accept the outcome of majoritarian decision-making, as has been demonstrated for instance in the Euro- and European debt crisis since 2008 and the refusal by a number of member states to regard the increased influx of refugees after 2015 as a common European challenge.

With regard to the implication of the no-demos thesis on European democracy and the future of EU integration there are two main academic positions: intergovernmentalists and supranationalists. Scholars subscribing to the intergovernmentalist perspective, (sometimes also called "sovereigntist" or "national civic" perspective, cf. Nicolaïdis 2013: 353) generally hold that European demos do not currently exist and are at best unlikely to emerge in the foreseeable future. Furthermore, they hold that the existence of the European demos is a necessary precondition for the creation of a European-level (supranational) democracy, since without it the democratic principle cannot be fully applied to the European Union (Besson 2008: 189; Nicolaïdis 2013: 353f.; cf. Grimm 1995: 296f.). Consequently, the European Union should remain or return to a purely or at least largely intergovernmental state, since the democratic principle can only be sufficiently applied within national democracies (Grimm 1995: 289). While Dieter Grimm, for instance, admits that "[a] large part of the problems needing political treatment can no longer be effectively solved in the narrow State framework of the European countries", he nonetheless insists that the democratic principle "can for the time being be adequately realized only in the national framework" (Grimm 1995: 297f.). Because of this, intergovernmentalists are skeptical of transfers of power from the national to the European level, cautioning against EU institutions such as the Commission or the European Court of Justice becoming too independent from membership control (cf. Grimm 2015, 2016).

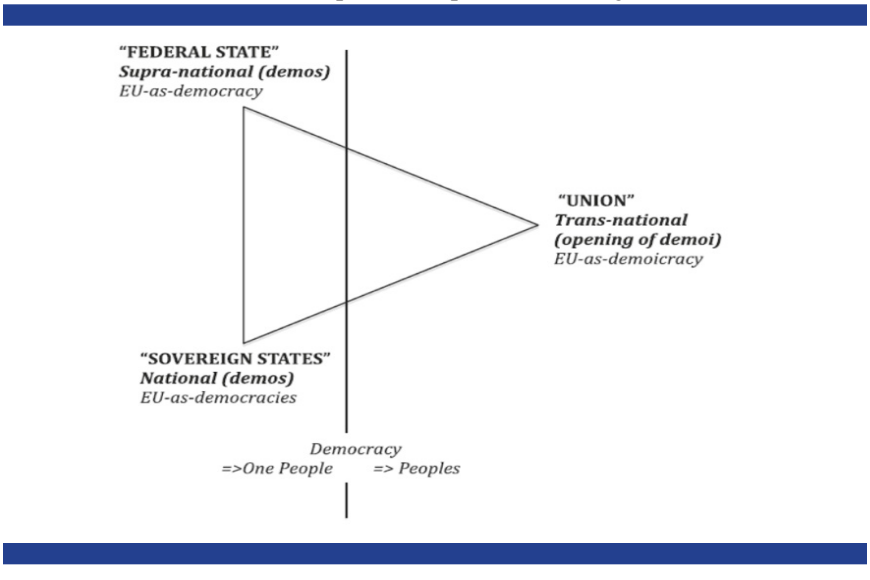
In contrast to the intergovernmental perspective, supranationalists hold that, through institutional cooperation, deliberation, and a European public sphere, the gradual development of a European demos is possible. Supranationalists often share intergovernmentalits' diagnosis of the democratic deficit in the EU, but build on different assumptions and therefore arrive at directly opposite conclusions. For instance, Jürgen Habermas agrees that for as long as there is no European-wide civil society and political public sphere and common political culture, there will be a legitimacy gap between supranational modes of decision-making and "still nationally organised opinion- and will-formation" (Habermas 1995: 304). However, he also sees European integration as a process of social integration. Through their functional interaction in a democratic system, people enter a "politically socialising communicative context" in which the "ethical-political self-understanding of citizens" as citizens of a democratic community can grow (Habermas 1995: 305f.). Such a process, in turn, is not dependent on an "historical-cultural a priori", but rather has at its basis the "legal institutionalization of citizen's communication". In other words, a shared political culture and solidarity between citizens can develop through participation in the same democratic institutions and shared spaces of communication. He also notes (with regards to ideologically pluralistic societies like the USA), that this common political culture may to some degree be detached from other cultural, religious and ethnic forms of life, allowing for a multicultural self-understanding as citizens (Habermas 1995: 306, cf. Cederman 2001: 148; for a similar point see Follesdal and Hix 2006: 550f.). Consequently, Habermas holds that the people of Europe could, in time, forge a multi-cultural and nonetheless robust European demos capable of legitimizing a substantial transfer of power from the national to the European level (cf. Nicolaïdis 2013: 352).

III. Demoicracy as a Non-Statist Vision for EU Integration

Demoicrats criticize both intergovernmentalism and supranationalism for their state-centric view of European democracy, and reject the idea that European democracy can only be realized once it can rely on legitimization by a single European demos (Nicolaïdis 2003: 5). It is meant to constitute a third way insofar as it stresses, with the intergovernmentalists, the "individual

embeddedness in national communities as seperate demoi", while also emphasizing the importance of shared responsibilities and asserting that a European democracy that is more than a co-operation of democratic member states can be legitimate (Nicolaïdis 2013: 354f.). It is therefore a third way not in the sense of a via media between intergovernmentalism and supranationalism, but a fundamentally different non-statist political model in which individuals are to be represented both as members of a European community and as members of their respective national demoi. Importantly, demoicrats not only propose an alternative normative ideal for how the European Union should look in the future, but they also hold that ontologically demoicracy is a much more accurate description of the institutional status quo of the EU.[2]

Graphic 1 European Demoicracy



Source: Nicolaïdis 2013: 354

The main idea behind demoicracy is one of a union of peoples "governing together, but not as one". As Nicolaidis points out, "however much shared [kratos] or power to govern, we must contend with the plurality of [demoi]; but also crucially, however many demoi, we need a common kratos to define and deliver, through mutually agree[d] disciplines, the responsibilities

2 It is also worth noting that by developing a post-statist model of European democracy, it seems conceptually closer to the theories of transnational or global democracy than to democratic theories of (federal) nation-states (cf. Bohman 2005, 2007; Besson 2008)

we owe to one another" (Nicolaïdis 2013: 351f.).

Through the shift from one demos to many demoi, demoicrats also move from a democracy with a single subject, to a plurality of subjects. Firstly, as already indicated, the national demoi are subjects of demoicracy. However, as Besson points out, "these [national] demoi are more together, however, than the mere sum of many distinct democracies with their different national demoi, because all of them are distinctly European" (Besson 2008: 191). Together, they form, secondly, a "demos of demoi" in the sense of the "European interconnection of national demoi", capturing the commonalities and shared elements of the European peoples (Besson 2008: 191, cf. Beetz 2015: 39f., Cheneval et al. 2015: 3). The main objective of demoicracy is now to bring the national demoi and the European demos of demoi into an institutional balance, so that they can "govern together but not as one" (Nicolaïdis 2013: 354). To this end, demoicracy seeks to "strengthen mutual recognition between [...] national demoi" without dissolving the national demoi as frames in which democratic self-determination primarily takes place (Gaus 2014: 4).

To summarize, the important innovation of demoicratic theory is that it conceives the current state of the European polity not only as a multi-level, but also as a multi-centric, entity, thereby emphasizing horizontal cooperation between the national demoi in addition to vertical integration (Cheneval et al. 2015: 7). Put differently, "demoicracy identifies the EU as a union with two normative subjects: states and citizens. Pursuing the common good of Europe, therefore, means protecting and promoting the values and interests of both states as self-governing collectives and citizens as autonomous individuals" (Nicolaïdis n.d.). Therefore, the EU as a demoicratic order must institutionally balance these two. It follows that 'in its vertical dimension, demoicracy is based on the equality and interaction of citizens' and statespeople's representatives in the making of common policies. Horizontally, it seeks to balance equal transnational rights of citizens with national policy-making autonomy' (Cheneval et al. 2015: 1).

3.1. Evaluating Demoicratic Legitimacy

With regards to the general principles of demoicratic legitimacy, Cheneval and Schimmelfennig (2013) arrive at three broad principles necessary to balance the political rights of

individuals and what they call "statespeoples" (demoi)[3] (Cheneval and Schimmelfennig 2013: 340f.; cf. Cheneval et al. 2015: 7). These are (1) the "sovereignty of the statespeoples' pouvoir constituant regarding entry, exit and basic rules of the political order of multilateral democracy", (2) the "non-discrimination of statespeoples and citizens" and (3) the equal legislative rights of citizens and statespeople and (4) the Supremacy of Multilateral Law and Jurisdiction (Cheneval and Schimmelfennig 2013: 341-343). The first principle specifies that "no statespeoples ought to be obliged to join or stay in a demoicratic order" either by the decision of a branch of government or by a majority decision of a group of states or a majority decision with the participation of citizens of other states (Ibid.: 342). The second is a universal prohibition of discrimination on the grounds of race, color, gender, religion, or political opinion as well as by nationality. It entails that (just as European law already specifies) whenever special rights are extended from one member state to another, it is to be extended to all member states, with analogue provisions for the extension of rights by states to individuals of their own or other states (Ibid.: 342). The third principle demands an equal legislative representation of citizens and statespeople, arguing that "a centralist and purely individualist-universalist" as well as "law-making by statespeoples (and statespeoples only)" are equally illegitimate (Ibid. 342f.). The fourth and last principle is the supremacy of multilateral law and jurisdiction as the basis for the legal framework of demoicracy (Ibid.: 343).

While these principles are useful as a basis for demoicratic legitimacy, they mainly concern the rights to and conditions of entry and exit of different demoi, and are too broad to evaluate the finer aspects of the EU's institutional setup or the day-to-day practice of policy-making. Consequently, Cheneval and Schimmelfennig's evaluation remains fairly broad. While providing some valuable insights into where the problems of EU demoicracy lie, they mainly specify the level (national or European) of these problems and (with the exception of the relation between the European Council and the Parliament) detail which institutional arrangements or processes they consider to be problematic (Cheneval and Schimmelfennig 2013: 344f.).

It is for this reason that we turn to Vivien Schmidt's more fine-tuned model of the EU's democratic legitimacy in terms of

3 Cheneval and Schimmelfennig use the term "statespeoples" to designate "the liberal democratic peoples apt to construct and constitute multilateral democracy" (Cheneval 2008: 42).

input-, throughput-, and output legitimacy and adjust it to a demoicratic understanding of EU democracy.

3.2. Setting up Appropriate Criteria for Evaluation of the EU's Demoicratic Legitimacy

In her prominent 2012 article, Schmidt does not seek to evaluate the EU's empirical legitimacy against normative standards, but rather to "conceptualize a new evaluative standard for EU legitimacy, building on established normative theory" (Schmidt 2012:3). Building on the works of, among others, Easton (1963) and Scharpf (1999), she conceptualizes the democratic legitimacy of the EU through three dimensions, namely input, throughput, and output legitimacy (cf. Schmidt 2012: 4ff., see Table 1).

Table 1: Criteria of Democratic Legitimacy of the EU (Schmidt 2012)

	Focus	Criteria
Input Legitimacy	Citizen demands (representative politics) and support through identity / community	Responsiveness of EU politics to these demands and support
Throughput Legitimacy	EU institutional processes and inclusion of interest groups	Efficacy, accountability, transparency, openness and inclusiveness, constructive interactions
Output Legitimacy	EU policies	Effectiveness of policies and resonance with citizen's values and identity

Source: Authors' summary, based on Schmidt 2012: 4-10

Schmidt's conceptualization undoubtedly has its merits, and has helped to open up and explore the black box of the EU's internal decision-making and their implications for the legitimacy of the EU as a whole. However, from a demoicratic perspective hers remains an incomplete and somewhat problematic conceptualization; it remains thoroughly statist, and evaluates

the democratic legitimacy of the EU as if it were a democratic nation-state. This becomes apparent, for instance, in the ease with which her conceptual framework can also be applied to any nation-state democracy, where the same processes would be evaluated largely according to the same criteria, albeit on a reduced level of complexity.

Furthermore, while her conceptualization opens the black box of internal EU processes, it does not include national-level processes in her evaluation. National-level democratic processes only appear on the "input" side of her framework, either as direct input by the respective national citizens or indirectly through member state policies. This is odd insofar as the criteria for both input and output legitimacy in part depend on citizen's values and identities (cf. Schmidt 2012: 5-7, 10-11). In not including the functioning of member-state-democracies in her framework, Schmidt arguably only looks at the European level of the EU democracy, and neglects the fact that the performance and legitimacy of this level are to a substantial extent dependent upon member state democracies. For instance, according to her framework, the recent turns towards illiberal democracy in, among other countries, Poland, Hungary, and the Czech Republic affect the democratic legitimacy of the EU primarily on the output side, because EU policies do not correspond to the political preferences of the majority of citizens in these states anymore. It seems far more plausible, however, to argue that these political shifts are in the process of corrupting the legitimate input and throughput of EU democracy, which only become apparent, however, when one includes the national level in one's evaluation of EU democracy.

In order to evaluate the input-, throughput, and output dimensions of the EU democracies according to the principles of demoicracy outlined above, it is therefore necessary to modify Schmidt's framework and expand it to include the Member-State-Level (see Table 2). While many of her criteria for democratic legitimacy are applicable on both levels, some important additions must be made to both in order to satisfy the requirements of demoicratic legitimacy. This is the case because demoicracy itself does not fundamentally change the democratic logic both within the member-state democracies nor the European institutions, but rather puts additional demands on their vertical and horizontal interaction (cf. Cheneval et al. 2015: 7).

The most important additions are the following: first,

regarding the input- and throughput-dimension on the European level, it is necessary to ensure equal legislative status of citizens as European citizens (institutionally represented through the EP) and as members of democratic statespeople (represented through the European Council). This mainly entails strengthening the EP's rights (for instance, by giving it the right to initiative) to be on par with those of the Council (cf. Cheneval and Schimmelfennig 2013: 345, Gaus 2014: 17).

Second, with respect to the input-dimension on the MS level, demoicracy requires the possibility for (horizontal) input between the MS, so policy suggestions are voiced and heard in a national debate from the citizens or parliaments of another MS. This could be achieved in several ways, be it through closer cooperation between the MS parliaments, or institutionalized feedback from other MS regarding major pieces of national legislation that may affect other MS.

The third point is related to the second one. It refers to the throughput dimension at the MS level, and states that the government and parliament of each MS ought to take into account the (potential) effects of its policies on the other MS. Although this consideration is secondary compared to the necessity to respond to the demands and needs of the respective citizens of the MS, it nonetheless ought to affect the MS's consideration (if not in the form of a strong "do no harm"-principle then at least in the acceptance that MS policies that may adversely affect other MS require a higher burden of justification than normal MS policies). Institutionally, this opening up of national democracies could be achieved in several ways, for instance through closer cooperation between the MS parliaments, or institutionalized feedback from other MS regarding major pieces of national legislation.

Table 2: Criteria for Demoicratic Legitimacy of the EU

		Focus	Criteria
Member-State Level	Input Legitimacy	Citizen demands (representative politics) and support through identity / community, (secondarily) demands and supports by the other EU MS	Responsiveness of political system to the demands and support of the citizens as well as (secondarily) the demands and support of the other EU MS.
	Throughput Legitimacy	Institutional processes and inclusion of interest groups	Efficacy, accountability, transparency, openness and inclusiveness, constructive interactions, consideration of political preferences of other MS and the EU citizens as a whole.
	Output Legitimacy	Policies	Effectiveness of policies (resolution of problems) and resonance with (1) national citizens' values and identity and (2) EU citizens' values and identity
European (Supranational) Level	Input Legitimacy	Citizen demands (representative politics (esp. EP elections)) and support through identity / community; MS government's political preferences	Responsiveness of EU political system to the demands and support of EU citizens and MS governments
	Throughput Legitimacy	Institutional processes and inclusion of interest groups	Efficacy, accountability, transparency, openness and inclusiveness, constructive interactions.
	Output Legitimacy	Policies	Effectiveness of policies (resolution of problems) and resonance with citizens' values and identity (EU and MS)

Source: Author's compilation, building on Schmidt (2012)

IV. Conclusion

Both from an analytical and from a normative perspective, demoicracy is the more appropriate model to understand and evaluate the EU than either a nation-state democracy or a European superstate-in-the-making.

Firstly, demoicracy offers a better understanding of EU democracy than either of the two statist models. The reason for this is that on the one hand, European integration has led to a steady Europeanization of national identities, an increase in people considering themselves as "citizens of the EU," and a continuous opening up of national public spheres. Transnational European identity, in this sense, is real, and relevant to how we conceptualize political representation in the EU. On the other hand, however, European identity is still far less important to most Europeans than national (or sub-national) identities. Even though the EU's formal authority and policy competencies have been greatly expanded in the last decades, we have to reckon with the fact that EU-level democracy is neither currently sustained by a European demos nor will it be in the foreseeable future. In light of these arguments, demoicracy, describing the EU as more than a cooperative effort of nation-state democracies, but less than a European federal democracy emerges as the most appropriate model in understanding the EU in its current form.

Secondly, demoicracy is not only a better fit analytically, but also a normatively desirable ideal of EU democracy. Demoicracy is understood here as 'the idea of a specific political order that takes into account the two fundamental normative reference points of liberal democracy, that is, citizens and peoples' (Cheneval 2011: 28). In other words, demoicracy considers the interaction among Europeans both as statespeople of their respective MS and as individuals and it recognizes statespeople's right to self-determination, as well as the transnational dimension of the individual rights of all people. Therefore, the EU's both institutional and social set up ought to protect and promote both the values and interests of the MS as self-governing entities and citizens as autonomous individuals.

As a normative model to which the EU should aspire, demoicracy has the potential to bring up the limitations of the Union in its current state as an incomplete demoicracy, as well as

guide the way for reform. The evaluation of the EU's demoicratic quality by Cheneval and Shimmelfennig mentioned above provides us with some insights, but remains rather vague. For this reason, we have adjusted Schmidt's model of the EU's democratic legitimacy in terms of input-, throughput-, and output legitimacy to a demoicratic understanding of EU democracy, thereby providing criteria for a more nuanced analysis of the EU's demoicratic legitimacy. This, in turn, can now be used to examine the different levels of EU democracy and different phases of policy-making according to their demoicratic legitimacy.

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Whistle-blowing in the Online Age and Political Hacktivism: Toward an Infrastructurization of Morality?

SUBMITTED BY

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Abstract

The last few years have seen new attention shed on whistleblowers and whistleblower protection. Whistleblower protection has been said to be increasingly important for detection and rectification of wrongdoing in and by organizations, and enforcement of citizen and worker rights. However, the form of legal protection remains contentious, and the digital realm, with its new set of tools and broadcasting capabilities, does not ease the task of setting geographically relevant and efficient laws. The lack of a common transatlantic and even global conceptual framework impede on national efforts made to protect and improve the whistleblower status. This article seeks to aid the understanding of the evolution of the definition of a whistleblower in the digital age. It proposes ways in which different policy purposes, approaches, and legal as well as technical options can be used in the design of better global legislation. It also opens the reflection on what could be an "encoding of morality" that would both frame and liberate the means for whistleblowers to express their concerns.

I. Introduction

In 1985, Near and Miceli pointed at "the unavailability of clear legal and organizational methods for responding to whistleblowers" and deplored the scarce literature on the subject (Miceli and Near, 1985). A little over 30 years hence, and a decent amount of infamous cases later, the subject is still delicate. Throughout the now vaster literature on the matter, it is suggested that the legal and organizational methods that address whistleblowing claims still lack comprehensiveness and clarity. Alexandra Webster (2015), points out that, in the UK "on July 2013, the Department for Business, Innovation and Skills (BIS) issued a call for evidence on how the current whistleblowing framework is working". The BIS has more recently (2015) signaled to regulators that the annual reporting of data on whistleblowing will become a requirement. On the other side of the Channel, a recent study from the French State Council stated that, "The provisions relating to whistleblowers cover a very wide field. Nonetheless, they lack coherence as a whole and are not sufficiently precise as to the definition of a whistleblower or the procedures that the party concerned, businesses and administrative authorities should follow or implement." At the European level, members of Parliament included whistleblower protection in an organized crime and corruption package (2013) and tried to establish an effective and comprehensive European whistleblower program. Attempts have also recently been made by legal scholars to address this lack of comprehensiveness (Brown 2013).

It seems predictable that institutions will struggle with how to define and handle whistleblowing, as they have to answer a somewhat paradoxical question: How can processes be set-up that would allow them to be challenged?

As a general rule, whistleblowing is perceived as an important organizational social control instrument (Bjorkelo et al, 2010; Rank, 2009), that efficiently helps institutions to confront and tackle internal ethical issues (Webster, 2015), avoids further harm to organizations, its members, or society as a whole (Bjorkelo, Einarsen, Nielsen, Matthiesen, 2011), and influences organizational performance (Bjorkelo, Einarsen, Matthiesen, 2010). One difficulty, from a legal standpoint, lies with the means of assessing the validity of a whistleblower claim, which by definition is a profound moral one, hence difficult to evaluate

(examples of various court interpretations in the US further complicate the matter, Heumann et al., 2013). The law also has to define the processes by which those claims can be made, striking a correct balance between encouraging claims and avoiding wrongful alert. Last, the law should ideally prevent retaliation against whistleblowers. An extensive body of work studying whistleblowing practices from various perspectives has emerged. Researchers have examined the relationship between whistleblowing intent and act (Dozier and Miceli, 1985); the correlation between whistleblowing intentions, actions and retaliation (Mesmer-Magnus, Viswesvaran; 2005); the characteristics and experiences of whistleblowers, the link between bullying and whistleblowing (Bjorkelo, 2013), and the role of personality as an antecedent of whistleblowing behavior (Bjorkelo, Einarsen, Matthiesen; 2010), to name a few. All outline the difficulty that various legal and social frameworks have when ruling on whistleblowers' activities. Many cases have made the headlines during these past few years (from the Watergate scandal brought by Mark Felt, to the more recent Libor one), focusing the public's attention on the misconduct of major private or public institutions and strengthening the need for a more comprehensive legal framework of whistleblowing activities. To date, only thirty countries have enacted relevant whistleblowing laws and few have comprehensive statutes (Apaza, Chang; 2011). While the legal status of whistleblowing practices dates back to, at least, the early days of the American Republic (Heumann et al., 2015), the practices themselves have greatly changed. The global reach of whistleblowing the Internet and its social platforms allow seems to change quite radically the power structure inherent in every whistleblowing action. If not borne out of the Internet, whistleblowing has certainly been transformed by it. By giving access to a vast range of information and through the extraordinary overall capacity of the network to share content, it has forced legal frameworks for this type of activity to evolve (Maier, 2010). The borderless nature of information-sharing directly challenges the national enforcement of the law, as greatly exemplified by Snowden's swift relocation to Russia after releasing top-secret NSA program files.

The purpose of this paper is to assess to some extent, the validity of whistleblowing claims and to try and understand the legal and social impact that this practice has on our national societies in the digital age. It is an attempt to build a fruitful dialogue between legal and media/social studies in order to unveil ways of refining the definition of what a whistleblower is in

the online realm. It is a call for the creation of a flexible transatlantic and even an international legal framework that, despite the disparity and intricacies of national mechanisms that need to integrate with a range of other regimes in any given jurisdiction, would help adequately answer the issue of the digital global blow. In order to carry out this assessment, we will first question the apparently blurring frontiers between hacktivism, civil disobedience, and whistleblowing practices and ask through Kenneth Einar Himma's framework whether or not such practices are morally justified. We will also take a close look at external (outside an organization) and internal (inside the organization) whistleblowing practices.

While trying to define the relationship between whistleblowing practices and the media and what is "in the public interest", we will explain why the notion is challenged by the Internet by examining the tensions that exist between territory, audience, and infrastructure. What is in the public interest might not always be "of interest to the public". We will support the view that the Internet challenges main media practices and that global access to information seems to loom over the territoriality of legal enforcement. To exemplify the always renewed difficulty in assessing the validity of a whistleblower claim and the means of its diffusion, we will take a thorough look at WikiLeaks and Julian Assange's case. That is to say, to try and understand how legal systems are tackling the issue of global whistleblowers, we will follow the legal developments in this case. This will lead us to query the limits of national legal frameworks and to ask the overall question of the "morality" attached to such practices and their means. In this attempt, we will support the idea that sense of belonging and notion of identity are partly shifting from a localized to a global scale and that jurisdictions struggle to address this shift. We will then circle back to what whistleblowing is and ask if, following Lessig, the infrastructure does not bear in itself a "morality" that should be made apparent to users and citizens. Society might want to shape and embed value and morality within their Internet infrastructure. Whistleblowing, like civil disobedience, profoundly asks the question: what is the nature of the civil society's involvement in reporting offenses?

II. Whistleblowing: a type of political activism?

Civil disobedience, political activism, hacktivism, whistleblowing, cyber-crime: what is whistleblowing?

As Brown (2013) states, "the basic comprehensiveness of a whistleblowing law in any particular jurisdiction or sector is determined by three issues: the range of reportable wrongdoing; the range of institutions about whom the whistle can be blown; and the range of individuals who can benefit from the processes and protections in the Act. This third issue is especially basic, and also often the most complex." When turning to social sciences, whistleblowing is defined as "the disclosure by organizations' members of illegal, immoral or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action" (Miceli and Near, 1984). A whistleblower challenges organizations from within by disclosing and making apparent wrongful practices that may or may not be critical for the organization itself (Himma, 2005). This internal point of view, this insider claim, restricts access to the whistleblower status quite drastically. It is, as Brown notes, legally difficult to sustain. This "internality" being challenged by practices and media usages, "the question of who should benefit from the law", thus goes to the heart of the intersection between employment law, and other legal dimensions, including open government and protection of citizen's rights more generally. While employees may lie at the heart of the whistleblowing definition, what about the position of organizational or industry members or workers who are not employees? What about employees in other organizations or sectors, beyond those to which the whistleblowing regime applies? What about individuals who are not employed or do not have a direct working relationship with the organization, but who might be considered 'insiders' in other ways, including by virtue of their vulnerability – such as clients or customers who are medical patients, aged care residents or prisoners?" (Brown, 2013). When looking at the literature, one thing seems clear; whistleblowing is assessed on a case by case basis. As Heuman, Friedes, Cassak, Wright and Joshi found, "at the core of this deficiency is the lack of a clearly articulated, commonly accepted definition of what does and does not constitute whistleblowing." Indeed, few studies (despite the shifting trend) offer comparative perspectives on existing national legal frameworks of whistleblowing activities. John-

son (2004) has made a notable effort in comparing whistleblower protection in the United States, Russia, India, and Israel by looking at their respective political, social, and cultural backgrounds. But despite these efforts, for most of us, whistleblowing practices as relayed by the media and online media, can take various forms, further complicating the definition of what a whistleblower is. Whistleblower cases are used to indifferently portraying civil disobedience ("I'm 132" in Mexico), hacktivism or cyber-activism (the "Orange Revolution" in Ukraine) and from time to time shift from being portrayed as pro-social behavior to that of a cybercriminal (*Anonymous* case). Even if the definition is commonly accepted as "the disclosure of information by an employee or contractor alleging wilful misconduct by an individual or individuals within the organisation" (Figg, 2000), the outcomes of whistleblowing seem highly dependent on the legal, social, and political framework in which they are expressed. The polymorphous aspect of whistleblowing claims (internal, external, localised, global, or addressed to private or public institutions) is also one factor of the blur that surrounds the notion and its consequences (for individual as well as for corporations or states). It seems undeniably quite difficult to treat Mr Monsen's whistleblowing about overbilling malpractices at Siemens in Norway, the Libor scandal unveiled in the UK, and Snowden's global blow on PRISM equally. It is important to also note that what reaches the media is only the tip of the iceberg. Most whistleblowing cases are raised internally and only reach the outside when internal attempts have failed. At first glance, one wonders if whistleblowing activities are not just a stage in a wider process ranging from individual moral stances to civil society involvement and a sense of agency in the correction of offences perceived as threats to its model. In general, whistleblowing itself is depicted as a process that "includes a range of stages such as "discovery", "evaluation", and "deciding to blow the whistle", as well as some type of "reaction" to the whistleblowing and an "evaluation" of the reaction" (Miceli & Near, 1992, quoted in Bjorkelo et Al, 2011). Before digging further into the moral and political issues of whistleblowing claims, let us look at the literature that nowadays addresses the question of the definition of a whistleblower. Miceli and Near's definition appears to be the reference that outlines what a whistleblower is. Subsequent literature depicts the commonly shared attributes of a whistleblower. Whether addressed from the angle of motives, psychological characteristics (usually 5), or wrongdoings people are more or less likely to blow the whistle on, or the retaliation that they experience. Power theories also suggest that

employees with status, skills and considered as valuable to an organization, are more likely to be successful in terminating wrongdoing (Bjorkelo, Einarsen, Nielsen, Matthiensen; 2011). From these works, a typology of whistleblower has emerged. Typically, internal whistleblowers are said to be more often older males in higher positions in the hierarchy and with higher levels of pay, job satisfaction, and work performance (Mesmer-Magnus, Viswesvaran; 2005). It seems that a link between a perceived sense of agency within an organization is determinant in feeling that one ought to report malpractices. At the heart of the practice lies a moral and political stand and an individual feels the need and the power to act upon the issue. Researchers in social science often depict the imperative that people feel when deciding to actually blow the whistle; findings show that after the act and whether or not there has been retaliation, whistleblowers would still have blown the whistle, meaning that they still would have raised their concerns in an attempt to stop malpractice. The resilience and tenacity of a whistleblower, as well as their naïveté or doggedness have also been outlined (Heumann, Friedes, Cassak, Wright, Joshi; 2013). In other words, one does not engage lightly in a whistleblowing activity; once in it, does not back down. As Near and Miceli wrote (1985), "Blowing the whistle on an organization is an act of dissidence somewhat analogous to civil disobedience" which highlights systems inefficiencies and threats to "a society" (internal to a firm, or external to it – its clients for example, or more broadly to a national or worldwide society).

Civil disobedience and whistle-blowing assessed through Kenneth Einar Himma's theoretical framework

Is every whistleblowing claim a political and moral one? Are whistleblowing practices by essence justified? As noted above, it is generally accepted that whistleblowing practices do foster more transparency and efficiency within an organization or state (Webster, 2015; Heumann et al., 2013) and are therefore beneficial for the organization that knows how to address them. But to be able to assess to what extent whistleblowing claims are indeed justified, it is of interest to build on Kenneth Einar Himma's theoretical framework which was initially constructed to answer the question: 'Is Hacktivism (politically motivated digital civil disobedience) morally justified?' and try to adapt it to whistle-blowing practices. This framework's relevance is justified as

hacktivism and whistleblowing are both acts of denunciation aimed at rendering "something wrong" which is obvious to the wider society. If both denounce a "malpractice", they lightly differ in means, as civil disobedience and hacktivism always become external and claim to be of interest for the whole society, but whistleblowing is, at least initially, internal to an organization. Looking at both more closely, it is in fact quite difficult to differentiate them – only from their starting point. The online realm adds some complexity to this. On the one hand, the claim is made by people experiencing a situation from the outside of the organization and who want to change it. On the other hand, an insider observes misconduct and feels morally obliged to try and make it stop. The relationship that can be drawn between hacktivism and whistleblowing practices is therefore quite close. The main difference lies with the contract that a whistleblower has with the institution that he might want to expose for malpractice. Both have however, differentiated legal statuses and need tight frameworks to be deemed morally justified. As Kenneth Eimar writes, "(...) acts of civil disobedience have both pluses and minuses that have to be weighted. The moral value, for example of a conscientious desire to call attention to injustice, must be weighed against the moral disvalue of imposing costs on third parties." Four main questions are then asked through the framework. The first one is whether or not the disclosure will cause harm. The second question is whether or not the people who disclose the information accept responsibility. The third one is that the claim needs to be supported by adequate reason. For example, with defacement of websites, the absence of a clear message can be problematic from a moral standpoint. The last question is then that the hacktivists need to have a plausible justification for the positions motivating their acts. While the first, third and fourth points are highly relevant for whistleblowing practices; the second has less relevance as whistleblowers, sometimes thinking that their claims will be welcomed, usually accept their responsibility (Bjorkelo et al., 2010; Heumann et al., 2013). It might however be argued that anonymous whistleblowing tools can be set up in organization and that therefore, in this case, the question of the responsibility stays as relevant as the others. In any case and through these four questions we can assess the moral justification of the claims on a case by case basis, "whether hacktivism is justified, civil disobedience must be addressed on a case by case basis because acts of hacktivism vary with respect to morally relevant characteristics." That is to say, that even with the framework proposed by Kenneth Einar, no universal law nor generalizable policy can be drawn and

that these actions while opening a dialogue between the institutions and civil society can only be assessed in the particular social, political, and moral context in which they have emerged. Yet, we do support that the framework given by Kenneth Einar seems to be an adequate one when trying to assess the moral legitimacy of a whistleblower claim and could help in defining a supra-national policy framework to assess the legitimacy of "global whistleblowing", meaning the cases carried out externally on the Internet. What has also been outlined here is that the legal framework that will apply is driven by the place from which the claim is made. It can be from an internal (whistleblower) or from an external (civil disobedience) standpoint or can be made internally (whistleblower) or through external communications channels (whistleblower and civil disobedience).

Internal vs external whistleblowing practices

The place from which the claim is made is somehow the first qualifier of a claim. If the person or group of people making the claim are internal to the organization, then it is whistleblowing. However, it seems important to note at this point in our reflection that the dichotomy between internal and external does not stop there; meaning that the method of making something public can be either internal or external. In *Horton v. Department of Navy* for example, the court stated that the purpose of the Whistleblower Protection Act is "to encourage disclosure of wrongdoing to persons who may be in [a] position to act to remedy it, either directly by management authority, or indirectly as in disclosure to the press." However, it is interesting to note that "courts insist that an employee put[s] a significant amount of "skin in the game" before they are willing to afford these protections" (Webster, 2015). Policies seem to emphasize the need for some persistence in the claim before granting whistleblower status. It also validates our point that whistleblower claims cannot be made without accepting the full responsibility for the claim they make. Cases that have been put forward for the attention of the public are claims that, for a vast majority, have been firstly made internally and because they failed "came out". Most of the literature outlines the harsher retaliation that whistleblowers face when a claim is made externally. As an example, Mesmer-Magnus and Viswesvaran (2013) wrote that, "when whistleblowers report wrongdoing via external channels, they are more likely to receive retaliation, and such retaliation is likely to be more severe than

when internal channels are utilized."

However, it also seems, pilling on Heumman et al.'s work (2013), that the relationship between whistleblowers and organizations is changing slightly, "several interview subjects contended that, rather than viewing the whistleblower as disloyal, corporations now view the whistleblower as "our friend" and protecting the whistleblower as "good business" (...) A whistleblower is a management failure". That is to say that in an ideal world where managers can be talked to without fear of retaliation, questions could be raised and solved within the organization without the need for any legal framework, simply by applying good management practices. The problem is, as outlined in our introduction, that it is very difficult for an organization to integrate criticisms that might threaten its functioning and even parts of its business model (take the case of Volkswagen and its gas emission chips, Volkswagen Group vs UK customers). When an organization refuses or cannot take action, a whistleblower's claims are made external.

One interviewee in Heumann et al's paper brilliantly summed up the difficulty of defining what a whistleblower is and the legitimacy for their claim to go external, "Among whistleblowers, 20% are heroes, 20% are nuts, and I'm not sure of the other 60%".

In their study they showed that the public perception of a whistleblower claim was highly correlated to whether it was an internal or an external one. This seems comprehensible as external claims ask the entire society to take a stand and to give its opinion. But in our new borderless age of information technology, this external practice takes another position. The whole world can now witness the malfunctioning of an institution and its disclosure can foster a wide array of geopolitical consequences. Existing legal frameworks seem to be somewhat in a difficult position to address the potentially global aftermaths of such claims. Media therefore have a major role in how civil societies view and relay the blow.

Because external whistleblowing has great repercussions on civil societies and asks them to take a stance, whistleblowing practices have significant political implications and can be brought closer to political activism in their effects (if not their means). We argue that whistleblowing's moral validity could be

assessed through the theoretical framework set up by Kenneth Eimar for hacktivism. It could be a useful tool, along with others such as the Matrix of Perspectives on the Nature of Whistleblowing Provisions (Brown, 2013), to draft international policies or to align national policies on whistleblowing practices. It could help manage the now global reach of external whistleblowing, by providing a common frame for "moral assessment" under shared values.

III. Morality and civil society: what is in the interest of the public?

The law and the interest of the public

Brown describes the difficulty that the law faces when addressing whistleblowing practices: "international recognition of the importance of whistleblowing through multi-lateral agreements such as the United Nations Convention Against Corruption (UNCAC) and G20 Anti-Corruption Action Plan have created a demand for best-practice legislative models. There has been a new focus on comparative analysis of existing laws and the extraction of key principles to guide such legislation. On the other hand, the search for 'ideal' or 'model' laws is complicated by three problems: the diversity of legal approaches attempted by jurisdictions that have sought to prioritise whistleblower protection through special-purpose legislation (sometimes inaccurately called 'stand-alone'); the frequent lack of evidence of the success of these approaches; and the lack of a common conceptual framework for understanding policy and legal approaches to whistleblowing across different legal systems, including those where whistleblower protection may be strong but not reflected in special-purpose legislation." Furthermore, one of the key aspects of the legal status of whistleblowing is, as previously argued, the assessment of the moral underlying of a claim. The importance of the impact of the condemned practice on societies that are involved or made to become involved is one of the components of this moral validity. That being said, when a claim goes public through external communications channels, society as a whole is asked for its opinion and cases are widely publicised. Are they under such media scrutiny because the claim is made "in the interest of the public"? Does civil society benefit from being asked

its opinion on an affair? To take extreme examples, the disclosure of the Libor scandal was certainly made in the public interest, but was it the same for the disclosure of Manning's files? In the US, many federal statuses, including the federal Whistleblower protection Act, protect whistleblowers but also encourage them through qui tam lawsuits. (Heumann et al., 2013) Private citizens can bring a cause of action on behalf of the government however, it would be difficult to imagine Manning asking for one. It is interesting to note that financial compensation or any personal gain seems to discredit any whistleblowing claim in the eyes of the public (Heumann et al., 2016).The motives of the claim need to be "pure" and untainted by personal gain to be deemed in its interest by the public. In the UK this has been outlined by the "good faith issue". In 1998, the Public Interest Disclosure Act required protected disclosures to be made "in good faith." However, after a series of cases where employees had disclosed matters that were in the public interest but failed in their unfair dismissal claims because their employers were able to show that the employee's primary motive was to discredit the employer, the "good faith" requirement came under much scrutiny. Then came, in place of the "good faith" requirement, the "made in the public interest" requirement which has been introduced in the Enterprise and Regulatory Reform Act 2013: *for disclosures made before 25 June 2013, the disclosure must be made in good faith, but from 25 June 2013, this requirement does not apply. The employee's motive in making the disclosure is, however, still relevant, as any compensation awarded to the employee can be reduced by up to 25 percent if the disclosure has been made in bad faith.*

A correlation (here from a labor law perspective) was drawn from the start between the "intentions" of the whistleblower and the consequences of its blowing. As previously stated, the question of the aim versus the means, of the morality, is at the heart of the problem. The difficulty lies with the definition of what is "in the public interest". As Helena J. Derbyshire wrote in 2013, "There is no prescribed test for what is in the public interest, and this will inevitably lead to case law on the point, but the expectation among employment lawyers is that it will be rare that breaches of the employer's legal obligations (for example financial irregularity, discrimination, health and safety, environmental, and criminal issues) are not in the public interest (...)" The digital realm somehow emphasises this difficulty as the "public" whether from a private or a public perspective, is now global and societies that constitute it have very different interests. While

Manning's shared information was discrediting part of the US government, it was also discrediting the people who supported it and the war. On the contrary, it was comforting their views and societies who stood against the war. It could also be the case that a European or Indian employee in San Francisco is made aware of malpractices (discriminatory hiring practices, sexual harassment schemes, tax fraud, etc.) in the Australian branch of the firm they work for. If addressed, the whistle might result in employees in their native country's office, or in the Tokyo office where one of their friends/co-worker is, and the employee, losing their jobs. This leads to the following questions. Where does the global public interest lie? How can morality be weighted, jurisdiction defined and laws enforced?

Within a globalized media realm what is of public interest seems to be even more confounded with what is of interest to the public (generating clicks, likes, shares, views, and visits). Our access to information relies upon search engines and algorithms, which are partly predictive. Broadly speaking these algorithms suppose that we are interested in what we already have been interested in (Jaeho Cho, Saifuddin Ahmed, Heejo Keum, Yun Jung Choi, and Jong Hyuk Lee; 2016) which self-reinforces us in our convictions and media consumption habits. The morality underlying our exposure to different types of content, the impact of the infrastructure and of the regulation of the Code (Lessig, 1998), are yet to be clearly assessed. From a structural point of view, whistleblowing activities whose "success" depends on main media practices, find themselves in a perpetually renewed paradox where their intentions should be morally acceptable but their means might not.

Whistleblowing and its relationship with the media

The determination and the courage that journalists need to deploy to act upon a whistleblower claim is successfully depicted by Apaza and Chang (2011)'s work on cases in Peru and South Korea. In both cases the media and the press played a vital role in the disclosure of malpractices within organizations and institutions. When playing their role as the Fourth Estate, described by Edmund Burke in 1787, mainstream media appear to be a whistleblower's last chance to be heard. It has been argued that in order to be efficient in being a whistleblowing conduit, in

a state of rights, media need to be independent and redactions need to have some appetite for risk (Apaza and Chang, 2011; Heumann et al., 2016). Wim Vandekeckhove puts forward the idea that "whistleblowing cannot be evaluated separately from its facilitation. Floridi (2011a) described journalists and sites of leaks as facilitators of whistleblowing." Numerous studies have shown that it is usually when all other internal routes have failed, that a whistleblower goes external. This has been shown to be more effective even if it triggers greater retaliation (Apaza and Chang, 2011). However, empirical research also shows that "only a tiny minority of whistleblowers try to raise a concern through the media" (Brown, 2008). Through many, if not all studies investigated here, we find that retaliation is much more severe if the whistle has been blown externally. Even the public perception of the claim is surprisingly negatively impacted by the fact that the claim is made public that is, made known to it. Support for the employee reporting internally and up-chain is significantly greater than the support for going public. Society and the public do not take lightly the scandals that might erupt from allegations made against recognized and trusted private or public bodies. But are the media a mere conduit? The (potential) audience nowadays seems the main if not the only rationale for publishing a piece of news. Recent worries on the impact of the media and digital expression have emerged following the last US presidential elections. It might be argued that while the media were there historically to keep politics in check and reflected part of a society's opinions, we are now in a realm where media shape more than ever before the opinions of the audience as well as reflecting part of it. The relationship between main media companies, their shareholders and political bodies is not the topic of this paper but one might find it amusing that independent media stations claim "a whistleblowing editorial line" to address a vivid critic to main media practices and question their independence (i.e. Mediapart in France.) In that sense, one might wonder if what is "in the interest to the public" is not confounded with "what is in the interest of the public". It is arguable that in our media realm, the frontier seems to blur. It has been underlined that the existence of a free press "promotes the flourishing of elections as information entities by being able to report on any unfairness, rather than actually having to report on fairness." This can be contrasted with, "organizations that produce false semantic data would still be informational entities, but the production of false semantic data causes entropy in the infosphere as misinformation, and disinformation can deplete or harm other informational entities such as consumers, inves-

tors, competitors or other producers of information." (Vandekerckhove, 2016) The independency and agency of journalists are one of the corner stones of effective whistleblowing. The impact of the media is outlined by Carmen R.Apaza and Yongjin Chang in their study (2011), "even though mass media play an obvious and critical role, specific research about their impact on whistleblowing is scarce." They conclude that "both cases illustrate the importance of free speech and of an independent press." This is along the same lines as Wim Vandekerckhove's opinion; "whistleblowing to the media is only good if true semantic data from a whistleblower gets published by facilitators that have a strong reputation of working with high standards of investigative journalism." In our age, these standards are challenged by our use of social platforms as information sources and more generally, by our evolving relationship with a medium that is increasingly global, instantaneous, and information-thick. The relationship between whistleblowing and the media as facilitator conduits needs much more thoughtful assessment. Nonetheless, concerns about ties between institutions, organizations and media might eventually threaten the legal efforts carried out to facilitate and protect whistleblowing activities as well as the public who face the consequences of institutional or organizational misconduct.

The impact of digital technology on whistleblowing activities

In 2000 Nadine Strossen, while talking about cyberliberties vs cybercrimes, wrote, "Of course, cyberspace is an inherently global medium. And cybercrime and terrorism are worldwide concerns. Likewise, though, preserving human rights in cyberspace is also an international concern." The new digital pipes and tools that are at our disposal to express our opinions are commonly shared by the public, cyber-activists, whistleblowers and cyber-criminals and distort the definition of whistleblowing further. Many countries have comprehensive digital regulatory and jurisdictional frameworks that partly answer the question. The UE Data Privacy Directive, which is deemed to be one of the strictest in the world, is one example of a supra-national regulation that tries to address data usage and international relations on the sharing of citizens'data and their profiles by advertising or commercial entities. Others do not have such legislative frameworks. India or Malaysia for example, do not have any specific applicable requirements. Even though the legal handling of online

content dispute is nowadays, at least in the UK, well established (looking at the place and domicile – except for consumers – and where the tort occurs), resolving global scale morality issues is not simple. It is debatable that a national legal framework will be able to entirely tackle the borderless nature of the Internet and the breadth of its span. Nadine Strossen even warns that, "many officials argue that we have to make trade-offs between, on the one-hand, individual rights and, on the other hand, public safety. In fact, though, this alleged tension is oversimplified and misleading." In her paper, she argues that we are going towards a firmer penalization of online activities that may infringe on our constitutional rights in order to "preserve" us from harm. Let us remind ourselves the words of Jefferson to Madison while corresponding about the Bill of Rights in the US, "a society that will trade a little liberty for a little order, will deserve neither and will lose both." The choices that a society makes on how to respond to whistleblowing greatly exemplify the tension between liberty and order in the online realm.

Moreover, it has been shown that new social media (online) have increased civil political participation (Sandoval-Almazan, Ramon Gil-Garcia; 2014; Sha, Cho, Eveland, Kwak; 2005) even if they replicate offline habits (Calenda, Maijer; 2009). Once again, mainly through the convergence of the media to express one's opinion, the frontiers are not so clear-cut between hacktivism, political disobedience, and whistleblowing (Hampson, 2012) and neither is their legal treatment. In the online space it can be a difficult task to distinguish between them. "As much as it is important to determine approximate boundaries of hacktivism regarding the tools and produced effects, it is also crucial to establish how its motives and goals set it apart from other aggression in the cyberspace."(Drmola, Bastl, Mares; 2015) Drmola et al. warn later, "any active and repressive measures should be carefully considered in advance and analysed for their expected net effect on risk."

One wonders if the convergence in the definition of cyber-hacktivism and cyber-terrorism (Hacktivism goes hardcore, May 2015) might not end-up impending our overall capacity, as societies, to address political issues online. In the new digital and geopolitical landscape, the legal treatment if not the definition of a whistleblower is again very tedious to construct. The media and online tools used to create, publish, and share information are converging. This makes the distinction between reporting actions

for types of offences an arduous task. Furthermore, legal efforts might be applied to legislating on "sound" online reporting practices.

IV. The limits of a model: the Assange case, a free prisoner

A Kafkaesque legal épopée

This might be what compelled Julian Assange to publish all of the documents received by Private Manning on his WikiLeaks platform. Could he have foreseen where it would have led him? Looking at the last health records of Mr. Assange on the Platform (Nov 2015), he might not have. The legal conundrum in which he is trapped seems to indicate that we are somehow reaching the end of our existing legal capabilities to tackle the online (hence international) whistleblower status. To recap, without being charged (as of now) with any offense, Julian Assange is now living (and has been since 2012) in the Ecuador Embassy in London in the fear of being extradited to the US if he is sent back to Sweden. The United States investigation confirmed its ongoing proceedings against WikiLeaks in a 15 December 2015 court submission. On 3 February 2016 the United Nations Group on Arbitrary Detention (WGAD) found that Mr. Assange's effective detention in the Embassy of Ecuador by the United Kingdom and Sweden was arbitrary and unlawful and that he must be freed and compensated. National and supra-national bodies seem not to agree. An interplay of foreign policy, national and supra-national laws, media participation and public opinion led to this peculiar situation where our global legal framework finds itself in quite an awkward position. From a national point of view, legal institutions have adapted mostly by addressing the issue of the "status of the whistleblower". In this respect, it seems that there has been an attempt to make the status of a whistleblower closer to civil disobedience activities or alternatively closer to terrorist activities. French law for example, inspired by the US legislation (where whistleblower status dates back to 23 July 1778) added a new Article L. 1132-3-2 to the French Labour code in which paragraph 1 sets out that "*no person can be excluded from a recruitment process or access to an internship or a training period in a company, no employee may be sanctioned, dismissed or be directly or indirectly, in particular as regards to remuneration, […] incentive measures or distribution of shares, training, reclassification, assignment, qualification, classification, promotion, transfer or renewal of*

contract for having reported or testified in good faith, facts constituting an offense or a crime of which he was aware in the exercise of its functions". A similar provision is included in Law n° 83-634 of 13 July 1983 on civil servants' rights and duties.

It seems that the law is adapting the whistleblower status within national frameworks but fails to address the issue within a global framework, even more so when the whistleblowing concerns political institutions themselves. The extraterritoriality of the offender questions the enforceability of the law and the globalization of the "blow" questions both the territoriality of the law and the definition of what is "in the public interest". We reach a point where we could argue that for the global citizen, a global international legal framework of whistleblowing activities might be conceivable and even more, desirable.

Jurisdiction and global citizenship: transfiguring identity and sense of belonging

From a cyber-libertarian point of view (Barlow, 1996) the intrinsic irregulability of the Internet gives a simple answer to whistle-blowing activity, but as for the rest of Internet content, it cannot be regulated and any attempt to do so will miserably fail. Information is out there and was/is/will be shared in the eternal present of the cyber-realm. While tempting, this approach is contradicted by our experience and by stances that political institutions have taken toward whistleblowing activities. We have stated that whistleblowing activities were emerging from an interconnected legal, political, and moral standpoint. In this regard, whistleblowing is yet again quite close to the definition given to civil disobedience that has been described by Mathias Klang (2003), "In its simplest form civil disobedience involves defying the law for a good cause. It is therefore essentially a conflict between the law and the individual's morality." The idea is that this sense of morality is now expressed online through and toward any content that might emerge from the network and even more so, is shaped by it. It has been widely discussed, but most agree that the Internet is not fixed and that there is a reciprocal co-construction between the Internet (and surely the Internet 2.0) and its users. Our identity and our sense of belonging are shaped and transformed by our usage. Responses to a piece of news are now global because the news itself reaches people that could not be reached before. It seems very important to take into account how a sense of

citizenship and belonging are evolving as this could end up waning national institutions as well as strengthening their worldwide stance. There is a scale effect that legislation should take into account that is highly relevant for whistleblowers. Harshly penalizing online attempts to warn citizen globally about an institution's or a firm's misconduct might prove unhealthy for society. People will either keep quiet for fear of retaliation or radicalize as the law does not permit nuances in the legal treatment of their actions. It has to be noted that more and more people, mainly through the environmental issue, consider themselves to be global citizens (BBC, April 2016). Their identity is built on the idea that we are living in an ecosystem where each part is dependent on the other. In this context, global whistleblowing should be deemed, as it is at national level, as fostering greater transparency and a sense of responsibility for each part of our globalized world. This might already be the case, as the Edward Snowden Prism release has shown, but it operates within very polarized and difficult to sustain national legal frameworks that tend to criminalize global whistleblowers as cybercriminals. But what can be done about this? We have considered the issue of the definition of whistleblowers and support the idea that to address our new media realm, international frameworks could partly be constructed on a shared assessment of the moral underlying of the claim and not primarily on where and how the claim was made. But could we go even further and build on Lessig's work, for which Internet regulation is intrinsic to the code, and imagine how the infrastructure of the Internet could play a better role in how offenses are reported and accessed on the Internet?

Toward an infrastructurization of morality?

If we follow Lessig, code is law, and trying to regulate it from "the outside" is somehow useless. "Privacy in design" is an example of this internal regulation where the infrastructure itself is the guarantor of privacy. It is argued that the programming of a piece of software in itself bears the "dos and don'ts" of its usage and that more globally, the Internet and the way it is structured guide the norms and the "code of conduct" that one is bound to adopt while using it. It seems reasonable to think that indeed our usage is framed by the tools that we use. This framing is nowadays, with the extensive usage of black-boxed algorithms, more and more salient. We do not access the same information as our neighbors and content that is pushed toward us is now "tailor-made". The

responsibility for the content that we access is in the hands of the platforms that we use (UE data protection act). But why does this have an impact on whistleblowing? Setting aside the question of "fair" access to any content, we can simply see that modelization of online behaviors and predictions of these behaviors establish a new setting on how morality can be enacted and information shared. As Drmola et al. puts it while explaining system dynamics, "(...) every object or phenomenon can be treated as a system whose properties and behavior emerge from its underlying structure," and the continue, "these systems rarely have any clear-cut natural boundaries so it often comes down to the purpose of the model itself." In their attempt to modalize hacktivism and support system dynamics as a tool to unveil new insights about existing complex problems our society face, they show how the infrastructure could be used not only to predict but also to frame civil society's involvement in the reporting of offenses. In this sense, the Internet could be seen as an enabler, where the rationale used to spread content would be the interest of our global society as a whole. Similar to how Blockchain makes it easier for two parties to get into a contractual relationship without going through a solicitor, we could envisage encoded contracts between societies and the tools that they use to access information.

V. Conclusion

We started by trying to define what whistleblowing is in an age where the blow is global and its impact is scattered over widely different societies. We supported the idea that the morality issue, the goal of whistleblowing activities, needed a framework to be assessed at a supra-national level, making it more relevant in an interconnected world. We then introduced the idea that whistleblowing as a guarantor of state transparency and its legal underlying national policies and jurisdictions needed to be assessed through its tight and even vital relationship with the media. We focused on how online tools were blurring the frontiers between concepts such as civil disobedience, activism, hacktivism, and whistleblowing, making justice difficult to render. In our opinion, the collusion of legal status is a threat to the civil expression of institutional malpractices. We ended up outlining the difficult legal treatment that exists nowadays of such activities, especially in a context where people, their identity and their sense of citizenship is displaced by their online usage and their renewed access

to information. Our last point outlined the efforts that are now made to modelize our online activities, by stating that the robustness and design of any online architecture were inducing usage and that therefore the rationale of widely used platforms could be "moralized". This permits the creation and the spread of information that would be deemed of interest to society.

This paper is by no means exhaustive and only outlines the effect that new media have on whistleblowing. It attempts to show that while legislations are evolving at a national level, supra-national efforts on defining a global whistleblower in our digital world remain scarce. We concluded by supporting the idea that an encoding of morality/shared values within the Internet infrastructure could present interesting ways to address these difficulties while still making the wider society an active participant of the evolution of supra-national legal frameworks. If code is law, then perhaps law will become more systematically coded.

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Analysis: Europeanization or Germanization of the Policy Field Raw Earth Metals?

SUBMITTED BY

Christian Hörbelt

Abstract

The European Union designates the Raw Earth Metals (REM) policy as a top strategic issue which has a significant impact on the European economy. Thirty million jobs rely on access to REM and in general most industrial countries are dependent on resources from abroad. While Germany highly depends on Raw Earth for its industry the single national states cannot negotiate trade deals with other states. Thus, it is in Germany`s interest to shape the RAW policy at European level for its own benefit. This policy paper uses Radaelli`s definition of Europeanization to analyze how Germany and the EU are interacting or influencing each other.

I. Introduction

> *"European industries need predictability in the flow of raw materials and stable prices to remain competitive. We are committed to improve the conditions of access to raw materials, be it within Europe or by creating a level playing field in accessing such materials from abroad."*[1]

As this apt quote from Günter Verheugen, the former vice-president of the Commission, clearly shows, the mostly unknown issue of raw materials is more important than one would think. Therefore, the European Union (EU) designates the Raw Earth Metal (REM policy) as a top strategic issue, which has a significant impact on the European Economy. Thirty million jobs rely on access to REM (see EC 2008: 1) and in general most industrial countries are dependent on resources from abroad (see Hilpert and Mildner 2013). But this topic is also relevant since the EU obtains REM from third-party countries like China, which introduced a trade restriction in 2010 (see EC 2014) and thus the prices are significantly vulnerable. The EU is tackling this challenge with The Raw Materials Initiative (RMI), published by the European Commission (EC) in 2008 with the aim of enabling access to REM in the future. The strategy is an appeal not only to the EU, but more to the Member States (MS) as well as to the industry. However, nowadays REM is a basic part of the central European 2020 strategy (EC 2010c)[2]. If we use the definition given by Hix and Høyland (2006: 16f.), the EU can be seen as a complex political system. The European and the national level are reciprocally linked, influencing each other in the whole EU political system. Scarce resources especially affect the Federal Republic of Germany because the German industry is highly dependent on REM. This is why Radaelli´s (2003: 30) definition of Europeanization is useful for understanding which impact the EU hap. It is a

> "Processes of (a) construction (b) diffusion and (c) institutionalization of formal and informal rules, procedures, policy paradigms, styles, 'ways

1. This is a statement from the former vice-president Günter Verheugen at a press conference in Brussels on 5 June 2007, where he announced a Commission Raw Materials Initiative and later such an initiative was implemented.
2. This is a short description: "Europe 2020 is the EU's growth strategy for the coming decade. In a changing world, we want the EU to become a smart, sustainable and inclusive economy. These three mutually reinforcing priorities should help the EU and the Member States deliver high levels of employment, productivity and social cohesion". See more detailed information on the official homepage: http://ec.europa.eu/europe2020/index_en.htm [reviewed 28.09.2015].

> of doing things' and shared beliefs and norms which are first defined and consolidated in the making of EU decisions and then incorporated in the logic of domestic discourse, identities, political structures and public policies".

Therefore, when derived from this Europeanization definition the scientific research question will be: Is Radaelli´s definition of Europeanization appropriate to REM policy?

The aim of this paper is to discuss why the REM policy is a good example of Europeanization in the EU as a political system. As a case study we will look at the German REM policy and resources strategy in detail. To answer this question we will use three working assumptions:

1. We can refer to Europeanization, because REM policy is constructed at the European level alone.

2. We can refer to Europeanization, because the EU diffuses the REM policy.

3. We can refer to Europeanization, because the EU institutionalizes the REM policy.

This essay will give an overview of the complex process of the REM policy's progress over the last ten years. Thus, the analysis will look more or less like a historical review, examining how the policy progressed at European and national levels. In particular, the German government was and is involved in the REM policy. Therefore, the German REM policy will be considered and compared more closely to the approach at the European level. In the conclusion, the question will be answered and the working assumptions discussed. However, this topic is underexplored and is a new issue for most of national governments. This is why most of the documents referred to in this research are official EU-papers. Nevertheless, various organizations and research centers such as the Heinrich Böll Foundation, the British Department for Environment Food & Rural Affairs, and the Foundation for Science and Politics (SWP) have published several articles on this subject. Also, the scientific research from Timm Beichelt (2009) Deutschland und Europa. Die Europäisierung des politischen System had an influence on this analysis. The result of Beichelt´s research will be discussed in the conclusion.

II. The Progress of the Raw Earth Metals Policy at European Level

As the political system theories by Easton (1965) and Hix and Høyland (2011) describe, the EU is perhaps handled as a political system (Hix and Høyland: 17f.). In this case, the demand is to guarantee the supply of resources and the identified issue is Raw Earth Metal. The assumption by the EU was that there might be a problem with the supply of REM, within and particularly outside the EU. It is rather hard to consider at what point in time the problem was perceived as an economic and security problem. However, the EU had an important role in identifying the problem and influencing the agenda setting.

2.1 Beginning of the Raw Earth Metal Policy

It is somewhat difficult to pinpoint a specific date when the REM policy became an urgent issue for the EU and thus for its Member States. The study Minerals Planning Policies and Supply Practices in Europe (EC 2004) commissioned by the EC in 2003 and published in November 2004 can be considered as a starting point for the pan-European REM policy. The study's goal was to analyze the supply of non-energetic raw metals and provide suggested solutions. The study (EC 2004: 342) clearly concluded that most of the Member States did not prioritize this policy. Following this, the EC communicated the Thematic Strategy on the sustainable use of natural resources (EC 2005) and stated quite clearly:

> "The EU is highly dependent on resources coming from outside Europe and the environmental impact of resource use by the EU and other major economies is felt globally."

Hence, the EU has to respond to this global development and call for new initiatives at all levels of governance; at EU, national and international levels. It is clearly stated that the EU cannot provide the whole solution and its implementation, and the Member States have to be involved in the REM policy process:

> "Many of the actions needed to implement this strategy can be best taken at national level. Aside from agriculture and fisheries, most natural resource policies do not fall under exclusive Community competence. The Member States have certain policy tools at their disposal, such as economic instruments, that are difficult to deploy at Community level."

In 2006 the EC published a communication (EC 2006a) on promoting sustainable development in the EU non-energy extractive industry. The report stated that the EU may remain highly dependent on imports for its supply of raw materials (see EC 2006a: 3) and the EC External Trade clearly emphasized for the first time that Europe is highly dependent on resources outside of the EU (EC 2006b). Furthermore, in 2006 on the basis of a mandate the Raw Material Supply Group (RMSG)[3]; the Directorate-General (DG) Internal Market, Industry, Entrepreneurship and SMEs the EC installed. The RMSG mandate is to provide support for the legislator in the development and implementation of EU legislation and policies and develop actions to improve sector sustainability. Therefore, the mission is to analyze, discuss, and exchange views on the supply of raw materials, with a focus on the sustainable competitiveness of the non-energy extractive industry sector. Almost all members are involved in the decision making process of the subgroup. All national administrations (except Croatia) and various European organizations such as associations, industry, stakeholders, NGOs or research institutes (e.g. Fraunhofer) working on this policy are organized into two subgroups: Working Group 1: Defining Critical Raw Materials and Working Group 2: Exchanging best practices on land use planning, permitting and geological knowledge. Their studies, research and recommendations have influenced the progress of the REM policy. One of the core papers is Analysis of the competitiveness of the non-energy extractive industry in the EU, published in July 2007 in close cooperation with the EC, making it an official Commission staff working document. The two-hundred-page paper shows that the EU is actually dependent on REM, and that REM has to be supplied from non-EU MP. Furthermore, within this subgroup companies such as Volkswagen, Knauf and Eurométaux have an exertion of influence, as the European

3. See for more information the official homepage of the RMSG: http://ec.europa.eu/transparency/regexpert / index.cfm?do=groupDetail.groupDetail&groupID=1353 [reviewed 28.09.2015].

Environmental Bureau (EEB) has criticized.[4] For example, Mark Curtis (2010: 27-40) pointed this out in his study The New Resource Grab: How EU Trade Policy on Raw Materials is Undermining Development. The subgroup RMSG also heavily influenced the adoption of the EU's RMI in 2008.

2.2. The Raw Materials Initiative

The EC-Communication on The Raw Materials Initiative "Meeting our critical needs for growth and jobs in Europe" (EC 2008 699 final) is the first official document that specifically mentions the securing of raw resources. Peter Mendelson, the former European Commissioner for Trade, stressed in his speech[5] in September 2008 at the Trade and Raw Materials Conference in Brussels, that there should be established rules, enforced and reinforced by the strategic relationship between the industry and Member States alongside the EC. He stated, "Events like today have pushed the issue onto the agenda and we will keep it there." Mendelson´s appreciation was right; the RMI has had a huge impact on the progress of the REM policy. It is an integrated strategy that ties together various EU policies, notably trade, external relations, development, competitiveness, environment, and research. But the strategy is now incorporated into the Commission's Internal Market, Industry, Entrepreneurship and SMEs group, headed by the Polish commissioner Elżbieta Bieńkowska. Ten lines of action were established based on the three pillars of the strategy:

1. **First Pillar:** Ensure access to raw materials from international markets under the same conditions as other industrial competitors;

2. **Second Pillar:** Set the right framework conditions within the EU in order to foster sustainable supplies of raw materials from European sources ;

3. **Third Pillar:** Boost overall resource efficiency and promote recycling to reduce consumption of primary raw materials and decrease the relative import dependence.

4. The EEB is a European Organization and describes itself as the environmental voice of European citizens, which stands for environmental justice, sustainable development and participatory democracy. Further information is available on the official EEB-webpage: http://www.eeb.org/ [reviewed 28.09.2015].
5. The Peter Mendelson's full speech is available on: http://trade.ec.europa.eu/doclib/ docs/2008/september/tradoc_140781.pdf [reviewed 28.09.2015].

As we will see in the further analysis, the three pillar strategy will be one of the most important paths for the development of the policy. After the strategy was presented the Member States also started to prepare their own national policies as discussed in the next chapter. Following this strategy, after seventeen meeting sessions the subgroup RMSG published two papers with recommendations for further implementations: Improving framework conditions for extracting minerals for the EU – Exchanging Best Practice on Land Use Planning, Permitting and Geological Knowledge Sharing (EC 2010a) and Critical Raw Materials for the EU (EC 2010b). Both were presented by the former vice-president of the EC, Antonio Tajani, during the Spanish presidential term in June 2010, when he stated:

> "Today's report provides very valuable input for our efforts to ensure that access to raw materials for enterprises will not be hampered. We need fair play on external markets, a good framework to foster sustainable raw materials supply from EU sources as well as improved resource efficiency and more use of recycling.'"

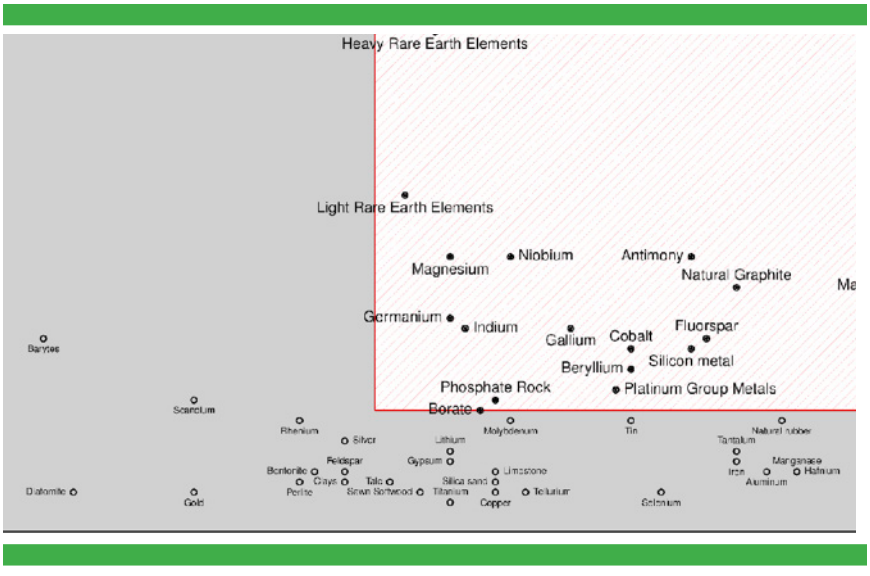
2.3 Critical Raw Earth Metals

The second publication (EC 2010b) is especially important for the REM policy, because within it the EC finally defines which metals, earth and resources are concretely described as critical REM:

> "This means that raw material is labelled "critical" when the risks of supply shortage and their impacts on the economy are higher compared with most of the other raw materials."

Around twenty critical raw materials were identified from a candidate list of more than fifty non-energy non-food materials (EC 2014b). In the communication on raw materials from 2011, the EC formally adopted this list. They issued an order to identify priority actions and to undertake a regular review and update of this list at least every three to five years. Illustration 1 depicts the latest complication of critical raw materials.

Illustration 1: Critical Analysis for REM from 2013. The critical raw materials are highlighted in the red shaded criticality zone. Source: EC 2014b p. 3.

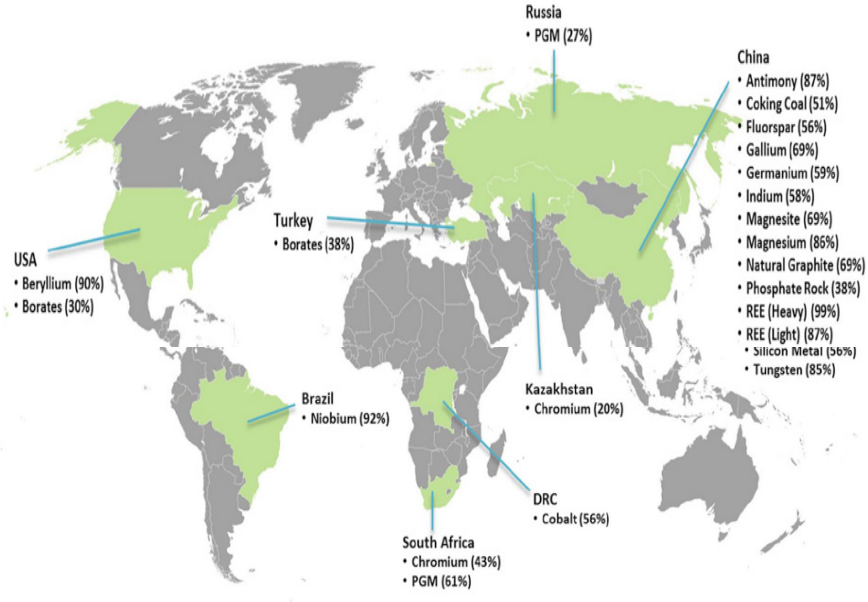


These indicators also show the rankings of REM at a fixed time, compare their usage, check the balance between recycling and supply, include the possibility of technical substitution, and check the resources trade markets. REM is mostly found abroad in developing countries like in China and Brazil. The second illustration shows that most of those critical raw earth materials are located in developing countries, above all in China. Nevertheless, in the European Parliament's resolution of 13th September 2011 on an effective raw materials strategy for Europe (EP 2011), the EP states:

> "[EP] believes that resource policy and resource diplomacy are of high importance for the EU, not only with regard to industrial policy and international trade but also as a transversal issue concerning different fields of domestic policy, as well as foreign and security policy."

The EP is actively policing REM and created a cross-party group of MEPs in 2011.

Illustration 2: The major producers of the twenty EU critical raw materials are shown below, with China clearly being the most influential in terms of global supply. Source: EC 2014b p. 5.



2.4 Update on the Raw Metal Initiative

The second EC initiative, Tackling the challenges in commodity markets and on raw materials (EC 2011b), published in February 2011, also named the financial and trade market as a problem. The communication was delayed because of the different expectations from the initiative of Germany and France. The French government under Sarkozy also managed to include commodities, including food and agricultural goods (see HBS 2011). However, the reason why the EU now also mentioned the trade markets, including commodities, is easy to understand if we take a look at the world market. China introduced trade restrictions on various Raw Earth Metal crucial to modern manufacturing in 2010 (see Kafsack 2011). It took more than five years in World Trade Organization (WTO) discussions to force China to end those restrictions. As a consequence, the prices for RAW (Jolly 2014) increased dramatically in 2010. One of the biggest challenges is to avoid resource nationalism, which means that the governments of third-party countries enact nationalization and expropriation

of foreign companies, export restrictions, cartel pricing behavior or high taxation (see also EC 2011a).[6] The REM policy is also integrated in the trade policy, serving the Europe 2020 Strategy from November 2010; a core part of the general strategy Europe 2020: the European Union strategy for growth and employment. This shows that foreign trade (the first pillar of the RMI) is one of the basic EU strategies.

2.5 European Innovation Partnership

On 29 February 2012 the Commission adopted a communication proposing the European Innovation Partnership (EIP) on raw materials (EC 2012). The conclusion of the promoted idea was to involve the industry more. This is a kind of flagship initiative of the Europe 2020 Strategy and emphasizes the significance within the industrial policy (EC 2010d) and resource efficiency (EC 2011c).The EC communication from February 2012 (EC 2012b) highlighted the importance and stated clearly that "the issues at stake have made it very clear that a continuation of 'business as usual' is no longer an option for Europe." As a further consequence, the EIP is implementing the RMI, bringing together EU countries, companies, researchers, and NGOs to promote innovation in the REM sector in order to provide a good working policy. The main task of the EIP is to increase the participation of the industry. Another platform, the European Resource Efficiency Platform (EREP) was set up to provide high-level guidance on the transition to a more resource-efficient economy, therefore stimulating growth and business opportunities (EC 2012c); this is now situated at the Environment Commission.[7] To achieve the EIP's task, the Strategic Implementation Plan (SIP) was introduced in September 2013. The Competitiveness Council had already endorsed this proposal in its conclusions on 11 October 2012 and invited the EC to launch the EIP and to develop and finalize the SIP by the end of 2013. This is a milestone of the EIP on Raw Materials and was reached with the announcement of the first set of commitments by over 800 companies, public agencies, research institutes, non-governmental organizations and other

6. In this paper resource nationalism is defined as anti-competitive behavior designed to restrict the international supply of a natural resource. For more information see the publication Horizon Scanning Programme: Resource Nationalism, provided by the British HM Government in 2014.
7. More information is available on the official EREP homepage: http://ec.europa.eu/environment/resource_efficiency/re_platform/index_en.htm [reviewed 28.09.2015].

stakeholders from all over Europe on 7 April 2014.[8] Both projects, the EREP and the SIP, still exist and pool their knowledge.

III. The European Raw Earth Metals policy Milestones

The following two EC reports on the implementation of the Raw Materials Initiative in 2013 (EC 2013) and 2014 (EC 2014), show that the EC as well as the EU and its Member States are converting the formulated strategies from the 2008 RMI. The newest communications regarding the implementation of the RMI shows that the EU is also now actively negotiating trade agreements with non-EU countries (EC 2014a). This has produced significant results both in concluding bilateral agreements, also known as Raw Earth Diplomacy, and in the context of WTO discussions, development policy, sustainable supply and resource efficiency. There are plenty more examples showing that the EU or the EC are more and more actively ensuring resource supply and recycling within the EU. This was one of the most important steps with the greatest influence on the national REM policy of MP. [9]

Following the publication of the second RMI, various communications, working groups, events and cooperation have emerged since 2011. Therefore, the following table[10] presents only the most important milestones since 2004. More detailed information about the current program and coming events is available on the official homepage of the European Commission Internal Market, Industry, Entrepreneurship and SMEs, in the section on Raw materials, metals, minerals and forest-based industries.[11]

8. More detailed information is available on the official SIP homepage: https://ec.europa.eu/growth/tools-databases/eip-raw-materials/en/content/strategic-implementation-plan-sip-0 [reviewed 28.09.2015].
9. See in more detail the SWP Study: Nationale Alleingänge oder international Kooperation? Analyse und Vergleich der Rohstoffstrategien der G20-Staaten (Hilpert and Mildner 2013).
10. The table is based on the Heinrich Böll Foundation's publication The German Raw Material Strategy: Taking Stock (Feldt 2012) and is supplemented by own research.
11. The European Commission´s Section Raw materials, metals, minerals and forest-based industries presents much information about the RAW policy and its strategies, groups and events: http://ec.europa.eu/growth/sectors/raw-materials/index_en.htm [reviewed 28.09.2015].

Table 1: The following table summarizes the milestone at German national level and at the European level, sorted by date in a descending order.

Date	European Level Milestones
November 2004	Publication: Minerals Planning Policies and Supply Practices in Europe
December 2005	Communication: Thematic Strategy on the Sustainable Use of Natural Resources
March 2006	Communication: Promoting sustainable development in the non-energy extractive industry
January 2006	Group: Creation of Raw Material Supply Group Two subgroups: Working Group 1 Defining Critical Raw Materials and Working Group 2 Exchanging best practices on land use planning, permitting and geological knowledge
June 2007	EC Press release by G. Verheugen: Securing raw material supply for EU industries. Announcement on the coming Commission strategy.
February 2008	Communication: The Raw Materials Initiative "Meeting our critical needs for growth and jobs in Europe"
2010-2015	China´s trade restriction on raw earth metals
June 2010	Communication: Critical Raw Materials for the EU
February 2011	Communication: Tackling the challenges in commodity markets and on raw materials
July 2011	Bilateral agreement: The EU-South Korea Free Trade Agreement
February 2012	Group: Creation of the European Innovation Partnership on Raw Materials
June 2012	Group: Plenary meeting and creation of the European Resource Efficiency Platform (EREG)
June 2012	Multilateral agreement: Comprehensive Trade Agreement with Colombia and Peru
December 2012	Publication: Manifesto for a resource-efficient Europe from the EREG
September 2013	Group: Creation of Strategic Implementation Plan (SIP)
January 2014	Group: The European Union Raw Materials Knowledge Base (EURMKB) as part of the SIP

March 2014	Final Meeting of the EREG
May 2014	Communication: The implementation of RMI
June 2014	Conference: First Raw Materials High Level Conference
October 2014	Conference: European Rare Earths Competency Network (ERECON) final conference
October 2014	Bilateral agreement: The EU and Singapore completed the negotiations for a comprehensive free trade agreement
January 2015	Conference: Second Raw Materials High Level Conference

IV. The Raw Earth Metal policy in the Federal Republic of Germany

Hörbelt

If we look at the national level, the Member States were not introducing and transposing the EU's recommendations and directives very actively. As the report *Substitution ability of Critical Raw Materials* (EP 2012) states, only Germany, France, and Finland approached this issue on a larger scale. In each state this topic is situated in a different department. It is difficult to clearly identify where the REM policy belongs and what the national RMI looks like. Because of the three pillar structure of the RMI, the REM policy can belong to the ministry for economics, sustainability, innovation, or education. Most of the Member States defined a single national strategy to fulfill the requirements. The publication *A Review of National Resource Strategies and Research* (Defra 2012), published by the British Department for Environment Food & Rural Affairs in March 2012, provides a comprehensive overview of almost all European MP. However, this chapter will take a closer look at Germany specifically. The German economy and its industry are highly dependent on resources such as RAW, and depend on supplies from non-European Countries. At the end is a table with key German and European raw materials policy dates/milestones.

4.1 The Beginning of the Raw Earth Metal Policy in Germany

A closer look at Germany shows the linked and overlapping character of the REM issue. The subject REM is enormously important for the German government and industry, as was clearly stated in the *Unterichtung durch die Bundesregierung* (federal government Information) in October 2010 (DT 2010). Thus, Germany is committed to implementing a good working REM strategy, and has made good progress (see Milde and Howald 2013: 59-68) however, it became actively involved at an early stage. For example, in Germany the *Bundesverband der Deutschen Industrie* e.V. (BDI) arranged the first raw materials congress agreement with the German federal government to develop a joint raw materials strategy for Germany in 2005. On this basis, at the second raw materials congress in March 2007, the BDI collaborated with the German government on the *Elements of a German government raw materials strategy* and "made it the guideline for its actions" (cited from BMWi 2010: 6). According to this report, "it was not least the German debate on raw materials which prompted the European Commission to present an EU raw materials strategy in 2008" (ibid: 6). The report also states that the EU level can better handle the field of trade and development policy.

4.2 The German Materials Strategy

The REM policy pertains to the *Federal Ministry of Economics and Technology* (BMWi), and they collaborated on *The German Government's raw materials strategy: Safeguarding a sustainable supply of non-energy mineral resources for Germany* (BMWi 2010), published in October 2010. Rainer Brüderle, the former BMWi Minister, said at the third BDI conference that the supply of resources is one of the top priority topics for the coming years.[12] This led to various bilateral and regional energy and resource partnerships. Furthermore, in the following years they created a *Resources Network*, an inter-departmental committee for resources and other initiatives (see also Mildner and Howald: 59-68).[13] The responsibility to guarantee REM belongs, from the point of view of the German government, to the private sector.

12. Nach: Brüderle gibt Startschuss für Deutsche Rohstoffagentur, Pressemitteilung des BMWi vom 20.10.2010, http://www.bmwi.de/ BMWi/Navigation/Presse/reden,did=361998.html [reviewed 28.09.2015].
13. More detailed information is provided on the BMWi-webpage: http://www.bmwi.de/DE/Themen/Industrie/Rohstoffe-und-Ressourcen/rohstoffpolitik.html [reviewed 28.09.2015].

But the government has to provide the necessary political conditions. Generally, this means ensuring trade agreements, building relations with target countries, and thus involving the private sector in decision making.

4.3 The German Government's Activities in the Field of Raw Earth Metals

Germany is quite active in the field of REM. They maintain bilateral trade agreements and resource partnerships. Germany signed this kind of agreement with Mongolia in October 2011 (BMWi 2011), with Kazakhstan in February 2012 (BMWi 2012) and with Chile in January 2013 (BMWi 2013). In the broader context of international trade relations the German government is committed to supporting the EC, as in its use of the dispute settlement mechanisms of the World Trade Organization (see Berger 2012). Also, the BMWi works closely with other German institutions, such as the *German Mineral Resources Agency* (DERA) and the *German Trade Chamber* (AHK), a resource network. It combines not only the knowledge of various German institutions, but also those of participating countries like Canada, Chile, and South Africa. Furthermore, the German government is active in various international mineral recourses organizations. Also, the German Environment Ministry and Ministry of Economic Cooperation and Development created their own strategies to involve all necessary groups from the state, industry, and NGOp.

4.4 German Federal Provinces' Activities

Moreover, some federal provinces also worked on these issues, above all Bavaria, which established its own resources strategy. Like at the federal level, The Bavarian Ministry of Economy established an inter-departmental committee for resources to engage actively in the European RMI (see VBW 2011). Also, the Bavarian Chamber of Industry and Commerce (IHK) analyzed the demand for REM and stated that the national and European level must cooperate more closely with each other and with the industry (see IHK 2015). Furthermore, the State of Hessen also published its own resource strategy in August 2011, and so did the Free State of Saxony in October 2013. The Saxony government stated that the European level in particular was pushing for and inspiring this process (see Sachsen 2013: 3). The German

government and BDI also provide support in other areas such as industrial alliances within Germany on cooperation on foreign investment in extractive projects connected to REM (see 2011 study).

V. Milestones at the German National or Regional and European Levels

As the German case shows, the European level has an impact on the national level. The REM policy clearly illustrates how the (German) national level operates in conjunction with the European level. Therefore, the most important milestones since 2004 are presented in the following table. [14]

Table 2: The following table summarizes the milestone at German national level and at the European level, sorted by date in a descending order.

Date	Milestones at the German National or Regional Levels	Milestones at the European Level
November 2004		Research publication: Minerals Planning Policies and Supply Practices in Europe
March 2005	Congress: 1st BDI (Federation of German Industries) raw materials congress Agreement with the German federal government to develop a joint raw materials strategy for Germany	
December 2005		EC Communication: Thematic Strategy on the Sustainable Use of Natural Resources
March 2006		Communication: Promoting sustainable development in the non-energy extractive industry

14. The table is based on the Heinrich Böll Foundation's publication, The German Raw Material Strategy: Taking Stock (Feldt 2012), and is supplemented with additional research.

January 2006		Group: Creation of Raw Material supply group or two subgroups: Working Group 1 Defining Critical Raw Materials and Working Group 2 Exchanging best practices on land use planning, permitting and geological knowledge.
March 2007	Congress: 2nd BDI raw materials congress presentation of "Elements of a German government raw materials strategy"	
June 2007	Group: Inter-Departmental Committee for Resources	EC Press release by G. Verheugen: Securing raw material supply for EU industries. Announcement by the Commission strategy.
February 2008		EC Communication: The Raw Materials Initiative "Meeting our critical needs for growth and jobs in Europe"
2010-2015	China´s trade restriction on raw earth metals	China´s trade restriction on raw earth metals
June 2010	Group: Bavarian Ministry of Economy established an inter-departmental committee for resources	EC Communication: Critical Raw Materials for the EU
October 2010	Strategy Paper: German government's raw materials strategy	
February 2011		EC Communication: Tackling the challenges in commodity markets and on raw materials
July 2011		Bilateral agreement: The EU-South Korea Free Trade Agreement
August 2011	Communication: State of Hessen publishes its own resources strategy	

September 2011	Group: Resource network, including German state, institution and industry.	
October 2011	Bilateral agreement: Signing of raw materials partnership with Mongolia	
January 2012	Formation of the raw materials alliance "Allianz zur Rohstoffsicherung" by German companies interested in direct involvement in extractive projects	
February 2012	Bilateral Agreement: Signing of raw materials partnership with Kazakhstan.	Group: Creation of the European Innovation Partnership on Raw Materials
June 2012		Group: Plenary meeting and creation of the European Resource Efficiency Platform (EREP)
June 2012		Multilateral agreement: Comprehensive trade agreement with Colombia and Peru
December 2012		Publication: Manifesto for a resource-efficient Europe of EREP
January 2013	Bilateral agreement: Cooperation in the field of mineral and metallic raw materials with Chile	
September 2013		Group: Creation of Strategic Implementation Plan (SIP)
October 2013	Communication: Free State of Saxony created its own strategy	
January 2014		Group: The European Union Raw Materials Knowledge Base (EURMKB) as part of the SIP
March 2014		Final Meeting of EREP

May 2014		Communication: The implementation of RMI
June 2014		Conference: First Raw Materials High Level Conference
October 2014		Conference: European Rare Earths Competency Network (ERECON) final conference
October 2014		Bilateral agreement: The EU and Singapore completed the negotiations for a comprehensive free trade agreement
January 2015		Conference: Second Raw Materials High Level Conference

VI. Conclusion

The aim of this paper is to give an overview of the Europeanization of the REM policy and to answer the question: *Is Radaelli´s definition of Europeanization appropriate to REM policy?* For this purpose the REM policy in Germany was analyzed alongside the European policy. Radaelli's definition addresses three main concepts through which we can understand how Europeanization takes place within the EU and within Germany specifically. Before answering the scientific research question, the three working assumptions below were discussed and the following conclusions have been reached:

1. *We can refer to Europeanization, because the European level constructs the REM policy alone:* ***No.***

As this analysis clearly demonstrates, the EU alone did not construct the REM policy. It was, as the German case shows, more or less a symbiotic collaboration. As the German government itself stated (BMWi 2010: p. 3), and as the study paper SWP (Mildner and Howald 2013: p. 67ff.) also illustrated, Germany and its industrial companies were heavily involved in shaping the REM policy before the first EC communications were published. Also, Germany was deeply involved during the development of the RMI, and it is now one of the key players in the subgroup. As the conflict with the French government in 2011 confirms, Germany

had – and probably still has – a heavy influence in the construct of the REM Policy (see ibd: 68).

2. *We can refer to Europeanization, because the EU diffuses the REM policy:* ***yes***

This question is more difficult to assess. It may be confirmed by the fact that the EC publishes communications and presents its strategies. But, as in the case of Germany, the government and industry already discussed this issue and set the agenda from top to bottom and the German economy shaped the European-wide strategy. Nevertheless, it can be stated that the EU pushed this process, especially after the publication of the RMI in 2008 and China's emerging resource nationalism. The German BMWi presented a national strategy only two years later in 2010. Thus, there is a significant impact, particularly when it comes to the content of both strategies. However, as Germany is also active in various international organizations, we can also assume that it plays a role in diffusing this issue, and gives it high priority.

3. *We can refer to Europeanization, because the EU institutionalizes the REM policy:* ***yes***

The third working assumption can clearly be confirmed. If we look at the milestones, summarized in the second table in the fifth chapter, the impact that the EU had on the development of the REM policy is evident. The EU institutionalized the procedures, the policy paradigm, and both the formal and informal rules. Also, the EU had a huge influence on the development of the German federal states. It should be noted that the subgroups especially were motors in the development process, thus the German government also had an influence.

The discussion on the three working assumptions shows the impact of the EU on the German REM policy. Even if the first working assumption on the construction of the policy is negative, the two others are positive. Thus, one may conclude that the REM policy is an example of Europeanization, especially when considering the first table. This table illustrates how the REM policy dynamically progressed and where the high points were: in the Raw Material Initiative from 2008 and its adaption in 2011. Therefore, the question is verified. But, as the EU is a political system and its Member States are a part of the European institutions, the nation-

al level has some kind of a bottom-up influence through consulting and knowledge transfer. Radaelli's definition is hence not the best but is useful for understanding how the EU is influencing the procedure of shaping a European-wide policy (see Börzel 2002: p. 193-214). As this paper does not analyze the EU's impact in the other Member States, this conclusion may apply only to Germany. However, there are several definitions of Europeanization (see Beichelt 2009: p. 20-44). Timm Beichelt (2009: p. 126) which define the term in a broader sense, and argue that the national level follows a certain European model:

> "[It] is a process in which the nation states, their institutions and their political cultures are transforming through the orientation to the EU level."

It is true that Germany and its federal subjects followed the pan-European strategy as it was formulated in the two larger strategies from 2008 and 2011. Also, it should be noted that multi-level governance is a good approach for describing policy-making within Europeanization. As Timm Beichelt (2009: p. 45-109) analyzes, the world of European officials in Brussels is not hermetically sealed but is influenced by the Member States and their national staff (see ibid.: p. 54). Undoubtedly, the EC also plays a significant role when it comes to Europeanization. Hix and Høyland (2011: p. 88f.) call this comitology, "[wherein] partnership between the national and the European levels of governance has become one of the marked features of EU policy-making". However, as the quote from Günter Verheugen shows, the REM policy will be one of the top priority issues in the coming years. Hence, it would be desirable if all European Member States had the same strong motivation to secure the further supply of Raw Earth Materials as Germany has. Therefore, it is important to consider how the REM policy also influences other fields, such as military security, and how the EC is trying to push this policy higher up the agenda.

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The Age-Orientation of the Euro Crisis

SUBMITTED BY

Ariane Aumaitre

I. Introduction

The welfare state as we know it may no longer be sustainable. While the European population is ageing, and family structures are changing, the welfare model designed in Europe after World War II to suit the needs of a young society based upon a male breadwinner model is showing serious shortcomings.[1] This has long been pointed out both by international actors such as the OECD[2], the IMF[3] and the European Commission[4], as well as by a wide range of scholars.[5]

Despite this wide consensus regarding the need for policy change, governments have been reluctant to undertake structural reforms that include cuts in pension spending. This can be explained as the result of a *blame-avoidance mechanism*[6]: since welfare state retrenchment is generally unpopular, governments will tend to avoid doing this if they have any alternatives, and they will try to postpone or even *disguise* their decisions in order to minimize their electoral costs.

In such a context, the Euro crisis can be seen as an *opportunity* for welfare state reform in some countries, by providing a source of external pressure that has made reforming unavoidable,

1. G. Esping-Andersen, The Incomplete Revolution (Cambridge: Polity Press, 2009), 1-15
2. See, for instance, OECD, Pensions at a Glance 2011: Retirement-income Systems in OECD and G20 Countries (Paris: OECD Publishing), 9-11
3. IMF, Fiscal Monitor: Fiscal Adjustment in an Uncertain World, (Washington: IMF, 2013)
4. European Commission, Ageing and Welfare State Policies, retrieved 01 May 2017 https://ec.europa.eu/info/business-economy-euro/growth-and-investment/structural-reforms/ageing-and-welfare-state-policies_en
5. There is a wide literature on the topic of welfare state sustainability. For a review, see Z. Barta, 'Fiscal Sustainability and the Welfare State in Europe', Journal of Finance and Risk Perspectives 4, no. 3 (July 2015): 145. For a more detailed approach to the topic, see G. Esping-Andersen, Why We Need a New Welfare State, (Oxford Scholarship Online: 2002); also V. Galasso, The Political Future of Social Security in Aging Societies, (Cambridge: MIT Press, 2006)
6. P. Pierson, 'The New Politics of Welfare', World Politics 48, no. 2 (1996): 143-179

allowing governments to overcome the logic of blame-avoidance.[7] Either under the pressure of market forces, or as an explicit quid pro quo in exchange for bailout packages, the crisis has triggered a set of structural reforms in some countries that has affected welfare states. This is especially the case in those countries which have undergone a bailout program from the EU (in the case of Greece, Ireland, Portugal and Spain), or where external pressure was especially relevant even in the absence of formal mechanisms (in the case of Italy). These five countries that will be referred to under the acronym of GIIPS, will be the focus of this paper.

These adjustment measures brought in by the crisis included in many cases pension sustainability as a core objective of structural reforms.[8] However, it seems that European governments strongly prioritized not applying austerity measures to pensioners. This is especially true when comparing different age groups within these countries' populations. While it seems that pensioners have remained largely untouched by the crisis, other policies targeted towards the young, children or new social risks were condemned to disappear in many cases.[9] In a country such as Spain, child and family policies that were implemented during the early 2000s as a shift towards a more age-distributive welfare state almost disappeared during the crisis, while pensioners saw their purchase power being increased.[10]

Why did governments in Europe decide to follow welfare state reforms that favored the elderly over the younger population? A possible explanation for this phenomenon, coming from the *institutionalist* literature, would be to consider that these choices are determined by the structure of welfare states that are unlikely to undergo structural change. This line of reasoning would argue that welfare state structures determine the options for the reform available, and thus that the reforms undertaken during the crisis could be explained by the *structure* of European welfare states.[11]

This paper aims to assess the validity of this approach in explaining these policy choices. It will do so through the

7. G. Bonoli, 'Blame avoidance and credit claiming revisited', The Politics of the New Welfare State, ed. G. Bonoli & D. Natali (Oxford: Oxford University Press, 2012): 93-110
8. K. Hinrichs, 'In the Wake of the Crisis: Pension Reform in Eight European Countries', ZeS Working Papers, no. 01/2015 (2015): 12-18
9. European Youth Forum, Youth in the Crisis: what went wrong? (2014)
10. P. Mari-Klose, La economía política de los recortes: un relato para niños y mayores, (Agenda Pública: 2015), retrieved 01 May 2017
11. This idea is summarized in C. Arza and M. Kohli, 'Introduction', in Pension Reform in Europe, ed. C. Arza and M. Kohli (New York: Routledge, 2008), 7

analysis of two clearly age-defined policy areas: old-age pensions (referred to as pensions throughout the paper) and family policy. While pensions are probably the most clear age-oriented social policy; family policy has a clear youth-oriented component to it, targeting both children and recent parents (who tend to be part of the young sectors of the population). Through the analysis of the evolution of these two policies in the GIIPS countries during the Euro crisis years, this paper aims to contribute to a better understanding of the age-orientation of policy decisions in Europe.

The paper is laid out as follows. Section 2 will establish the theoretical framework of the analysis, as well as set the methodological grounds for it. Section 3 will be dedicated to the analysis itself, through the study of the evolution of age orientation, pensions and family policy. Section 4 concludes.

II. Analytical framework

When it comes to explaining welfare state evolution and policy choices, one of the most prominent theories is what has been called *welfare state institutionalism*. This has its foundations on Esping-Andersen's seminal work *The Three Worlds of Welfare Capitalism*[12], where he develops what is now known as 'regime theory'; the idea that welfare states can be grouped in clusters with "similar institutional design, similar political orientations and similar outcomes[13]". This implies a "static conception of welfare"[14], according to which welfare state structures generate a lock-in effect that will lead to path-dependent policies. In summary, the way in which welfare states were organized when originated would create "lasting patterns of political solidarity and political mobilization that shape definitions of what is just, how groups define their interests and the political coalitions that are likely to emerge"[15].

This idea from regime theory can be embedded in Paul Pierson's *New Politics* approach, where he argues that the logic consequence of blame avoidance mechanisms is that it is very

12. G. Esping-Andersen, Three Worlds
13. C. Arza and M. Kohli, 'Introduction', 6
14. Ibid, p. 7
15. E. Immergut and K. Anderson, 'The political-institutional framework for pension politics', in The Handbook of West European Pension Politics, ed. E. Immergut, K. Anderson and I. Schulze (New York: Oxford University Press, 2006), 11

unlikely "to find radical changes in advanced welfare states"[16]. Following this line, when it comes to retrenchment, welfare state structures, and thus the *type* of welfare state one country belongs to, will "have implications for the decisions rules governing policy change . . . and for how visible cutbacks will be".[17]

Pierson identifies three variables in welfare reforms that that he considers would entail a structural change in welfare, and therefore that he expects to remain stable in well-established welfare states, even in cases of retrenchment. These are reliant on means-tested benefits, transfers of responsibility to the private sector or *dramatic* changes in benefit and eligibility rules[18].

In the context of the Euro crisis, this institutionalist approach would expect countries to undertake reforms *within* the scope given by the welfare state type they belong to. Following this line, the age-orientation of policy measures would be explained as the result of already existing patterns of welfare structure. This has been challenged in the past by Lynch, who finds that age orientation of the welfare states does not seem to be related to welfare state regimes.[19] Her analysis, however, focuses on a static moment of time, whereas the analysis of this thesis is concerned with the *evolution* of welfare state structure. In this dynamic context, the expectation from this theoretical approach would be to see welfare state structures remaining still over time, and thus Pierson's indicators of structural change being stable during the crisis.

In order to test the validity of this theory, the analysis will look at quantitative data on several indicators of pension reforms and family policy. This has been decided in order to provide a broad overview of the evolution of these policies, and to allow for comparisons in the way different indicators evolve among countries. The study of welfare state structure during the crisis will be divided into three main parts: age-orientation, pension structure, and family policy.

Age-orientation will be analyzed through three indicators. First, an elderly/non-elderly spending ratio (ENSR) based on

16. P. Pierson, 'The New Politics of Welfare', 176
17. P Ibid, p. 147
18. Ibid., p. 157
19. J. Lynch, Age in the Welfare State, (New York: Cambridge University Press, 2006), 4-9

the one created by Lynch in her seminal work on age-orientation[20] will be calculated in each country for the years 2000, 2005, 2010 and 2012, in order to look at its evolution during the crisis. This ratio will be computed by using SOCX data from the OECD, and will compare per capita spending on the elderly with per capita spending on the unemployed and on families.[21] A second indicator of age-orientation will be the evolution of spending on the elderly. Since most of our sample countries are in a context of ageing populations, increases in this spending area may be triggered by an increase in the number of the population over 65. This fact will be accounted for by dividing the total spending on old age by the total number of elderly in the population, and expressing it as a % of GDP per capita. The last indicator will be the evolution of family spending as a % of social spending instead of a % of GDP, with the aim of controlling the impact of GDP variations in the analysis.

Concerning pensions, the analysis will use OECD data from the period 2005-2014 in relation to the evolution of three main indicators; pension spending as a % of GDP, net replacement rates, and minimum pensions. These indicators will allow the analysis of whether there have been significant changes going on the structure of this policy as a result of the crisis years.

As for family policy, the analysis will use OECD data from the *Family Database* to look at the evolution of public spending on cash benefits for families, on services and in-kind benefits for families, and on tax breaks for families.

The analysis will, for each of the three parts, assess whether the *structure* of welfare state in these areas seems to have undergone *structural* changes or whether it has remained stable, as welfare state institutionalism would predict.

Aumaitre

20. Ibid., p.4

21. In order to compute the ENSR ratio, the numerator includes the total social spending on the elderly divided by the number of the population over 65. The denominator consists of the sum of family allowances divided by the total of population aged 0-14, unemployment benefits and active labor market policies and by the total number of unemployed.

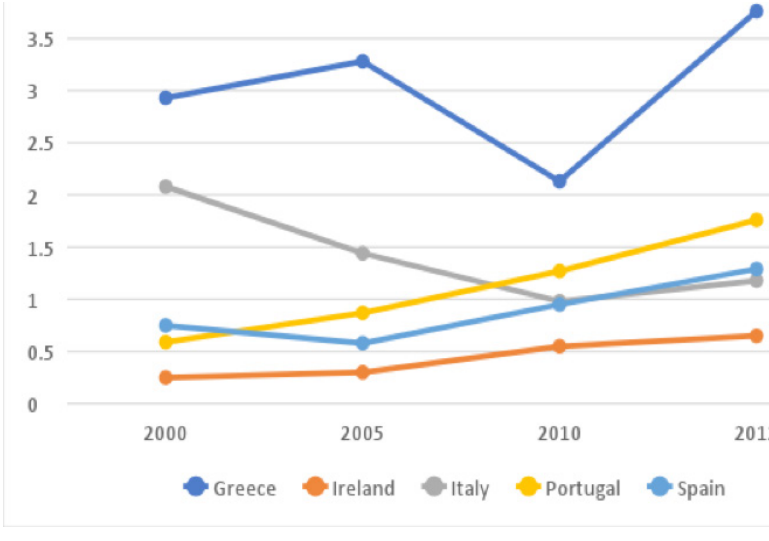
III. The evolution of age orientation during the Euro crisis

After having set the analytical framework of the paper in section 2, this section will now present and assess the evolution of welfare states in the GIIPS countries during the Euro crisis years. This will be done through three subsections: the first on the age-orientation structure of welfare states, followed by a closer analysis of first pensions and then family policy.

A. Age orientation structure

In order to assess the evolution of *age orientation*, the first indicator that will be computed is the ENSR. Figure 1 and Table 1 showing the evolution of this ratio during the crisis years for our set of countries:

Figure 1. Elderly Non-elderly Spending Ratio (ENSR), 2000-2012[22]



22. Data for calculations retrieved from 'Social Expenditure Database (SOCX)', OECD, last accessed 18th September 2017, http://www.oecd.org/social/expenditure.htm

Table 1. Elderly Non-elderly Spending Ratio (ENSR), 2000-2012

	2000	2005	2010	2012
Greece	2,93	3,28	2,13	3,76
Ireland	0,25	0,3	0,55	0,65
Italy	2,08	1,44	0,98	1,18
Portugal	0,59	0,87	1,27	1,76
Spain	0,75	0,58	0,95	1,29

The data show that, except in the case of Italy, all other countries are more elderly-oriented nowadays than they were in the year 2000. This general increase in the value of the ENSER ratio indicates that per capita spending on the elderly has grown almost everywhere at a higher pace than spending on younger sectors of the population. This tendency has been especially strong in the case of Portugal, where the ENSR value for 2012 is three times that of the year 2000, and also in Ireland, where spending on the older sectors of the population has increased more than twice as fast as spending on the younger ones.

Further research into Italian welfare state policies is needed to understand the decrease in the ENSR ratio for this country, but the results from everywhere else suggest that there is an evolution occurring towards a more elderly-oriented welfare state in the studied countries.

Figure and Table no. 2 serve as a complement to the ENSR ratio by presenting the results for the *old age spending ratio*, an indicator that assesses the evolution of spending on the elderly while accounting for the ageing of the population and the variations in GDP per capita. In addition, the fact that these data are available annually allows for a better understanding of the evolution of these phenomena.

Figure 2. Old age spending ratio, 2005-2013[23]

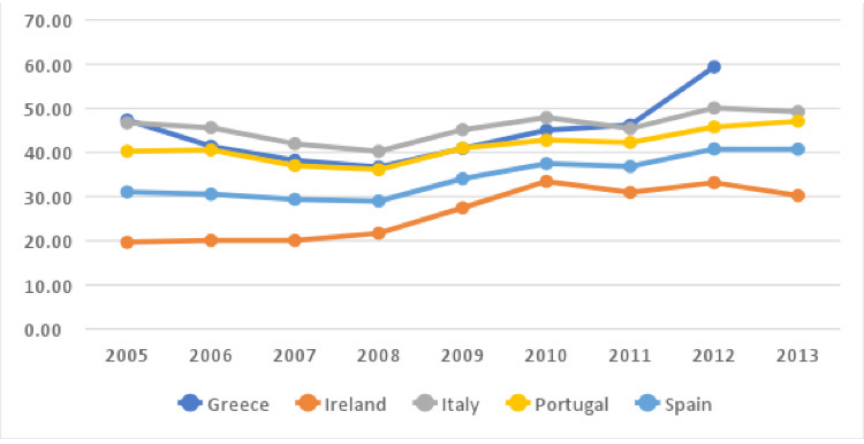


Table 2. Old age spending ratio, 2005-2013

	2005	2006	2007	2008	2009	2010	2011	2012	2013
Greece	47,36	41,41	38,21	36,71	40,89	45,06	46,22	59,38	
Ireland	19,64	20,08	20,07	21,70	27,46	33,44	30,94	33,15	30,25
Italy	46,68	45,62	41,97	40,28	45,15	47,88	45,41	50,08	49,24
Portugal	40,31	40,57	37,01	36,10	40,98	42,78	42,26	45,76	47,07
Spain	31,06	30,54	29,37	28,99	34,06	37,48	36,83	40,79	40,74

The data reproduces a similar tendency to the one observed with the ENSR. In fact, we see spending on the elderly rising in all countries, even when accounting for the amount of people over 65 and the evolution of GDP per capita. This is the case even in Italy, which appeared as an outlier in the case of the ENSR.

The evolution of this *old age spending* ratio shows a clear tendency towards an increasing elderly-orientation of welfare states in the GIIPs countries, which spend more and more on this

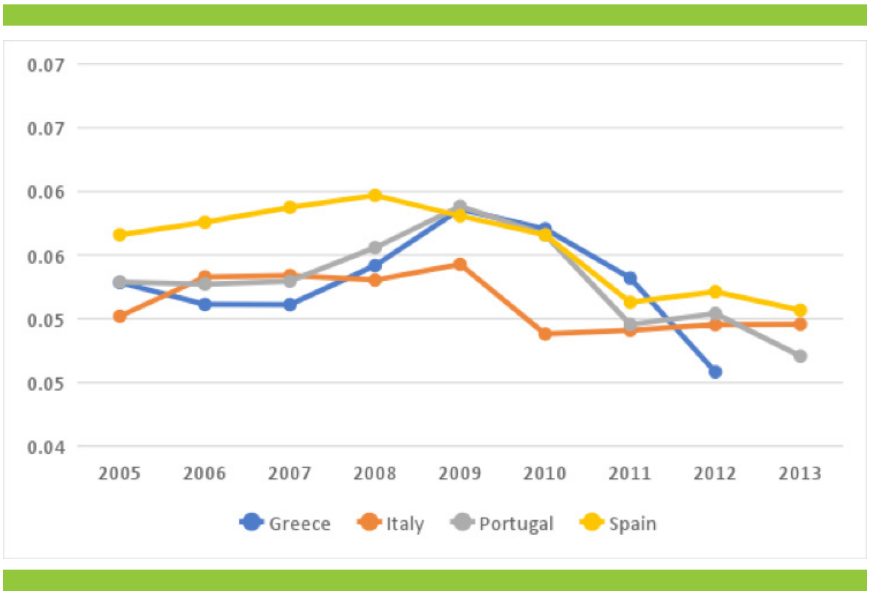
23. Data on spending retrieved from 'Social Expenditure Database (SOCX)', OECD. Data on GDP per capita retrieved from 'GDP per capita (current US$)', World Bank, last accessed 18th September 2017 https://data.worldbank.org/indicator/NY.GDP.PCAP.CD. Data on population retrieved from 'Population data", Eurostat, last accessed 18th September 2017 http://ec.europa.eu/eurostat/web/population-demography-migration-projections/population-data

sector of the population, even in times of deep economic crisis. This may be seen as an indicator of *structural change*, to the extent that spending is not only rising because the population is increasing, but it is doing so in absolute terms.

Furthermore, this tendency seems to cut across welfare state types: one of the major increases in this ratio takes place in Ireland, which has traditionally been considered as a rather youth-oriented welfare state. [24]

The last indicator of age orientation is the evolution of spending on family policy as a percentage of social spending, which is represented in Figure and Table no. 3

Figure 3. Family policy as a % of social spending[25]



Here, the tendency is inversed from the case of spending on the elderly: the crisis seems to have triggered a decrease in family spending in all the countries of our set. Figure 3 shows how all of them reach a peak on family spending between 2008 and 2009, right before the Euro crisis, and then lower their spending on this area as soon as the crisis starts.

24. J. Lynch, Age in The Welfare State, 32
25. Ireland has been excluded from the graph for better visualization, given the broad difference between its level of social spending and that of the rest of the countries.
All data retrieved from 'Social Expenditure Database (SOCX)', OECD

Table 3. Family policy as a % of social spending

	2005	2006	2007	2008	2009	2010	2011	2012	2013
Greece	0,05	0,05	0,05	0,05	0,06	0,06	0,05	0,05	
Ireland	0,18	0,18	0,18	0,18	0,18	0,17	0,17	0,16	0,16
Italy	0,05	0,05	0,05	0,05	0,05	0,05	0,05	0,05	0,05
Portugal	0,05	0,05	0,05	0,06	0,06	0,06	0,05	0,05	0,05
Spain	0,06	0,06	0,06	0,06	0,06	0,06	0,05	0,05	0,05

This shows a contrast with the two indicators represented above, and at the same time helps explain the relative rise in elderly spending during the crisis years; governments indeed seem to have decided to cut more youth-oriented policies such as family spending. Once again, this is a tendency that crosses country groups, even in the case of Ireland, where the proportion of family spending is higher than in the southern countries, and family spending represents a smaller part of social spending in 2013 than it did in 2005.

In summary, the data presented above in age orientation suggest that the age structure of welfare states in the GIIPS countries is becoming more elderly-oriented, and that the crisis has actually increased this tendency; in all of the countries in our analysis, spending on the elderly has increased proportionally faster than spending on younger sectors of the population, even when accounting for the increase in ageing population and GDP variations.

These results thus challenge the institutionalist idea that welfare state structures do not change, and therefore welfare state institutionalism would fall short in explaining the policy choices that trigger this change of weights in policies. The following subsections will continue to assess this.

B. Pension policy

After assessing the evolution of age orientation during the crisis years, this subsection will focus on one of the most clearly age-oriented social policy areas: that of pensions. A first approach to this policy will be the analysis of the evolution of pension spending as a percentage of GDP.

Figure 4. Pension spending as a % GDP[26]

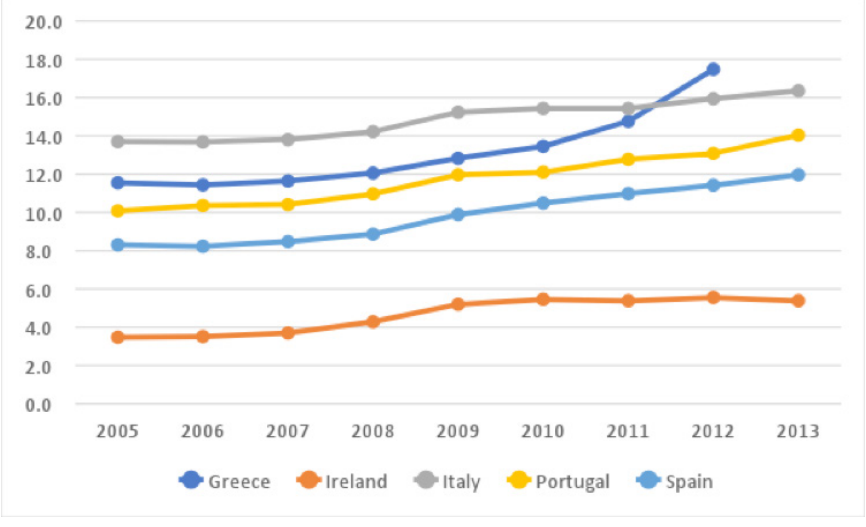


Table 4. Pension spending as a % GDP

	2005	2006	2007	2008	2009	2010	2011	2012	2013
Greece	11,6	11,4	11,6	12,1	12,8	13,5	14,8	17,5	
Ireland	3,5	3,5	3,7	4,3	5,2	5,5	5,4	5,6	5,4
Italy	13,7	13,7	13,8	14,2	15,2	15,4	15,4	15,9	16,4
Portugal	10,1	10,4	10,4	11,0	12,0	12,1	12,8	13,1	14,0
Spain	8,3	8,2	8,5	8,9	9,9	10,5	11,0	11,4	12,0

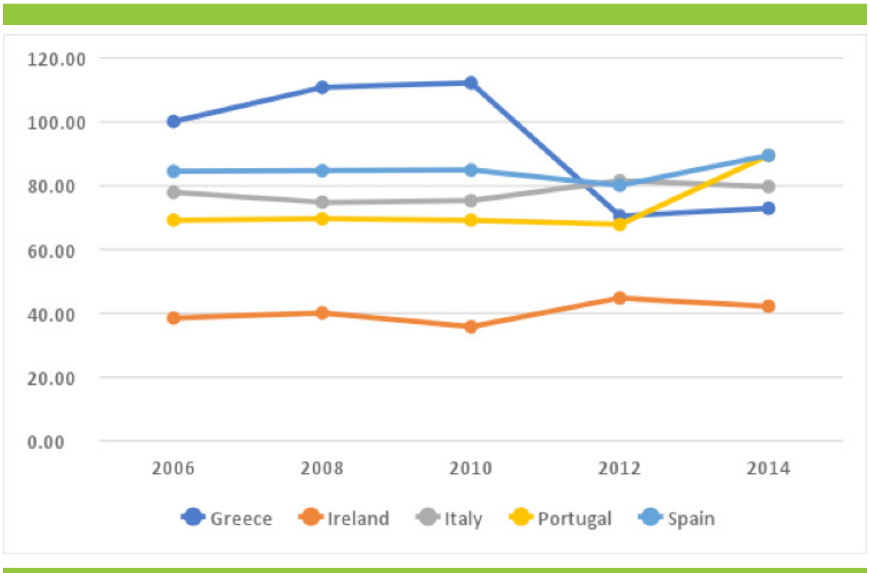
26. Data retrieved from 'Social Protection – Pension Spending', OECD. Last accessed 18th September 2017 https://data.oecd.org/socialexp/pension-spending.htm

Figure and Table no. 4 show that, in line with what has already been seen in the age orientation subsection, pension spending increased in all the GIIPS countries between 2005 and 2013. While the scope of the increase varies among countries, the tendency is clear in all of them.

As at least part of this increase can probably be explained by an increase in the over 65 population, we now know, having seen the evolution of the old age spending ratio in the previous subsection, that this factor cannot explain the whole tendency. This suggests that the pension systems of our analyzed countries could actually be increasing in generosity.

The next indicator, net replacement rates, will also shed light on the generosity of pension systems. The evolution of these can be seen in Figure and Table no. 5.

Figure 5. Net replacement rates, 2006-2014 [27]



27. Data from OECD, Pensions at a Glance, (Paris: OECD), editions from 2007, 209, 2011, 2013 and 2015

Table 5. Net replacement rates, 2006-2014

	2006	2008	2010	2012	2014
Greece	100,10	110,80	112,20	70,50	72,90
Ireland	38,50	40,10	35,80	44,80	42,20
Italy	77,90	74,80	75,30	81,50	79,70
Portugal	69,20	69,60	69,20	67,80	89,50
Spain	84,50	84,70	84,90	80,10	89,50

Data on net replacement rates do indeed suggest an increase in the generosity of pension systems during the crisis years, with the only exception being Greece. This can probably be explained by the emphasis on pension reform present in the conditionality of Greek bailout packages.

For all other countries, replacement rates are shown to be higher in 2014 than they were in 2006. While these data should be analyzed with caution, given that they may not incorporate the features of the pension reforms undertaken during the crisis years, the tendency is clear and similar in most of them, which is something that suggests an increase in the generosity of the system even in times of crisis and austerity measures.

So far, the data do not show major changes in the structure of the pension system, although the increase in spending and generosity during the crisis years suggests that there may be a structural change going on towards a more elderly-oriented welfare state. This is in line with the data observed in the previous subsection.

The final indicator for this policy area is that of the evolution of minimum pensions, represented in Figure and Table no. 6.

As with the case of previous indicators, these data suggest that minimum pensions were barely affected by the crisis: they were frozen in Ireland and Greece, and continued to grow in the rest of countries. Even if this can be seen as the mere result of indexation, we know from the data on age orientation that these increases happened at a faster pace than they did in other policy

areas. We are thus, once again, in a case of increasing generosity of welfare systems towards the elderly, even in a period of crisis and austerity measures.

Figure 6. Minimum pensions, 2006-2014[28]

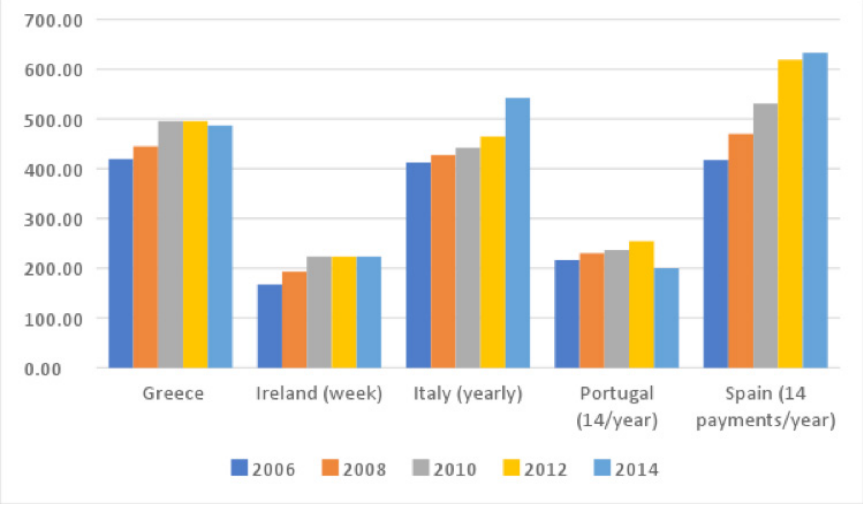


Table 6. Minimum pensions, 2006-2014 (in €) [29]

	2006	2008	2010	2012	2014
Greece	419,48	445,37	495,74	495,74	486,84
Ireland	167,30	193,30	223,30	223,30	223,30
Italy	412,67	427,50	442,55	465,17	542,62
Portugal	216,79	230,16	236,47	254,00	
Spain	417,81	469,73	530,63	618,90	632,90

28. Ibid.
29. The variation among countries here is partly explained by the differences in the number of payments pensioners receive. In the case of Greece and Italy, the value corresponds to monthly payments on a basis of 12 months. For Ireland, the value is for weekly payments. The cases of Spain and Portugal correspond to monthly payments, from a total of 14 per year.

The analysis of pension systems in the GIIPS countries shows that this policy area remained rather stable during our studied period; there are no dramatic changes in the structure of pensions. This does not entail, however, a total absence of change; the data above show a steady increase in the generosity of pension systems that cannot be fully accounted for by the fact that the population is ageing.

The absence of dramatic changes in pensions is in line with the expectations coming from the welfare state institutionalism theory. On the other hand, the increases in the levels of pension spending, replacement rates and minimum pensions are probably at least partially explained by policy choices; something that shows the shortcomings of this theory in providing a full explanation.

Furthermore, the increase in generosity could be especially relevant in a context of crisis and austerity measures, where increasing spending on pensions probably entails cuts in other policy areas. This will be explored in the case of family policy in the next subsection.

C. Family policy

This final subsection of the analysis will focus on family policy. While this policy area does not have the same budgetary impact as pensions, it is clearly a youth-oriented policy, targeted towards parents and children. Its study will enable us to have a better understanding of the age-orientation component of social policy choices during the crisis.

Figure and Table no. 7 represent the evolution of public expenditure on cash benefits for families as a percentage of GDP. The data show similar levels in 2013 compared to those from 2005 in all countries, but it is important to look beyond this and analyze the evolution of this expenditure post.

In fact, we observe that the pattern is rather similar in all countries: there is a trend of increasing spending during the first five years of the analysis, with a peak being reached right before the start of the crisis. Once the crisis hits, however, there is a general decrease in cash benefits for families: with the exception of Spain,

all countries have lower spending in 2010 than they did in 2009, and the percentage decreases even further in 2011 in the cases of Ireland, Portugal, and Spain.

Figure 7. Public expenditure on cash benefits for families, 2005-2013[30]

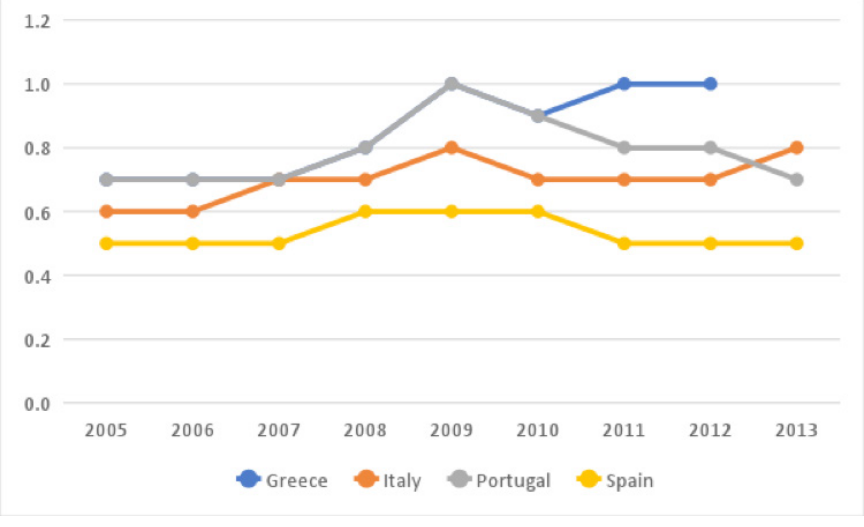


Table 7. Public expenditure on cash benefits for families, 2005-2013

	2005	2006	2007	2008	2009	2010	2011	2012	2013
Greece	0,7	0,7	0,7	0,8	1,0	0,9	1,0	1,0	
Ireland	2,1	2,1	2,2	2,6	3,1	2,9	2,6	2,6	2,4
Italy	0,6	0,6	0,7	0,7	0,8	0,7	0,7	0,7	0,8
Portugal	0,7	0,7	0,7	0,8	1,0	0,9	0,8	0,8	0,7
Spain	0,5	0,5	0,5	0,6	0,6	0,6	0,5	0,5	0,5

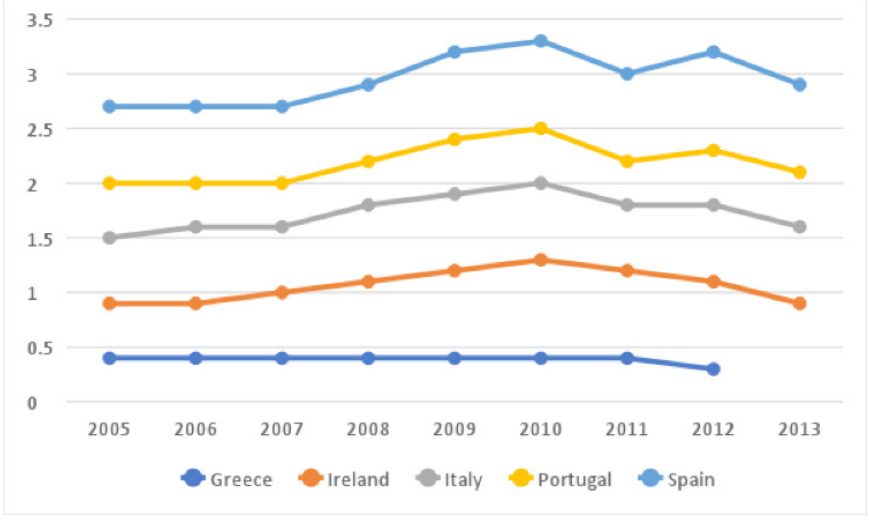
30. Data retrieved from 'OECD Family Database', OECD, last accessed 18th September 2017 http://www.oecd.org/els/family/database.htm

Ireland has been excluded from the graph because of it having too different spending levels from the other countries.

While the variations in spending can hardly be seen as dramatic, they do reflect a policy choice of implementing cuts in this policy area, which was not present in the case of pensions.

Figure and Table no. 8 show the evolution of the other main family policy spending positions, together with cash benefits: that of services and in-kind benefits for families. The tendency pictured is indeed similar to the one seen in Figure and Table no. 7, meaning that spending follows either a steady or an increasing pattern prior to the crisis, and then starts decreasing in 2010 and 2011.

Figure 8. Public expenditure on services and in-kind benefits for families[31]



Once again, when contrasted with the trends seen in the previous subsections, it becomes clear that welfare structures did not remain fully stable, but rather that policy choices were made to implement cuts in certain areas while still increasing the generosity of others.

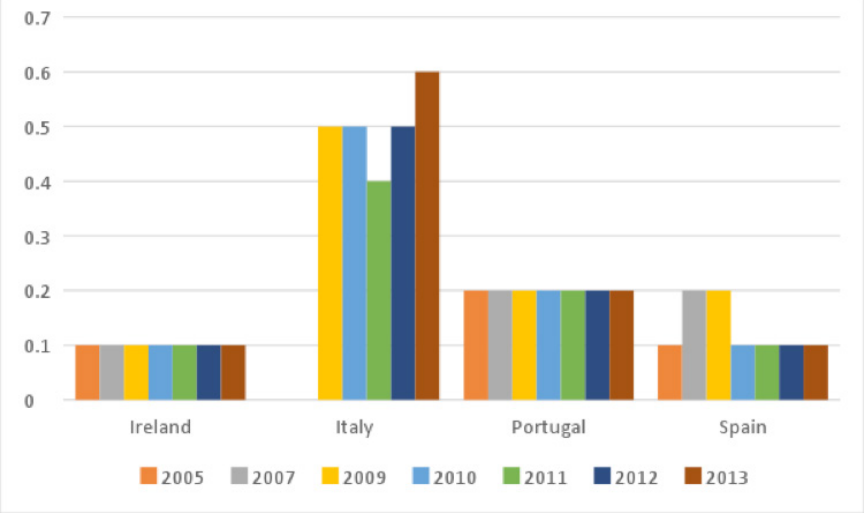
31. Ibid.

Table 8. Public expenditure on services and in-kind benefits for families

	2005	2006	2007	2008	2009	2010	2011	2012	2013
Greece	0,4	0,4	0,4	0,4	0,4	0,4	0,4	0,3	
Ireland	0,5	0,5	0,6	0,7	0,8	0,9	0,8	0,8	0,9
Italy	0,6	0,7	0,6	0,7	0,7	0,7	0,6	0,7	0,7
Portugal	0,5	0,4	0,4	0,4	0,5	0,5	0,4	0,5	0,5
Spain	0,7	0,7	0,7	0,7	0,8	0,8	0,8	0,9	0,8

A final indicator of family policy evolution will be public spending on tax breaks for families, as represented in Figure and Table no. 9.

Figure 9. Public expenditure on tax breaks for families [32]



Spending on tax breaks for families proves to have been rather steady with the crisis, with the exception of Spain, where the same pattern of the previous indicators is reproduced. For Ireland and Portugal the percentage does not change, while in Italy it even increases after the crisis. Before drawing conclusions from this,

32. Ibid., no data availability for Greece

however, it should be noted that the spending percentage is rather low in all countries, with the exception of Italy.

Table 9. Public expenditure on tax breaks for families

	2005	2007	2009	2010	2011	2012	2013
Ireland	0,1	0,1	0,1	0,1	0,1	0,1	0,1
Italy			0,5	0,5	0,4	0,5	0,6
Portugal	0,2	0,2	0,2	0,2	0,2	0,2	0,2
Spain	0,1	0,2	0,2	0,1	0,1	0,1	0,1

Consequently, data in family policy have shown that this policy was less protected from the crisis than pensions. While spending levels are in general similar in 2005 and 2013, the spending pattern that we have seen in most crises is that of a progressive increase up to 2010 and a posterior decrease between 2010 and 2013. As stated above, this reflects a policy choice to implement austerity cuts in this policy area, something that was not present in the case of pensions.

In fact, cuts in family policy happen at the same time as the increase in pension spending, something that shows that policy choices did indeed affect the structure of welfare systems; some policies (in this case, elderly-oriented ones) seem to have been more shielded than others. Returning to welfare state institutionalism, it is true that the crisis does not lead to *dramatic* changes in the structure of family policy. However, when combining the data from the three subsections, the level of generosity of some policy areas has clearly increased in comparison to others, with age-orientation playing a big role in this.

IV. Conclusions

The analysis of this paper has aimed to contribute to a better understanding of the reasons behind the age-orientation of policy choices during the Euro crisis. More specifically, the analysis

has studied the impact of welfare state structures on the decision made by governments to protect certain social spending areas targeted towards the elderly such as pensions, while imposing much harder cuts on youth-oriented policies such as family policy. The study has assessed the expectations coming from the *welfare state institutionalism* literature that expected policy choices to be the result of existent welfare state structures.

In order to ensure that the case studies selected countries where the crisis came together with a strong component of *conditionality*, the paper has focused on the GIIPS countries, which were amongst those most affected by the crisis. The assessment of age-orientation has been done through specific indicators, as well as through the evolution of two clearly oriented policy areas: pensions and family policy.

The analysis of the evolution of the age structure of welfare states has shown both the usefulness and the shortcomings of the welfare state institutionalism literature. Indeed, there are no apparent *dramatic* changes in pensions or in family policy, something that suggests structures did play a role during the crisis. On the other hand, the analysis has shown a contrast between an increase in generosity in pensions and a decrease in family policy, something that comes together in an increasing elderly-orientation of welfare states, and is apparent in our *age-orientation* subsection.

In addition, there is a general tendency in all of the analyzed countries to move towards a more elderly-oriented welfare structure. This suggests that institutions are not the only factor influencing welfare state change and that other elements probably pay an important role for governments when taking these policy decisions. Whether these come from electoral concerns, interest groups' action or other factors, is a case for further research.

There are certain limitations related to the analysis that should be acknowledged. First, while the Euro crisis seems to be over in the analyzed countries, with the exception of Greece, its impact will probably still be visible for years to come. Many of the decisions and reforms that were undertaken as a result of the crisis have not been implemented yet, and thus it is only possible to speculate concerning their future effect. For this reason, it may be too early to reach strong conclusions on the impact of these 'Euro crisis policies' on welfare state structures. A second limita-

tion concerns policy areas. While family policy and pensions have been traditionally used to assessing age-orientation, family policy is far from the only youth-oriented social policy area. There is, thus, scope for further research to analyze the impact of the Euro crisis on youth-oriented policies such as labor market or unemployment policies.

The relevance of this analysis is not only theoretical but also has practical implications. Europe is facing an increasingly ageing society that challenges the sustainability of welfare states as we know them. In addition, it seems that the features of most European welfare states are not able to incorporate new demographic challenges such as the entrance of women into the labor force or the increase in the number of new family models, which has been called an "*unstable equilibrium*". In this context, a better understanding of the political reasons behind welfare state-related decision-making also contributes to better knowing how to reform these structures in order to make them sustainable.

While the analysis performed throughout this thesis has shown that there are strong political obstacles for welfare state reform, the results also give room for some cautious optimism. The shortcomings of the institutionalist approach to explaining policy decisions show that welfare state structures are actually able to change, and have changed during the Euro crisis. This shows that welfare states are not immutable, unchangeable structures, and thus that there is scope for reform. Whether these reforms will keep moving in one or another direction will largely depend on political factors.

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Rethinking recognition in international law – is there a case for quasi-collectivization of recognition?

SUBMITTED BY

Ilya Akdemir

I. Introduction

Without a doubt, few questions have perplexed and at the same time fascinated legal scholars as much as the question of statehood.[1] The jurists who expounded the foundations of the modern international legal order – Vettel, Bodin, Hobbes, Grotius – tackled the question of statehood in international law in response to contemporary problems of their day, whether it was the secularization of the state during the Protestant Reformation and the numerous wars of religion in Bodin's case[2], or the Dutch War

1. See. e.g. Thomas Hobbes, Hobbes: Leviathan: Revised Student Edition (1651, 1996 edn). (Leviathan famously begins by arguing the State is an artificial Man, with limbs, soul, nervous system etc: "Art goes yet further, imitating that Rationall and most excellent worke of Nature, Man. For by Art is created that great LEVIATHAN called a COMMON-WEALTH, or STATE, which is but an Artificiall Man; though of greater stature and strength than the Naturall, for whose protection and defence it was intended; and in which, the Soveraignty is an Artificiall Soul, as giving life and motion to the whole body; The Magistrates, and other Officers of Judicature and Execution, artificial Joynts; Reward and Punishment…are the Nerves, that do the same in the Body Naturall; The Wealth and Riches of all the particular members, are the Strength…etc."); Jean Jacques Rousseau, The Social Contract (1762, 2015 edn). (Arguing that the State is corporation established and entered into by means of a social contract: "'Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole' At once, in place of the individual personality of each contracting party, this act of association creates a moral and collective body…This public person, so formed by the union of all other persons, formerly took the name of city, and now takes that of Republic or body politic; it is called by its members State when passive, Sovereign when active, and Power when compared with others like itself."); Georg Wilhelm Hegel, Elements of The Philosophy of Right (1820, 2003 edn). 275, Part III, Section 3: The State, ¶257-258 (Hegel argues that the State, in its ideal form, is an ethical entity with its own will, rationality and consciousness, existing in the custom and history of a people: "The state is the actuality of the ethical Idea - the ethical spirit as substantial will, manifest and clear to itself, which thinks and knows itself and implements what it knows in so far as it knows it. It has its immediate existence [Existenz] in custom and its mediate existence in the self-consciousness of the individual [des Einzelnen], in the individual's knowledge and activity.")

2. Daniela Carpi & Marett Leiboff, Fables of the Law: Fairy Tales in a Legal Context, 95 (2016), (noting that "Bodin lived during the aftermath of the Protestant Reformation and wrote against the background of religious conflict in France.")

of Independence in Grotius' case[3], or the English Civil War in the case of Hobbes'[4]. Of course today, the question comes up in other contexts but its essence remains largely the same – what makes a state, a "state"?

Despite the seemingly arcane and academic nature of this question it is also apparent that it hardly lies beyond the concern of the peoples of the world – indeed, one simply has to catch a glimpse of current events to see that the issues surrounding statehood, independence and recognition are permeating the news feeds of millions, as is the case with the very recent and ongoing crisis surrounding the legality of Catalan secession from Spain.[5]

Throughout these discussions both in the academia and the media, an important part is played by two interrelated argumentative threads. Firstly, there is so-called "Kosovo precedent" argument, which suggests that International Court of Justice (ICJ's) Kosovo Advisory Opinion, despite being sui generis, could be opening the floodgates for various entities worldwide seeking independence – as Timothy Garton Ash put it "Kosovo is unique, and there will be more Kosovos."[6] On the other hand, the second element of the debate is much older than the 2010 "Kosovo precedent" – namely, it is the discussion surrounding the age old-dilemma of recognition, its relation to statehood and the role it plays in international law.[7] What unites these two elements is the ICJ Kosovo Advisory Opinion itself, specifically the recognitions of Kosovo by other states that happened after the ICJ advisory opinion. It goes without saying that the role of ICJ itself has been re-examined after its Kosovo Advisory Opinion – Andrew Coleman's seminal work on the potential of the ICJ to peacefully

3. Marco Barducci, Hugo Grotius and the Century of Revolution, 1613-1718: Transnational Reception in English Political Thought (2017).
4. James Leslie Brierly & Andrew Clapham, Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations 11 (2012). See also, Martin Van Gelderen, From Domingo de Soto to Hugo Grotius: theories of monarchy and civil power in Spanish and Dutch political thought 1555-1609 in The Origins and Development of the Dutch Revolt (Graham Darby ed. 2003)
5. Raphael Minder & Patrick Kingsley, Spain Dismisses Catalonia Government After Region Declares Independence, The New York Times, October 27, 2017, https://www.nytimes.com/2017/10/27/world/europe/spain-catalonia-puigdemont.html (last visited Nov 12, 2017).
6. James Ker-Lindsay, Not such a "sui generis" case after all: assessing the ICJ opinion on Kosovo, 39 Nationalities Papers 1–11 (2011); See also Christian Walter, Antje von Ungern-Sternberg & Kavus Abushov, Self-Determination and Secession in International Law (2014); Stefan Wolff & Annemarie Peen Rodt, Self-Determination After Kosovo, 65 Europe-Asia Studies 799–822 (2013).
7.France would not recognise unilateral Catalan declaration - minister, , https://uk.reuters.com/article/uk-spain-politics-catalonia-minister/france-would-not-recognise-unilateral-catalan-declaration-minister-idUKKBN1CE0HZ?il=0 (last visited Nov 15, 2017). Judith Mischke, Catalan independence declaration would not be recognized: French minister POLITICO (2017), https://www.politico.eu/article/catalan-independence-declaration-would-not-be-recognized-french-minister/ (last visited Nov 15, 2017).

resolve self-determination claims is especially relevant in this regard and forms the backbone of this paper's discussion.[8] As we see more claims of independence emerging in the past couple of years, from the so-called "Republic of Crimea" to the recent case of Catalonia, it is only natural to ask ourselves – are there any other models that can help us resolve statehood claims peacefully? In essence, this paper is a hypothetical look at a world where the ICJ plays a far bigger role in resolving statehood claims like that of Catalonia.

II. Political considerations as basis for recognition

According to Lauterpacht, recognition under the modern conception of international law is primarily based on political, rather than legal considerations.[9] A good demonstration of the use of the power of recognition in the service of political aims can be observed during the events surrounding the 2014 Ukrainian Crisis, which culminated with the Crimean referendum on joining the Russian Federation and the subsequent annexation of Crimea.[10] What is largely overlooked however, is that prior to the referendum and eventual annexation, Crimea unilaterally declared itself independent from Ukraine.[11] Existing for roughly 10 days, the Republic of Crimea – as it called itself in Articles 2 and 3 of the Declaration of Independence of March 11, 2014[12] – was recognized by Russia as a sovereign and independent state as soon as the referendum on joining Russia was

8. Andrew Coleman, Resolving Claims to Self-determination: Is There a Role for the International Court of Justice? (2013).
9. Hersch Lauterpacht, Recognition in International Law (1948). 67; James Crawford, Brownlie's Principles of Public International Law (2012). 25
10. T. Grant, Aggression against Ukraine: Territory, Responsibility, and International Law (2015). (stating that "The Russian Federation in February and March 2014 employed its armed forces against Ukraine… For the first time since World War II, a State in Europe invaded a neighbor and forcibly annexed part of its territory.); Ukraine: Putin signs Crimea annexation, BBC News, March 21, 2014, http://www.bbc.com/news/world-europe-26686949 (last visited Mar 3, 2017).
11. Deklaratsiya o Nezavisimosti Avtonomnoy Respubliki Krym i Goroda Sevastopolya [Declaration on the Independence of the Autonomous Republic of Crimea and the City of Sevastopol], Verkhovnyi Sovet Avtonomnoy Respubliki Krym [Supreme Council of the Autonomous Republic of Crimea] Mar. 11, 2014. https://web.archive.org/web/20140312060543/http://www.rada.crimea.ua/app/2988 (last visited Mar 3, 2017); See also., Crimea parliament declares independence from Ukraine ahead of referendum, RT International, https://www.rt.com/news/crimea-parliament-independence-ukraine-086/ (last visited Apr 3, 2017).
12. Id.

concluded.[13] For the present purposes, it suffices to say that Russia's recognition of the Republic of Crimea is a clear case of the use of the power of recognition as a mechanism for the realization of Russia's political goals, rather than as a mechanism for the legal certification of a putative state's legal and factual status.[14]

Despite Russia's actions being a clear violation of international law, especially when we take into account the Budapest Memorandum of 1994 signed by Russia, and the clear illegality of Crimea's declaration of independence under domestic Ukrainian law[15] – from the perspective of the law of recognition, the legality of Russia's act of recognizing the "Republic of Crimea" is not as clearly established. [16] Generally, international law does not prohibit the recognition or non-recognition of a putative state on the basis of politics[17], which is clearly problematic. From the established non-recognition of Taiwan's statehood despite its clear satisfaction of the classical criteria of statehood;[18] to Spain's refusal to recognize Kosovo in the belief that such an act would have enormous political implications, especially from the perspective of Catalan independence, as we are seeing today [19] – there are numerous examples of the political considerations' immense influence on the decision to recognize a putative state.

In light of this problem, Chen pertinently states that "the evils of basing recognition upon political considerations are too

13. Executive Order of the President of Russia on recognizing Republic of Crimea, March 17, 2014, Official Website of the President of Russia, http://en.kremlin.ru/events/president/news/20596 (last visited Mar. 3, 2017). (stating that "Given the declaration of will by the Crimean people in a nationwide referendum held on March 16, 2014, the Russian Federation is to recognize the Republic of Crimea as a sovereign and independent state, whose city of Sevastopol has a special status."); For official Russian version of the order See., Ukaz o priznanii Respubliki Krym, [Executive Order on recognizing Republic of Crimea], Offitsialnyi internet portal pravovoy sistemy, [Official Internet Portal of Legal Information] March 17, 2014, http://pravo.gov.ru/proxy/ips/?doc_itself=&nd=102171789&page=1&rdk=0#I0 (last visited Mar 3, 2017); See also., Russia's Vladimir Putin recognizes Crimea as nation, BBC News, March 17, 2014, http://www.bbc.com/news/world-europe-26621726 (last visited Mar 3, 2017).

14. Crawford in The Creation of States in International Law (2006), 540

15. See generally Thomas D. Grant, Aggression against Ukraine: Territory, Responsibility, and International Law (First edition ed. 2015).

16. Id., (noting that: "In any event, the recognition of Crimea's putative independence was short-lived. It was a step on the way to annexation.")

17. Ti-Chiang Chen, The International Law of Recognition: With Special Reference to Practice in Great Britain and the United States (1951). 62

18. James R. Crawford, The Creation of States in International Law (2006). 60, 198 (noting that "Taiwan … appears to comply in all respects with the criteria for statehood based on effectiveness but is universally agreed not to be a separate State and is recognized by no other State as such.")

19. Christopher J. Borgen, From Kosovo to Catalonia: Separatism and Integration in Europe, 2 Goettingen J. Int'l L. 997, 1034 (2010) (noting that: "Spain was one of the five EU States that did not recognize Kosovo and stated that it viewed the separation as a violation of international law. In light of the preceding discussion of Catalan and Basque separatism, the arguments that Spain made in its written submission to the ICJ are instructive of the concerns of States regarding how self-determination may or may not be defined as a legal right")

well known to require emphasis."[20] Yet, despite this stark statement and the many examples of the abuse of the power of recognition, contemporary international legal scholarship follows Brownlie's definition of recognition, which states that recognition is a "public act of state, an optional and political act and there is no legal duty in this regard."[21] Solutions to the problem of the discretionary use of the power of recognition[22] have been proposed throughout the years.[23] However, these solutions have been extensively criticized, and deemed by many scholars as unworkable and unacceptable.[24] Under the prevailing view of recognition – which is the result of the dominance of the declaratory view in international law – an existing state will essentially recognize a putative state if it is convenient from the perspective of national self-interest, rather than using the tool of recognition as a means of certifying that a putative state has satisfied certain criteria of statehood, such as those established in Article I of the Montevideo Convention, or others, like the effectiveness of a state's legal order, and independence. [25]

III. The definition conundrum

"International Law or the Law of Nations is the name of a body of rules which – according to the usual definition – regulate the conduct of the states in their intercourse with one another" – with this sentence begins the "Principles of International Law", written by the 20th century positivist legal theorist Hans Kelsen.[26] But this definition of international law is hardly unique – in fact, many notable treatises on the subject begin with similar, almost

20. Ti-Chiang Chen, The International Law of Recognition: With Special Reference to Practice in Great Britain and the United States (1951). 50
21. James Crawford, Brownlie's Principles of Public International Law (2012), 25
22. Also referred to as "politicization of recognition"
23. Hersch Lauterpacht, Recognition in International Law (1948), 67; Philip C. Jessup, A Modern Law of Nations (2007). 45; Ti-Chiang Chen, The International Law of Recognition: With Special Reference to Practice in Great Britain and the United States (1951). 221
24. (As far as this principal thesis goes, Lauterpacht has entirely failed to prove it; the law is exactly to the contrary. How did it come about that so serious a scholar as Lauterpacht was led into what must be called a falsification of the positive law? First, it seems, that the wish was the father of the thought.)
25. Thomas D. Grant, Aggression against Ukraine: Territory, Responsibility, and International Law (First edition ed. 2015). 38
26. Hans Kelsen, Principles Of International Law (1952). 3

identical definitions of international law.[27] Of course, defining international law as "a legal system which regulates relations between states"[28] is perhaps one of the few consensuses in a subject fraught with countless divisions.[29] But it is hard to ignore the fact that in all these definitions, the key term – namely "*the state*" – remains largely undefined. For instance, who should determine if an entity is a state or not and what procedure should be followed in making such a determination? On a more critical level, one might even ask why "states" should be the primary subjects of international law at all – and not, for instance, nationalities[30] or perhaps even individuals?[31] The difficulty of answering these and many other questions regarding statehood begins when we start with the basics, namely when we seriously consider what the definition of a state is.[32] To fully appreciate the problem of defining statehood it is necessary to revisit the very first sessions of the International Law Commission.

Some historical context must be given here. The International Law Commission – established by the UN General

27. See e.g., James Leslie Brierly, The Law of Nations: An Introduction to the International Law of Peace 6th edn. (1963). 1 (stating that "The law of Nations, or International Law, may be defined as the body of rules and principles of action which are binding upon civilized states in their relations with one another.") Georg Wilhelm Hegel, The Philosophy of Right (1952). 108, ¶303 (stating that "International law springs from the relations between autonomous states); Georg Schwarzenberger & Edward Duncan Brown, A Manual of International Law (1976). 3, (stating that "International law is the body of legal rules which apply between sovereign States and such other entities as have been granted international personality"); William Edward Hall, International Law (1880). 1, (stating that "international law consists in certain rules of conduct which modern civilized states regard as being binding on them in their relations with one another"); Oppenheim's international law (1993), 3.
28. Georg Wilhelm Hegel, The Philosophy of Right (1952). 108, ¶303
29. In essence, the vast majority of definitions of international law consist of two essential elements – that international law is a legal system; and that it concerns itself with regulation of conduct between states.
30. See W. R. Bisschop, Nationality in International Law, 37 The American Journal of International Law 320–325 (1943). (noting that "If the State fails to [protect civil rights and liberties], the individuals should find protection elsewhere vis-a-vis their own State. If nationality is the link between an individual and the enjoyment of the benefits of the law of nations, the individual is entitled to invoke the protection of that law against the State which intends to sever such link.") See also Alice Edwards & Laura van Waas, Nationality and Statelessness under International Law (2014).
31. See e.g. D. P. O'Connell, International Law (1970). 80 (noting that "A half century ago the international lawyers could content themselves with the proposition that 'States only are subjects of international law"); M.W. Janis, Individuals as Subjects of International Law, 17 Cornell International Law Journal (1984), 74 (noting that "Before positivism, there was no theoretical insistence that the rules of the law of nations applied only to states… The positivist notion that individuals are not fit subjects for international law springs not from a description of reality, but from a jurisprudential philosophy most concerned with a subject-based categorization of types of law.); See also W. R. Bisschop, Nationality in International Law, 37 The American Journal of International Law 320–325 (1943). (noting that "Before positivism, there was no theoretical insistence that the rules of the law of nations applied only to states… The conception of States as subjects and individuals as objects of the law of nations seems to ignore the fact that States, after all, are built up by individuals and that the well-being of the individual is the principal aim of all legislation and international intercourse.")
32. See supra note 2 and accompanying text for brief illustration of the discussion. Although a countless amount of philosophical works exists exploring the idea of statehood, for the purposes of this paper, legal developments that came about after the Second World War will be the ones considered in greater detail.

Assembly in 1947[33] – met at a time of pervasive optimism in the world generally, and in international legal scholarship in particular.[34] This short period – immediately after the end of the Second World War but prior to the onset of the Cold War – is arguably responsible for the complete remodeling of the international legal system on a fundamental level – from an enunciation of the principles of human rights and an affirmation of the commitment to these principles,[35] to UN Charter's "unprecedented attempt to legally regulate the use of force"[36] and construct a new system of collective security.[37] In fact, the level of optimism was so high that President Truman boldly proclaimed at the closing of the 1945 San Francisco Conference that the signing and unanimous adoption of the UN Charter was "a victory against war itself."[38] Indeed, if the age-old problem of war was finally resolved, then it seemed certain that a solution could be found to any issue in international law. [39]

Yet despite all the optimism, finding a definition of "statehood" that everyone would agree on proved to be a challenging task. In April 1949, during the first session of the newly-established International Law Commission, the difficulty, or

33. G.A. Res. 174(II) (Nov. 17, 1947).
34. Abba Eban, The U.N. Idea Revisited, 74 Foreign Aff. 39, 55 (1995), 39 (noting that "The United Nations was born 50 years ago amid such euphoria that a fall from grace was inevitable. Its founding conference at San Francisco in April 1945 resounded with slogans of redemption and hope.")
35. See U.N. Charter art. 1 ¶ 3 (stating that "the purposes of UN are… in promoting and encouraging respect for human rights and for fundamental freedom without distinction as to race, sex, language or religion.); See generally, G.A. Res. 217 (lll) A, Universal Declaration of Human Rights (Dec.10, 1948), See also Anthony Carty, Philosophy of International Law (2007). 64
36. See U.N. Charter art. 2 ¶ 4 (stating that "All members shall refrain in their international relations from the threat or use of force…"); Samantha Besson & John Tasioulas, The Philosophy of International Law (2010). 269; See also Abba Eban, The U.N. Idea Revisited, 74 Foreign Aff. 39, 55 (1995), 39 (noting that "The U.N. founders had an additional reason for optimism. The new peace organization, they said, would not be toothless like the League of Nations but would be able to enforce its decisions. This idea received expression in Article 43 of the U.N. Charter. A military staff committee composed of members from the five major powers… would work out a plan for the mobilization of U.N. forces to be held ready under the command of the Security Council. For the first time in history collective security would be institutionalized.")
37. Hans Kelsen, Collective Security and Collective Self-Defense under the Charter of the United Nations, 42 Am. J. Int'l L. 783, 796 (1948)
38. Stephen C. Schlesinger, Act of Creation: The Founding of the United Nations (2009). 298
39. During this period, many proposals that are considered somewhat radical today, were seriously being debated among international legal practitioners and scholars: See e.g., Hans Joachim Morgenthau, Politics Among Nations: The Struggle for Power and Peace at 391, 398. (1948) (arguing for the establishment of a supranational world state in the long run: "What is needed, is a radical transformation of the existing international society of sovereign nations into a supranational community of individuals…The argument of the advocates of the world state is unanswerable."); Hans Kelsen, Peace Through Law, 14 (1944) (arguing against a world state, but for a more realistic establishment of an international court with compulsory jurisdiction: "The next step.. is to bring about a treaty… which would establish an international court endowed with compulsory jurisdiction. This means that all [signatory] States … are obliged to… submit all their disputes without exception to the decision of the court, and to carry out its decisions in good faith."); Hersch Lauterpacht, Recognition in International Law (1948) (arguing for the collectivization of recognition which will be discussed below)

rather "impossibility"[40] of the task of defining statehood was fully exposed. The question of statehood and recognition came up during the discussions on the numerous state proposals for the articles of "Draft Declaration on the Rights and Duties of States."[41] In the course of the Commission's debate over the proposed articles from Panama[42] and India[43], the jurist James L. Brierly stated that "the definition [of State] would be difficult to establish and highly controversial."[44] The complex and controversial nature of defining statehood was also emphasized by other jurists, most notably George Scelle. It was recorded that Scelle felt "appalled by the magnitude of the task before the Commission, which seemed to have undertaken to perform a legal feat of the utmost difficulty," adding that it would be "almost impossible to arrive at a universally satisfactory definition of the term "State." [45]In fact, a year later, in the context of the same Commission but dealing with other proposals that inevitably touched upon questions of statehood and the closely related question of recognition, Georges Scelle plainly stated that despite "having been active in international law for more than fifty years, [he] still did not know what a State was; and he felt sure that he would not find out before he died" adding that "he was convinced that the Commission could not tell him."[46] However, Scelle's somewhat ironic statement, coupled with the Commission's unwillingness and outright refusal to define statehood does not mean that the Commission, which was comprised of the most eminent international jurists and practitioners of the time, was simply unaware

40. Yearbook of the International Law Commission 1949/I, 68 ¶ 67, http://legal.un.org/ilc/publications/yearbooks/english/ilc_1949_v1.pdf.

41. Later adopted as G.A. Res. 375 (IV) (Dec. 6, 1949)

42. Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States - Memorandum submitted by the Secretary-General: Draft Declaration on the Rights and Duties of States and Explanatory Note Submitted by Panama, A/CN.4/2, 35-38 (Dec. 15 1948), art. 2: "Every State is entitled to have its existence recognized. The recognition of the existence of a State merely signifies that the State recognizing it accepts the person of the State recognized, together with all the rights and duties which arise out of international law. Recognition is unconditional and irrevocable. Article 3. The political existence of the State is independent of its recognition by other States. Even before it has been recognized, the State has the right to defend its integrity and independence, to provide for its preservation and prosperity, and, consequently, to organize itself as it sees fit, to legislate in regard to its interests, to administer its services and to determine the jurisdiction and competence of its courts of justice", http://legal.un.org/ilc/documentation/english/a_cn4_2.pdf; For this discussion see James R. Crawford, The Creation of States in International Law, 38 (2006).

43. Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States - Memorandum submitted by the Secretary-General: Annotations to the Draft Declaration, A/CN.4/2, 52 (Dec. 15 1948), art. 2 "Every State has the right to recognize another State. The recognition of the existence of a State signifies that a State recognizing it accepts the person of the State recognized together with all the rights and duties which arise out of international law." http://legal.un.org/ilc/documentation/english/a_cn4_2.pdf.

44. Yearbook of the International Law Commission 1949/I, 64 ¶ 21.

45. Id. 68 ¶ 67.

46. Yearbook of the International Law Commission 1950/I, 84 ¶22, http://legal.un.org/ilc/publications/yearbooks/english/ilc_1950_v1.pdf.

or willfully ignorant of the problems of statehood. Indeed, the issues of statehood in the Korean peninsula were already leading to tensions in the newly-founded United Nations and were to escalate mere months after the Commission's 1949 initial meeting.[47] Thus, the key issue underpinning any attempt to define statehood is that any such attempt stumbles upon the inevitable question of recognition – is an entity's statehood *dependent* on recognition by other states or is statehood *independent* of recognition of other states?[48] In other words, is recognition a condition for statehood?[49]

IV. The Role of Recognition

A definition of recognition, when compared to a definition of statehood, might seem less contentious. Recognition is essentially an act of certification or acknowledgment of a putative state's claim to statehood.[50] Recognition under international law is thus inherently concerned with actions of *other* states regarding certain situations, rather than with the actions of the putative state itself. It can, therefore, be seen as an external procedure or act, primarily concerned with defining relationships between legal entities that claim statehood. [51]

The importance of recognition as a procedure producing legal effects, particularly in light of the noticeable lack of an international organ which determines the existence of states, was initially elaborated upon by Hegel[52], and later by the constitutive theorists such as Jellinek[53] and Anzillotti[54]. An intuitive way of thinking about recognition in this vein is to remind ourselves that

47. Resolution on the Problem of the Independence of Korea, G.A. Res. 293 (IV) (Oct. 21, 1949).
48. James R. Crawford, The Creation of States in International Law, 4 (2006).
49. Id., 93.
50. T. Grant, Aggression against Ukraine: Territory, Responsibility, and International Law (2015). 37 (noting that "Recognition is the mechanism by which international law, in the absence of a centralized institution of certification, responds to claims of the emergence of new 38 l Aggression against Ukraine States"); Gérard Kreijen, State Failure, Sovereignty And Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa (2004). 13 (noting that "recognition constitutes the acknowledgement of statehood…Whereas statehood is the gateway to international legal personality, recognition may be seen as the key to statehood.")
51. Georg Wilhelm Hegel, Elements of The Philosophy of Right (1820, 2003 edn.) 367 ¶ 331, (noting that "Without relations [Verhältnis] with other states, the state can no more be an actual individual [Individuum] than an individual [der Einzelne] can be an actual person without a relationship [Relation] with other persons").
52. Id.
53. Georg Jellinek, Die Rechtliche Natur Der Staatenverträge: Ein Beitrag Zur Juristischen Construction Des Völkerrechts, 91 (1990).
54. Dionisio Anzilotti, Cours de droit international, 160 (1999). See also Hersch Lauterpacht, Recognition in International Law, xxxi (2012).

in a state, that is an internal legal order, the existence of an individual – from her birth to her death – is legally determined and recorded by the various organs of the state, in the form of birth and death certificates. Therefore, the legal existence of an individual is dependent upon an external procedure of recognition, rather than the factual existence of his or her personhood. A person may thus exist in fact, but not in law, and vice versa. In fact, this subtle but important distinction between the factual and legal aspects of personhood has often been subject to many artistic depictions in countless films and stories.[55] Thus, recognition in an *internal* legal order plays a fundamental role in establishing legal personhood. [56]

In international law, on the other hand – due to a lack of a centralized body akin to a state in a Weberian sense of the word, that is an entity that has the monopoly over the legitimate use of force - the legal significance of the recognition procedure is tenuous, and as a result, statehood is largely determined on a factual and evidentiary basis.[57] However, it is clear that there is certainly an intimate, albeit controversial relationship between recognition and statehood in international law.[58] This relationship between the two, although important, does not in and of itself constitute the main source of the controversy. Rather, it is the nature and the procedure of the act of recognition that lies at the core of the problem of defining statehood – namely that the act of recognition is a legal right which is solely within the discretion of the individual state that engages in the act of recognition. [59]

Indeed, during the reexamination of the topic of statehood by the recent 1996 International Law Commission, it was stated that "the... decision – to recognize or not – is plainly not appropriate for 'codification or progressive development'; it is intensely political and apparently discretionary in character, and the range of factors that may be taken into account does not appear

55. To a contemporary audience this distinction often comes in form of mystery plots where a person fakes death to achieve a certain aim. A good example of this is the 1973 classic "The Sting." In literature, an example of this gap between factual and legal personhood comes from Nikolai Gogol's "Dead Souls," in which the protagonist, Chichikov, in order to secure a large loan, purchases "the actually non-living but legally living, serfs" with the intention to make it seem as though he is a rich landowner that owns many serfs. See NIKOLAI VASIL EVICH GOGOL , RICHARD PEVEAR & LARISSA VOLOKHONSKY, THE COLLECTED TALES OF NIKOLAI GOGOL (1998).
56. Georg Wilhelm Hegel, Elements of The Philosophy of Right (1820, 2003 edn.) 367 ¶ 331
57. James R. Crawford, The Creation of States in International Law, 45 (2006).
58. Id., ix (noting that: "Perhaps the most controversial issue in [the area of public international law of statehood] is the relationship between statehood and recognition).
59. Lassa Oppenheim, International Law: A Treatise (1920). 136

to be limited to considerations directly related to the statehood of the entity concerned."[60] It seems that the specific character of the problem lies not in legal scholars' inability to define statehood, but rather, in that such a definition would undoubtedly limit the right of existing states to recognize as they see fit. Going back to the discussions of the 1949 Commission we can see that Brierly, together with other members of the Commission, clearly acknowledge this, stating that "the problem of recognition of States is *political* rather than *legal*, and discussion of it by the Commission is otiose until it had been settled elsewhere."[61] In light of this, it is perhaps not surprising that Crawford asks "how a concept as central as statehood could have gone without a definition, or at least a satisfactory one, for so long."[62] He answers this question by arguing that statehood, in most cases, is not really controversial.[63] Indeed, decades earlier Brierly came to a similar conclusion, stating that "the word state is commonly used in documents and speech, and its meaning had been understood without definition."[64] But where statehood matters, and thus suddenly becomes a controversial and delicate subject, is in the circumstances surrounding what Crawford pertinently calls "borderline cases."[65] These cases essentially form a spectrum of entities that can be characterized as international legal anomalies – from recognized states that, according to some scholars, have difficulty satisfying the criteria of statehood, such as Somalia[66] or Afghanistan[67], to entities that satisfy or have the potential to satisfy the criteria of statehood but are not recognized as states for

60. Yearbook of the International Law Commission 1996/II, A/51/10, Annex II, Reproduced in full in James R. Crawford, The Creation of States in International Law, 758 (2006).
61. Yearbook of the International Law Commission 1949/I, 260 ¶ 26.
62. James R. Crawford, The Creation of States in International Law (2006) 40, 98. (noting that "the international legal status of most States most of the time is not in dispute")
63. Id.
64. Yearbook of the International Law Commission, 1949/I, 64–5.
65. James R. Crawford, The Creation of States in International Law (2006). 40
66. Report of the Secretary-General on the situation in Somalia, UNSC S/2000/1211, 19 December 2000, ¶34 (noting that "Extended parts of coastal areas … are not under the control of any effective regional authority… Some parts of the country, including the area around Kismayo, can be described as anarchic."); See also., Report of the Secretary-General on the situation in Somalia, UNSC S/2002/1201, ¶55. See also Gérard Kreijen, State Failure, Sovereignty And Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa (2004)
67. Gérard Kreijen, State Failure, Sovereignty And Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa (2004). 35-36 (noting that "In Afghanistan, the initially insignificant Taliban movement had gained control of almost the entire territory of the country … [which resulted in] … the majority of the international community [viewing] the Taliban as the new government of Afghanistan. In none of these cases did the international community seriously consider that the statehood of the countries in question had changed due to the ineffectiveness of the challenged governments.")

various reasons[68], such as Taiwan or more recently Catalonia.[69] To this, Oppenheim states that "it thereby becomes apparent that the granting or the denial of recognition is not a matter of International Law but of International policy"[70] The 1949 Commission concluded its discussion on the problem of statehood and recognition in a similar manner, stating that "the whole matter of recognition was too delicate and too fraught with political implications."[71] As a result, the impossibility of defining statehood lies not in the abstract nature of the question, but rather, in the fact that providing a definition of statehood or some universal criteria for recognition would ultimately limit existing states' important discretionary right, which has been used many times to further states' political aims.[72]

But this lack of criteria can be seen as being both a blessing and a curse. It is a curse in that it inevitably leads to inconsistent, politicized, controversial, and unpredictable decisions regarding recognitions of states. This weakness is particularly exploited by states like Russia, who use this limitation of the current international legal regime to recognize entities that came into existence through illegal means, like Crimea, Abkhazia, and South Ossetia. On the other hand, it can also be seen as a blessing in that states are not limited in their discretion to recognize, leading to a very flexible and decentralized approach to recognition. This leads Crawford to conclude that under the contemporary international law of recognition "existing States tend to retain for themselves as much freedom of action with regard to new States as possible."[73] The positive side of flexibility that comes with the lack of definitions is perhaps best illustrated by the European Community's 1991 "Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union."[74] The declaration established that collective recognition by Members of the EC would be granted based on certain enhanced requirements, most notable of which are the "respect for the provisions of the Charter

68. Ti-Chiang Chen, The International Law of Recognition: With Special Reference to Practice in Great Britain and the United States (1951).
69. James R. Crawford, The Creation of States in International Law (2006). 95, 97 (noting that "Taiwan [is] the prototype of the independent legal system that is not a State." and "effective entities have existed that have been widely or even universally held not to be States—for example, Rhodesia, Taiwan and the Turkish Republic of Northern Cyprus.")
70. Lassa Oppenheim, International Law: A Treatise (1920). 136
71. Id.
72. Id., (noting that "since the granting of recognition is a matter of policy, and not of law, nothing prevents a [state] from making the recognition of a new state dependent upon the latter fulfilling certain conditions")
73. Id., 45.
74. European Community Declaration of 16 December 1991 on the Guidelines for the Recognition of New States in Eastern Europe and the Soviet Union (1992) 31 ILM 1485

of the United Nations...especially with regard to the rule of law, democracy and human rights" and "acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation."[75] In essence, the European Community expanded the criteria used in determining statehood – the so-called "classical criteria,"[76] namely the principle of effectiveness, and Article I of the Montevideo convention – by supplementing them with (inter alia) acceptance of various international legal obligations. Although these elements were supposed to be supplementary to the practice, such an approach proved to be more innovative but has led to some controversy. For instance, Croatia and Bosnia and Herzegovina were recognized as states by the European Community despite these states' inability to satisfy the principle of effectiveness due to the clear presence of Serb forces on their territories.[77] This approach has been praised, especially in light of the atrocities that the Serb forces have committed during the wars in the Balkans. [78]

But it is obvious that not in all cases would such discretionary utilization of the right of recognition lead to positive results. In fact, the potentiality for inconsistency is massive and could lead to the abuse of the power of recognition. Lauterpacht, in his seminal work on recognition, defined this abuse of the right of recognition as being solely used "for the direct purpose of securing particular national advantages."[79] The example of Russia's recognition of Crimean's independence discussed previously is a clear example of the abuse of the function of recognition, as it is obvious that Russia recognized Crimea solely for the purpose of subsequently annexing Crimea without the consent of Ukraine.[80] But this case of the abuse of the function of recognition, or rather, the use of the discretionary right of recognition to further political aims, is not isolated to the case of Ukraine. For instance, the case of refusal to grant recognition to Taiwan[81] or Spain's refusal to recognize Kosovo due to Spain's internal political issues, are two cases that can be cited. According to Lauterpacht, existing states

75. Id.
76. JAMES R. CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW (2006). 45
77. Danilo Türk, "Recognition of States: A comment" 4 EUROPEAN JOURNAL OF INTERNATIONAL LAW 66-71 (1993).
78. Id.
79. Hersch Lauterpacht, Recognition in International Law (2012).33
80. T. GRANT, AGGRESSION AGAINST UKRAINE: TERRITORY, RESPONSIBILITY, AND INTERNATIONAL LAW (2015).
81. JAMES R. CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW (2006). 60, 198 (noting that "Taiwan … appears to comply in all respects with the criteria for statehood based on effectiveness but is universally agreed not to be a separate State and is recognized by no other State as such.")

are motivated to pursue their own political goals, and expecting states to act against their own political and national interests is clearly impossible; but he has proposed a solution to this problem – the theory of collectivization of recognition.[82] Although largely ignored and rejected by modern international legal scholarship, Lauterpacht's theory plays an important role in helping us understand the role of recognition in international law.

V. Lauterpachtian collectivization of recognition

Lauterpacht's theory of collectivization of recognition – conceived as a means to rid the recognition process of the political interest problem – contains the following two elements:[83] "ascertainment" and "duty of recognition."[84] The "ascertainment" of the existence of requisite conditions of factual governmental capacity means a determination or appraisal of a certain minimum of the effectiveness of the putative state's legal order.[85] This first element seems to be directly borrowed from Hans Kelsen's "Pure Theory of Law", which is not surprising considering Lauterpacht was Kelsen's student in Vienna. However, it is worth pointing out that Kelsen's conception of ascertainment was more philosophical in nature, and was primarily conceived as a means of explaining the relationship between the natural and the legal as they relate to the national legal order. Kelsen argues that "it is only by ascertainment that the fact reaches the realm of law; only then does a natural fact become a legal fact."[86] In an example given by Kelsen, a man who committed murder could be punished for his act, not because of the natural fact of murder, but only after a law-applying organ of the legal order, namely the court, has ascertained that the natural fact of murder has indeed occurred, thus creating a legal fact from a natural fact.[87] Birth and death certificates, discussed earlier, are very similar in this regard – the existence of something in the eyes of the legal order, whether it is a newborn baby or an act such as murder, only occurs after ascertainment by an organ of the state. The theory of ascertainment helped Kelsen explain errors in the decisions of the legal order, for instance, situations when a crime might remain unpunished,

82. Hersch Lauterpacht, Recognition In International Law (1948). 55, 69, 155
83. Id., 71
84. Id., 74
85. Hersch Lauterpacht, Recognition in International Law (1948). 55, 69, 155
86. Hans Kelsen, Pure Theory of Law (1978). 239
87. Id.

or an innocent person might be found guilty of a crime he or she did not commit. Because the legal order does not recognize natural facts but only legal facts which have to be ascertained by a law-applying organ, any mistake in the ascertainment procedure could lead to the wrongful establishment of a legal fact. Thus, for instance, the *natural fact* of murder being committed by person A does not necessarily imply the establishment of the *legal fact* that the murder was committed by person A. Essentially, the law-applying organ such as a court, through processes such as fact-finding and evidence collection acts as what software engineers would now call "data conversion." Through this procedure, the natural fact of murder is converted into a format understandable to the legal order, or into a legal fact. In summary, the basic idea of ascertainment is that a legal order, for practical reasons, cannot deal with facts alone – it can only deal with "facts as ascertained by the legally competent authority in a legally prescribed procedure"[88]

Lauterpacht extends Kelsen's concept of ascertainment into the realm of international law but with one important difference; Lauterpacht proposes the transferal of the function of ascertainment – which in international law is a discretionary function of every individual state – to an executive body of the international legal order.[89] Therefore, under the Lauterpachtian conception of ascertainment as applied to international law, the ascertainment of the factual considerations of a state's existence or non-existence is decided by one body – namely an executive body of the international legal order, which Lauterpacht argues should be the Security Council of the United Nations. Lauterpacht firmly rejects the role of courts in ascertainment.[90] However, his view that international courts are not adequately equipped to ascertain has come into question, particularly by Coleman, who argues that the courts could play an important role in recognition.[91]

The second element is a "fulfillment of [the function of recognition] in its affirmative sense."[92] Simply put, it is the act of the state which involves the actual official statement of the recognition. Here too Lauterpacht argues for a change. In addi-

88. Josef L. Kunz, Critical Remarks on Lauterpacht's "Recognition in International Law," 44 The American Journal of International Law 713–719 (1950). 714
89. Hersch Lauterpacht, Recognition In International Law (1948). 69
90. Hersch Lauterpacht, Recognition In International Law (1948). 6
91. Andrew Coleman, Resolving Claims To Self-determination: Is There a Role For The International Court Of Justice? (2014). 21
92. Hersch Lauterpacht, Recognition In International Law (1948). 73

tion to the centralization of ascertainment of factual considerations of statehood in one international legal body, Lauterpacht proposes that upon the affirmative decision of that body, all other states should have a *duty* to recognize the putative state, and the putative state which was found to be factually a state, will have a *right* to be recognized. This recognition can be enforced against those states that do not recognize the putative states.[93] With these two elements, Lauterpachtian collectivization of recognition, in theory, could successfully remove any form of abuse of the power of recognition for political gains or national interest – the discretionary power of recognition is simply transformed into a duty.

The model of imposing a duty of recognition, of course, was greatly criticized and the political nature of recognition of states remains a reality in international law today. Even before the publication of Lauterpacht's treatise on recognition, Kelsen in his own paper on recognition unequivocally states that "existing states are only empowered, not obliged to recognize."[94] States can base their decisions on national interests, and undeniably have the power to refuse recognition – in both cases, they would not be in violation of international law.[95] Other objections to Lauterpacht's model of collectivization of recognition have been framed in terms of its untenability and failure to find evidence in state practice.[96] But a proposal for an essentially modified Lauterpachtian collectivization of recognition recently came from Coleman's work on the role that the International Court of Justice could play in the debate on statehood and recognition.[97]

VI. Quasi-collectivization of recognition

Having established Lauterpacht's original conception and the criticisms it received we now look at Coleman's recent proposal that the International Court of Justice (ICJ) could and should play a larger role in questions surrounding statehood and recognition, particularly in cases of self-determination and

93. Id. 89
94. Hans Kelsen, Recognition in International Law: Theoretical Observations, 35 The American Journal of International Law 605–617 (1941).
95. Id., (noting that "the refusal to recognize is no violation of general international law.")
96. Josef L. Kunz, Critical Remarks on Lauterpacht's "Recognition in International Law," 44 The American Journal of International Law 713–719 (1950).
97. Andrew Coleman, Resolving Claims to Self-Determination: Is There a Role for the International Court of Justice? (2014)

decolonization.[98] But unlike Lauterpacht, Coleman argues that the ascertainment cannot be centralized – national interest is just too important a factor.[99] Instead, the ICJ should play an advisory role through its advisory opinion jurisdiction.[100] According to Coleman "what could be more appropriate than to have the ICJ, the UN's principal judicial organ, in its role as a legal advisory, advise the General Assembly whether a new member, that is a colonized people, be recognized as a new State, and admitted to the UN?" Coleman argues that the ICJ, with its impartiality and expertize, could essentially be the body to which the first element, namely that of ascertainment, can be transferred.[101] Under this model, the ascertainment of a putative state's claim will be achieved through ICJ's advisory opinion jurisdiction, which is non-binding in nature. Although it is not stated as such, this model can be called a "quasi-collectivized of recognition" as it clearly has intellectual roots in Lauterpacht's original conception, but lacks its crucial characteristics, namely a duty of recognition – recognition under this model is entirely voluntary. An example of a quasi-collectivized approach to recognition is arguably the 2010 Kosovo Advisory Opinion of the ICJ, which will be discussed in further detail in the following section.

VII. Evidence

To test the quasi-collectivization model of recognition, we construct an original panel dataset which tracks official recognitions of Kosovo over time after Kosovo's Declaration of Independece on February 17, 2008. The dataset was created by researching news reports and verifying them with various recognizing states' official ministry of foreign affairs statements on Kosovo's recognition.[102] In addition to the 111 states that officially recognized Kosovo, there are four other entities that officially recognized it, but were not included in the dataset due to themselves

98. See generally, Andrew Coleman, Resolving Claims to Self-Determination: Is There A Role For The International Court Of Justice? (2014).
99. Andrew Coleman, Resolving Claims To Self-Determination: Is There A Role For The International Court Of Justice? (2014). 139, 314 (noting that "States cannot be expected to act in a manner contrary to their self-interest")
100. Andrew Coleman, Resolving Claims To Self-determination: Is There a Role For The International Court Of Justice? (2014). 180
101. Id.
102. Dataset is on file with the author.

being not recognized as states.[103]

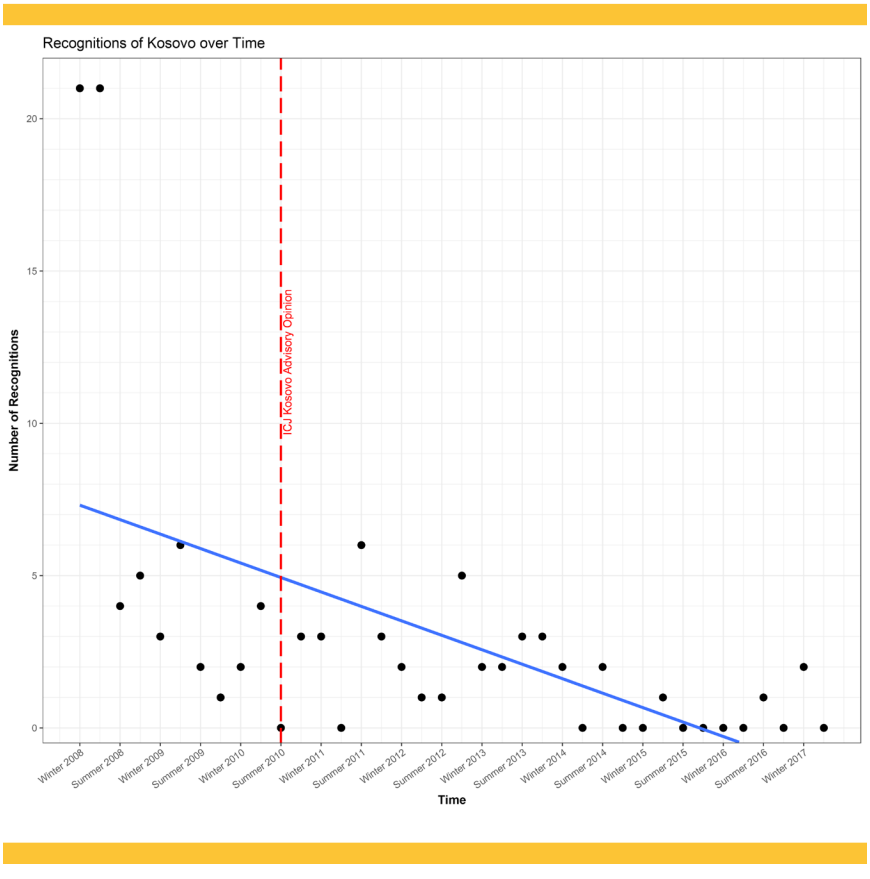
ICJ's 2010 Kosovo Advisory Opinion has been much discussed in academic literature and does not need further reiteration.[104] For the purposes of this paper, it suffices to say that unlike what is envisaged by the Lauterpachtian quasi-collectivization model of recognition, where ideally, the ICJ clearly and unequivocally states whether or not a putative state's claim to statehood is valid – the ICJ essentially shied away from answering this question regarding Kosovo's statehood. Instead, ICJ limited itself to answering the question of whether international law prohibited declarations of independence with regards to the international legal obligation to respect the territorial integrity of an existing state.[105] As Christakis states "The Court eschewed the question completely: it did not even mention the criteria of statehood in its advisory opinion"[106] Thus, the court simply stated that there was no general prohibition against unilateral declarations of independence, and therefore Kosovo's Declaration of Independence was not contrary to international law. However despite this narrowness and a lack of clear opinion and factual ascertainment of whether Kosovo has achieved statehood, many across the world interpreted ICJ's Kosovo opinion as endorsing Kosovo's claim to statehood[107] – in fact the ICJ advisory opinion is many times referred to as the "Kosovo Precedent", implying that the ICJ, due to its opinion, opened a door to many similar statehood claims in the future.[108] Therefore, for the purposes of empirically analyzing the quasi-collectivization model, the Kosovo advisory opinion could be seen as the best, and perhaps the only example of the effect an ICJ opinion could have on the subsequent recognition of a putative state.

103. See generally James R. Crawford, The Creation of States in International Law (2006). 60, 198 (noting that "Taiwan … appears to comply in all respects with the criteria for statehood based on effectiveness but is universally agreed not to be a separate State and is recognized by no other State as such." And at 201 that "the People's Republic was seated in the General Assembly and the Republic of China expelled by General Assembly resolution 2758 (XXVI) on 25 October 1971" Thus although Taiwan recognized Kosovo, technically, Taiwan lacks statehood under international law pursuant to UN General Assembly Resolution 2758.)
104. See e.g., Peter Hilpold, Kosovo and International Law: The ICJ Advisory Opinion of 22 July 2010 (2012); 1. Marko Milanovic & Michael Wood, The Law and Politics of the Kosovo Advisory Opinion (2015); 1. James Summers, Kosovo: A Precedent?: The Declaration of Independence, the Advisory Opinion and Implications for Statehood, Self-Determination and Minority Rights (2011).
105. Para 79-84
106. Theodore Christakis, The ICJ Advisory Opinion on Kosovo: Has International Law Something to Say about Session?, 24 LEIDEN J. INT'L L. 73, 73-86 (2011);
107. Robert Muharremi, A Note on the ICJ Advisory Opinion on Kosovo, 11 German L.J. 867, 880 (2010)
108. James Ker-Lindsay, Not such a "sui generis" case after all: assessing the ICJ opinion on Kosovo, 39 NATIONALITIES PAPERS 1–11 (2011); See also CHRISTIAN WALTER, ANTJE VON UNGERN-STERNBERG & KAVUS ABUSHOV, SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW (2014); Stefan Wolff & Annemarie Peen Rodt, Self-Determination After Kosovo, 65 EUROPE-ASIA STUDIES 799–822 (2013).

The dataset covers recognitions starting on 18th of February, 2008, a day after Kosovo's declaration of independence, and ending on 27th of February, 2017, which is the date of the most recent official recognition of Kosovo's independence by Bangladesh.[109] To account for long periods of inactivity between recognitions, the dataset was organized seasonally, with June, July, and August being the summer months, and so on. Thus, the two observations in the top left corner of Figure 1 are the numbers of recognitions for the winter and spring of 2008 respectively. In total, 42 recognitions were officially announced in the first two seasons after Kosovo declared its independence from Serbia. Of the initial 42 recognitions, only five recognitions came from members of the Non-Aligned Movement.[110] All other recogntions in this initial period came primarily from NATO and EU member states and their close allies.[111] The vertical dotted line in Figure 1 represents the cut-off point (or intervention). The cutoff point corresponds with 22 July, 2010, the date ICJ announced its advisory opinion on Kosovo's declaration of independence. As we can see, after the initial 42 recogntions in the first months after Kosovo's declaration of independence, there was a sharp decline in recognitions. It is important to note, however, that 42 states is a significant number given that there are 196 member states of the United Nations in total.[112] Therefore, due to the finite number of UN member states, it is natural for the overall trendline to be downward-sloping and for recognitions to eventually stop. But does the data show whether the ICJ's opinion had an effect on subsequent recognitions of Kosovo? By smoothing the line to better fit the data points, we will be able to observe more accurately any change in the number of recognitions (if any) after the ICJ opinion.

109. Bangladesh officially recognizes Kosovo as independent state : World, News - India Today, , http://indiatoday.intoday.in/story/republic-of-kosovo-bangladesh/1/892927.html (last visited May 1, 2017).
110. Non-aligned movement members' recognitions – Afghanistan and Senegal officially announced their recognition of Kosovo on February 18th, 2008; Peru officially announced its recognition of Kosovo on February22nd, 2008; Burkina Faso officially announced its recognition of Kosovo on April 23rd, 2008; and lastly Liberia announced its recognition of Kosovo on May30th, 2008
111. States like Australia, Japan, Korea, Lichtenstein, Monaco, Nauru, Switzerland, San Marino are not members of either NATO or EU but the vast majority of the aforementioned states are close allies of NATO or EU
112. UN welcomes 193rd member state, United Nations Regional Information Centre for Western Europe (UNRIC), http://www.unric.org/en/latest-un-buzz/26841-un-welcomes-193rd-member-state (last visited May 1, 2017).

Figure 1. Linear regression line over seasonal data - amount of recognitions over time

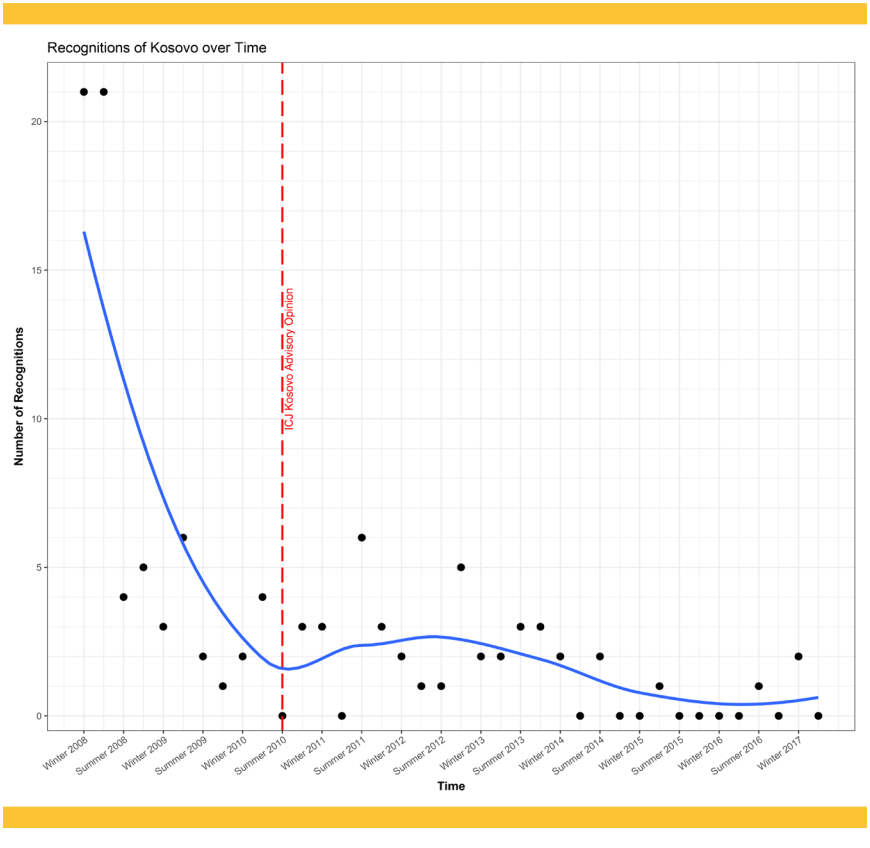


In the time-series plot in Figure 2, the fitted curve clearly shows that there was indeed a sharp decline in recognitions after the initial 42 were announced. The plot starts an initial sharp decreasing trend signifying a substantial decrease in the number of recognitions of Kosovo. This trend lasts up until the cut-off point is reached – namely when the ICJ announces its advisory opinion. As the fitted line passes the cut-off point there is a noticeable change in the direction of the trend, demonstrated by a visible rise in the trendline after the cut-off point, which signifies an increase in the number of recognitions post-ICJ opinion. This suggests that after the ICJ's advisory opinion there was a period of significant reversal in the initial decreasing recognition trend. To better illustrate the full extent of the reversal of trends after the ICJ's advisory opinion, we can use a regression discontinuity design over time. Figure 3 provides a better representation of the

difference between recognition trends before and after the ICJ's 2010 advisory opinion. Although both recognition trends are decreasing – which reflects the natural decrease in the number of recognitions over time due to the limited number of states as seen in Figure 1 – the noticeable discontinuity between the regression line before and the regression line after the ICJ's advisory opinion suggests that its opinion might have had a noticeable effect on states' decisions to recognize Kosovo.

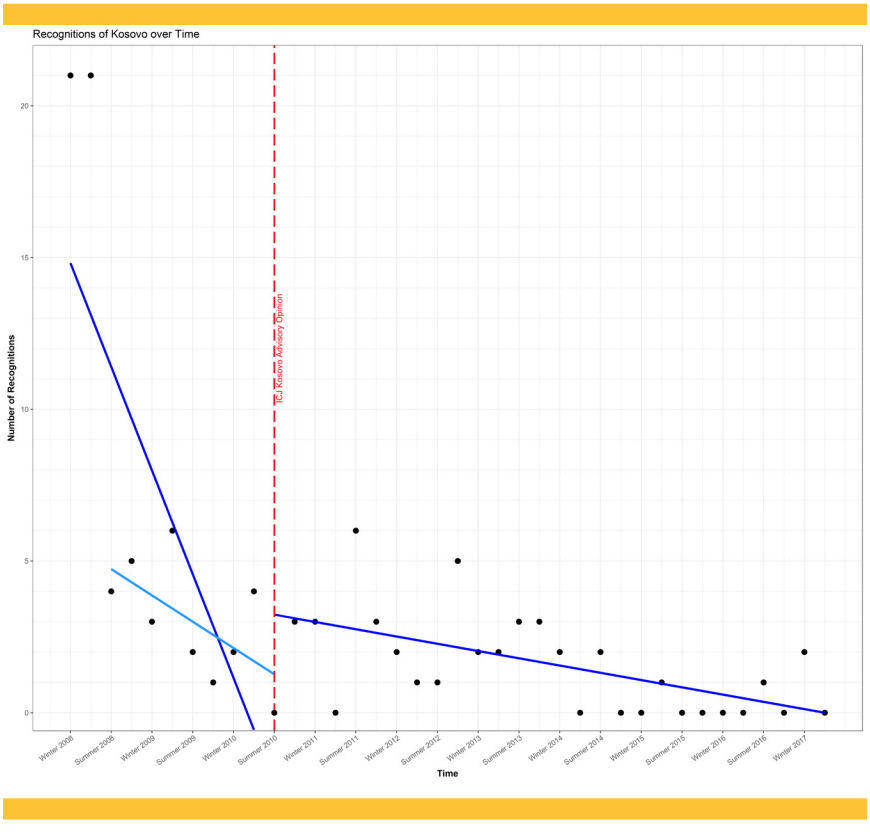
The smaller line to the left of the discontinuity is there to demonstrate that the discontinuity is significant even if we remove the two outliers of the data that stand for the initial 42 recognitions by states. The discontinuity suggests that the ICJ's 2010 advisory opinion on Kosovo could be interpreted as having a significant "convincing" effect on states.

Figure 2. Smoothing the regression line to better fit the observations



It is worth noting that the data demonstrates that most NATO and EU members recognized Kosovo long before the 2010 advisory opinion. From this, it is reasonable to suggest that states that have an "entrenched political interest" in recognition, or non-recognition are less likely to be influenced by an international judiciary's advisory opinion.

Figure 3. Regression discontinuity at the cut off point (i.e the ICJ's decision). There is a clear change in the trend after the ICJ's decision



In this sense, it is perhaps safe to say that the United States' and Albania's immediate recognition of Kosovo finds its inverted reflection in the categorical denial of recognition by Russia and Serbia – in both of these extremities political considerations will again play the decisive role.[113] Consequently, international judicial ascertainment of statehood would ultimately fail to convince and compel politically entrenched states on both sides

113. Hersch Lauterpacht, Recognition in International Law (1948). 67

of an issue to abandon their established positions. In contemporary international law, states are ultimately free to decide on recognition however they wish – there is no Lauterpachtian legal duty to recognize.[114] But this should not undermine the importance of the convincing and compelling influence of international judiciary's advisory opinion to other states uninvolved with the political aspects of the US-Serbia-Russia rivalry in the Balkans.

In this sense, we look to the Non-Aligned Movement, which established itself during the Cold War as a neutral bulwark opposed to both communist and western ideologies.[115] For the purposes of the analysis, membership in the NAM could be a good proxy for uninvolvement with the political aspects of the Balkan Crisis and thus demonstrate a "lack of entrenchment." Therefore, the best evidence for the "convincing and compelling" effect of the ICJ's Kosovo opinion can be observed by comparing the percentage of Non-Aligned Movement states that recognized Kosovo before and after the opinion, which is shown in Figure 4. The difference between recognitions prior to and after the ICJ Kosovo opinion seems quite substantial, although it does take into account the full period after 2010, right up until 2017. Nevertheless, it can be argued that overall, the ICJ's advisory opinion had a tremendous effect on states that were not a part of the Serbia-NATO dispute. Consequently, this analysis could provide further evidence that an ICJ judgment can only convince those states that are not involved in the dispute. It is very unlikely that Russia and the United States would change their minds on recognizing Kosovo – indeed, as stated above, the United States and many other NATO members recognized Kosovo in its first days, whereas Russia, in solidarity with its ally Serbia, refused to do so, and no decision from the ICJ will likely convince Russia to go back on its decision. This is consistent with previous research which established that there was a higher probability of recognizing Kosovo if a state was a member of NATO. [116]

114. James R. Crawford, The Creation of States in International Law (2006).
115. Natasa Miskovic, Harald Fischer-Tine & Nada Boskovska, The Non-Aligned Movement and The Cold War: Delhi - Bandung - Belgrade (2014).
116. Nikola Mirilovic & David S. Siroky, International Recognition and Religion: A Quantitative Analysis of Kosovo's Contested Status, 0 International Interactions 1–20 (2016).

VIII. Comparing the recognition of Kosovo to other recognition events

However, in order to fully observe the causal effect of the 2010 Kosovo advisory opinion, we need to establish some form of counterfactual, or other observable outcomes in similar circumstances but without the intervention. For instance, we can compare the seasonal amount of recognitions of other states in a similar time period. The most comprehensive data comes from the recognitions of Palestine (1988 and onwards) and South Sudan (2011 and onwards). Unlike Kosovo, both of these putative states did not have an advisory opinion issued by the ICJ, meaning that there was no judicial involvement with regards to ascertainment and determination of statehood as per Coleman's quasi-collectivization model. As a result, they are demonstrative of what the trend usually is in cases of recognitions that happen without an ICJ advisory opinion.

Figure 4. Bar plot demonstrating an increase in recognition by states who are members of the Non-Aligned Movement after the ICJ's advisory opinion in 2010

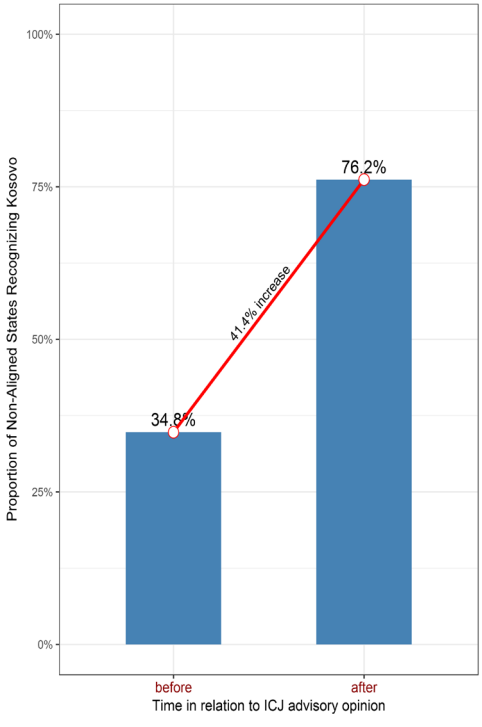


Figure 5 clearly demonstrates what we have seen before – that there is a noticeable increase in recognitions in Kosovo's case after the ICJ's advisory opinion. As we have previously established, most of these post-ICJ advisory opinion recognitions came from states of the Non-Aligned Movement. However, looking at figures 6 and 7 we can see how a typical recognition process occurs. It is clear that recognitions, at least in the cases of Palestine and South Sudan, generally followed a constant downward trend after an initial spur of recognitions. We can, therefore, state that – provided there were no other explanations for the trend change in the Kosovo graph – that the increase in recognitions of Kosovo might have been a result of the ICJ advisory opinion. But it is important to note that this is but a clear correlation and does not necessarily imply causation, and further examination of the trend is required.

Figure 5. Time Series of recognitions of Kosovo, starting with the 2010 Kosovo declaration of independence

Figure 6. Time Series of recognitions of Palestine, starting with the 1988 Palestinian declaration of independence

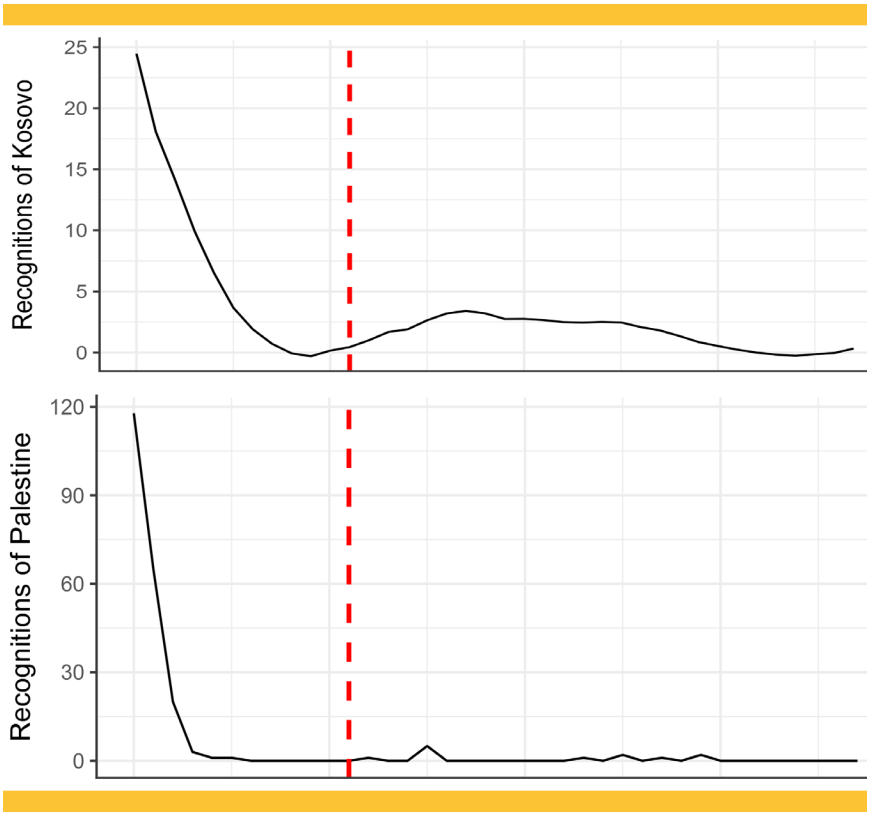
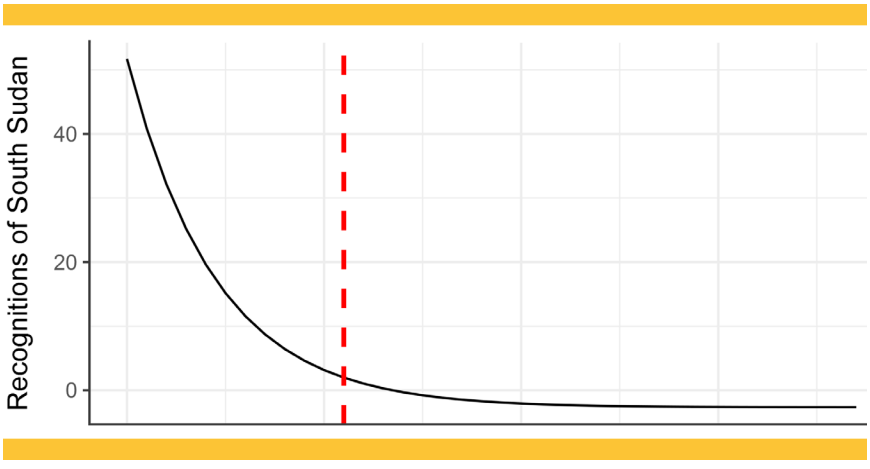


Figure 7. Time Series of recognitions of South Sudan, starting with the 2011 South Sudanese declaration of independence



IX. Future application – is the cure worse than the disease?

The paper began by looking at the recent events in Catalonia and Crimea and asking whether it would be beneficial for the ICJ to play a role in the examination of statehood claims. Evidence from the ICJ's Kosovo advisory opinion shows that it indeed has the capability to convince states that are not entrenched in the political question relating to a statehood claim. It is, therefore, possible to compel politically uninvolved states to recognize a putative state's claim, mainly because the ICJ is perceived to be unbiased.[117] The proxy used for involvement with the Kosovo crisis was the membership in the Non-Aligned Movement and the significant increase in the number of Non-Aligned Movement members recognizing Kosovo after the ICJ's advisory opinion shows that the opinion could have played an important compelling role. The data also confirms that the quasi-collectivization of recognition could actually be a viable model for similar cases in the future.

However, despite the analysis above demonstrating the capabilities of this model, it can also be argued that the model is inherently flawed. First, if such a model was to be adopted for future cases such as Catalonia or Iraqi Kurdistan, an overreliance on

117. Andrew Coleman, Resolving Claims To Self-determination:Is There a Role For The International Court of Justice? (2014).

the ICJ would, in addition to greatly increasing the power of the Court, in the long run, undermine its credibility, reputation, and the perceived impartiality of the Court. This, in turn, could eliminate the persuasive and compelling force of the ICJ's opinion that, according to the evidence, is very likely to exist. Second, although Coleman makes a strong case for the ICJ's advisory jurisdiction in peacefully solving similar cases, Lauterpacht himself, despite being a judge of the International Court Justice in 1954, doubted such a role for the Court, stating that "the political implications of recognition, as well as the necessity for expeditious action, would seem to favor the exercise of [the function of determination] by a political organ."[118] Third, letting a very small number of expert judges decide the fates of whole states and peoples seems intuitively wrong and ripe for disaster. Although it is accepted that the advisory opinion is non-binding by its nature, the noticeable effect of the Kosovo advisory opinion on subsequent recognitions suggests that, despite its non-binding nature, it could have a great impact on future recognitions of a putative state's claim to statehood. Therefore, in my view, the model of quasi-collectivization of recognition is a case when the cure is potentially worse than the disease. The evidence demonstrates the great potential, but also the great dangers of this model. More empirical research is obviously needed, but it is certain that the 2010 Kosovo advisory opinion had a noticeable effect on the recognition of Kosovo, and particularly affected the states of the Non-Aligned Movement.

X. Conclusion

According to Kelsen "the problem of recognition of states and governments has neither in theory nor in practice been solved satisfactorily."[119] After discussing the problems within the theory of the recognition of states, particularly the problem of the abuse of the power of recognition, this paper has examined the collectivization model based on Lauterpacht's theory of collective recognition and Coleman's important modifications to Lauterpacht's original conception. Statistical time-series analysis of the effect of the Kosovo judgement on subsequent recognition has demonstrated that letting the ICJ issue non-binding advisory opinions on issues of statehood has a "compelling and convincing" effect on states not politically entrenched in the question, perhaps due

118. Hersch Lauteroacht, Recognition In International Law (1948). 169
119. Hans Kelsen, Recognition in International Law: Theoretical Observations, 35 The American Journal of International Law 605–617 (1941).

to the ICJ's perceived impartiality, as was demonstrated by the significant increase in recognitions of Kosovo by members of the Non-Aligned Movement. However, this paper concludes by affirming Kelsen's statement and argues that the quasi-collectivization of recognition through ICJ's non-binding advisory opinion jurisdiction does not seem to offer a satisfactory solution to the problem of recognition of states. Therefore, the international legal community should refrain from transferring the power of ascertainment to the ICJ and should either retain the flawed yet established practice of recognition or develop some other ways of resolving the problems associated with recognition of putative states.

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Northern Ireland & Brexit: Resurrecting The Border

SUBMITTED BY

Amanda McAllister

I. Introduction

Sean O'Hagan recalls life on the island of Ireland when its division was physically manifested by a hard border separating the Republic of Ireland from Northern Ireland. During the conflict known as "the Troubles" in Northern Ireland, the "journey from one capital to the other", Dublin to Belfast, would take a mere 90 minutes, while, on a bad day, it "could take up to 90 minutes just to negotiate the heavily fortified British army checkpoint that stood on the outskirts of Newry[.]"[1] O'Hagan details the experience of crossing the border and "undergoing the familiar interrogation ritual: name, date of birth, address, where have you come from, where are you going and why? It was a routine intrusion that you never got used to and that never lost its power to unsettle."[2] Reflecting on the experience, he quotes a Seamus Heaney poem that "evoke[s] the indignity of inspection and interrogation":[3]

> A rifle motions and you move
> With guarded unconcerned acceleration –
> A little emptier, a little spent
> As always by that quiver in the self,
> Subjugated, yes, and obedient.[4]

In 1998, the Good Friday Peace Agreement was signed to mark the end of hostilities in the North. Pivotal to the agreement was a provision that required the removal of the border that had

1. Sean O'Hagan, Will Brexit Reopen Old Wounds with a New Hard Border in Northern Ireland? The Guardian (Apr. 23, 2017).
2. O'Hagan recalls the difference between heading north to heading south: "Coming back into the north could be even more of an ordeal: one of the last times I came through the checkpoint in the early 1990s, my friend and I were pulled over, ordered out of the car and made to stand between two twitchy young soldiers, as an RUC man searched the car meticulously. We were eventually sent on our way, as ever, without an explanation." Id.
3. Id.
4. Id.

unsettled and separated so many. During the post-conflict period, it seemed the future would remain seamless, permitting a unity between the two countries that has provided significant economic and social advantages. However, the referendum in the United Kingdom to leave the European Union has rendered the "invisible" border's future tenuous, fragile, and unknown.

On June 23, 2016, the United Kingdom voted to leave the European Union by 52 to 48 percent.[5] This decision, coined "Brexit", has ignited serious debates on the economic, cultural, and political consequences of the withdrawal. Brexit will include the departure of the entire United Kingdom – England, Scotland, Wales, and Northern Ireland. Northern Ireland's unique situation in light of its history, its relationship with the Republic of Ireland, and its post-conflict setting has made discussions around Brexit especially urgent. One of the many contested aspects of negotiating the withdrawal has been that of the border between the Republic of Ireland and Northern Ireland.

This essay explores the important issue of the border and proffered solutions in the wake of Brexit for Northern Ireland, including the significance of a resurrected, hard border between the North and the South. Such a border will constitute the only land border between the U.K. and the European Union. The border had symbolic status during the Troubles conflict as the British Army checkpoints utilized it for policing and it also physically manifested the separation between the North and the South. The importance of its removal in the Good Friday Agreement and the post-conflict period make it imperative to consider how the imposition of a renewed border would impact the continuing peace process, the legacy of the conflict, and how Northern Ireland functions as a post-conflict state during the negotiations between the United Kingdom and the European Union; reinstating a border in the wake of Brexit could cause serious harm to the peace and economic prosperity of the country.

This paper will first discuss the European Union, focusing specifically on the relationship between the European Union and the United Kingdom as well as the European Union and Northern Ireland. The paper will then trace the history of the Troubles conflict with an emphasis on the role of the border between the

5. Stephen G. Gross, The Brexit Vote, One Year Later, Foreign Affairs (Jun. 23, 2017) https://www.foreignaffairs.com/articles/europe/2017-06-23/brexit-vote-one-year-later.

North and the South. Next, the paper will assess the current state of Brexit negotiations regarding the border in Northern Ireland as well as some of the proposed solutions and their critiques. Finally, the paper will posit the significance of borders in conflict and post-conflict settings to underscore the extreme significance of a resurrected border in a country still grappling with the consequences and legacy of its conflict.

II. The European Union

This section will explore the European Union's relationship with the United Kingdom and the Republic of Ireland as well as its concurrent existence with and the downstream effects of the Troubles conflict. Section A will discuss the formation of the European Union and the four freedoms – the free movement of goods, capital, services, and labor. Section B will delineate the oft-contentious relationship between the European Union and the United Kingdom as well as the incompatible notions of parliamentary supremacy and primacy of the Treaty of the European Union that underlie many of these tensions. Section C will elaborate on Brexit and its immediate aftermath. Finally, Section D will specifically delineate the effect of Brexit on several dimensions of life in Northern Ireland.

A. The European Union

The initial precursor to the European Union was the European Coal and Steel Community, an organization created after the Second World War.[6] This organization sought to prevent further hostilities between France and Germany by tying them together in the production of steel and coal under the notion that "countries that trade with one another become economically interdependent and so [be] more likely to avoid conflict."[7] This integration eventually led to the creation of the European Economic Community (EEC) in 1958 to foster economic cooperation between Ger-

6. Desmond Dinan, Ever Closer Union: An Introduction to European integration (4th ed., 2010).
7. Id., The EU in Brief, Europa, https://europa.eu/european-union/about-eu/eu-in-brief_en; "World peace cannot be safeguarded without the making of creative efforts proportionate to the dangers which threaten it." The Schuman Declaration - 9 May 1950, Europa, https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en; "The pooling of coal and steel production . . . will change the destinies of those regions which have long been devoted to the manufacture of munitions of war, of which they have been the most constant victims." Id.

many, France, Italy and the Benelux countries.[8] The Community deepened and widened in the coming decades amidst the Cold War and its precarious geographical situation between two superpowers. Step-by-step the EEC has worked towards the goal stated by French foreign minister Robert Schuman in the *Schuman Declaration* proposing the European Coal and Steel Community: "Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity."[9] Today, the European Union has become not just an organization or a community, but an "ever closer union" consisting of 28 member states and a supranational authority regulating everything from climate and agriculture to security and currency.[10]

The European Union consists of many supranational institutions, including the European Parliament, the European Council, the Council of the European Union, the European Commission, and the Court of Justice of the European Union.[11] Each plays a pivotal role in the legislation and enforcement of EU regulations, directives, and decisions. The cornerstone of the European Union is the single, internal market and its creation of the free movement of goods, services, people, and labor throughout a more seamless and open Europe without internal border controls or impediments and obstacles to trade in, such as varying import and export laws and tariffs.[12] The UK will be the first country in the EU's history to withdraw from the single market. For many, the prevalence of British Euroscepticism has meant Brexit has been "a long time in the making."[13]

B. The European Union and the United Kingdom

Since its accession to the European Communities in 1973, the United Kingdom has often been a reluctant player in the process of widening and deepening European institutions.[14] Significantly, at the core of the United Kingdom's legal and politi-

8. Dinan, supra note 6.
9. The Schuman Declaration, supra note 7.
10. Id.; Dinan, supra note 6.
11. Several other agencies and institutions play key roles in the regulatory interface. See EU Institutions and Other Bodies, Europa, https://europa.eu/european-union/about-eu/institutions-bodies_en.
12. Id.; Roger Goebel, et al., Cases and Materials on European Union Law (2015).
13. Anand Menon, Why the British Chose Brexit, Foreign Affairs 124 (Nov./Dec. 2017).
14. Other countries, too, have faced tensions within domestic courts ceding primacy to the Court of Justice, particularly on issues integral to the conception of the country's identity, such as human rights in Germany or reproductive rights in Ireland. Goebel, supra note 12.

cal identity is the notion of parliamentary supremacy.[15] Here, Parliament has the power to undo anything a previous Parliament has done if it deliberately passes an act with the intention of repudiating the prior act. Any direct clash with an outside treaty or a European Union regulation results in the primacy of parliamentary supremacy.[16] Indeed, the Act of Accession to the European Union of the United Kingdom was a parliamentary act and one that can be repudiated by a subsequent parliamentary act.[17] The primacy of parliamentary sovereignty over the treaty was examined in the 2002 case *Thoburn v. Sunderland City Council*, where the High Court responded to the question of primacy of European Union law with a strong statement on the principle of parliamentary sovereignty and it providing the basis for the voluntary acceptance of the supremacy of EU law, which did not qualify the conditions of Parliament's legislative supremacy. [18]

These two different notions often collided like tectonic plates under the surface. It has been argued that: "[t]he UK has never culturally adjusted to its membership, as a senior partner in a large group, instead retaining its former perceived role as a mercantile individualist nation" and that "Britons have always been encouraged to view the EU through a British lens."[19] This, combined with arguably significant gaps for average voters in the processes that regulate their daily lives, citizens' perceptions on how institutions work, the struggles of the British dualist system for incorporating EU law, and populist perceptions on globalization could very well have contributed to the ultimate decision to leave the single market.[20]

C. Consequences of Brexit

The short and long-term consequences of Brexit are unknown – no other country has triggered Article 50 to leave the European Union. Significantly, "thinking beyond Brexit is difficult when there is no clear government strategy to deliver the Prime Minister's objectives, or plan to achieve her outcomes. Rather, each day brings another news headline, fresh resignation or un-

15. Id.
16. Id.
17. See Macarthy's Ltd. v. Smith, [1980] ECR 1275.
18. Goebel, supra note 12. Thoburn v. Sunderland City Council, [2003] QB 151.
19. Janice Morphet, Beyond Brexit? How to Assess the UK's Future 14 (2017)
20. The high-threshold for judicially reviewing acts of the EU as a non-privileged applicant could also have contributed to increasing the divide between EU institutions and citizens. Goebel, supra note 12.

expected implication of what is at risk for the UK." [21]

Yet, leaving the European Union necessarily entails that Britain will no longer have access to the single market. Many predict serious economic consequences arising from lower trade and lower foreign investment. In addition, London may no longer be an attractive headquarters or base for European Union companies with access to the market, the UK will be outside the European Central Bank system, British universities will lose access to EU students under ERASMUS and British students may lose access to EU universities. Everything from visas to drivers' licenses will need to be negotiated.

Professor Anand Menon writes, "[w]hatever kind of Brexit the government decides to adopt, the United Kingdom seems set for a turbulent few years. Even now, economic warning signs are flashing red. Inflation is on the rise, partly driven by the devaluation of the pound that immediately followed the referendum. Business and consumer confidence have fallen and things are likely to get worse before they get better. Economists estimate that a hard Brexit would lead to a 40 percent reduction in trade with the EU, the United Kingdom's largest trading partner. The British economy will have to adapt some export industries' decline and firms, especially in the manufacturing and service sectors, consider relocating to a country within the EU's single market and customs union. That adaptation will likely prove a slow and painful process."[22]

On the whole, "[t]he British state will [] have to change to cope with Brexit."[23]

D. The European Union and Northern Ireland

It is necessary to consider the effects on Northern Ireland specifically. In addition to the consequences of withdrawal delineated above, Northern Ireland faces unique struggles and challenges in the wake of the Brexit referendum. Indeed, "[t]he position of Northern Ireland in relation to the result of the UK's referendum on membership of the EU is particularly difficult

21. Morphet, supra note 19 at 1.
22. Menon, supra note 13 at 126.
23. Id.

when Northern Ireland voted to remain."[24] Significantly, Northern Ireland has received more funding from the EU given "their economic and social well-being status and the difference between their economies and the UK average." [25]

More than EU funds is at stake for Northern Ireland. "UK membership of the EU is a fundamental component of [Northern Ireland's] devolved powers: the devolution of many powers from the UK government to devolved national Parliaments derive from the legislation that the UK has already agreed with the EU . . . The major issues for Scotland, Northern Ireland and Wales if the UK leaves the EU will be to what extent they will retain their existing powers of decision making over the implementation of legislation or whether a new set of powers will need to be identified."[26]

Next, European Union law has been the basis of the peace process and the peace agreement in Northern Ireland. "Since 1998, the establishment of the Northern Ireland Assembly and subsequent devolution of powers has been founded on this agreement and its signatories remain the UK, Ireland, the EU and the US. There have been some comments that the withdrawal of the UK from the EU would fundamentally change the terms of the Good Friday Agreement of which the EU is a signatory."[27] Further, the "Good Friday Agreement supported by the EU [and] the culmination of the peace process, has been a key factor in supporting change."[28] Specifically, "Northern Ireland has been in receipt of support funding from the EU since 1989 through a successive range of programs, labeled PEACE since 1995. The purpose of these programs has been to support cohesion between communities involved in the conflict in Northern Ireland and the border counties of Ireland and economic and social stability."[29]

Brexit has become politically contentious as incompatible solutions focusing on rival futures are being demonstrated, and are often along sectarian lines. The referendum has renewed some calls for the political reunification of the island of Ireland and it is extremely significant to note that "[a]lthough there was a majority in favour of remain in the EU in Northern Ireland there is a political and sectarian split, with many Unionist party support-

24. Morphet, supra note 19 at 25.
25. Id. at 14
26. Id. at 21
27. Id.
28. Id. at 14.
29. Id. at 25.

ers voting to leave the EU."[30] The fueling of sectarian political allegiances is especially fraught in a post-conflict setting emerging from sectarian violence going to the core of national identity.

III. THE TROUBLES CONFLICT AND NORTHERN IRELAND'S POST-CONFLICT SETTING

This Section will explore the coexistence with the European Union and the conflict and peace process. Section A will provide a context and brief history of the conflict. Section B will describe the accession of Ireland and the United Kingdom to the European Union during the conflict. Finally, Section C describes the post-conflict border in its current state.

A. The Troubles

The history of the conflict begins centuries back when Ireland was still under England's control and many English and Scottish Protestants settled in what is today Northern Ireland. Attempts were made to free the country from England's rule, and by 1920, Britain divided Ireland by granting independence to what is now the Republic of Ireland while Northern Ireland remained in the United Kingdom. "Therefore, from its creation in 1920, Northern Ireland was a state whose citizens differed over their national allegiance."[31] During the following decades, there was significant discrimination against the Catholic nationalist minority, reflected in the laws and institutions of the state.[32]

By the 1960s, a campaign for civil rights was met with state brutality, as exemplified by the infamous Bloody Sunday massacre in Derry, Northern Ireland, where unarmed civilians campaigning against internment were shot by British soldiers.[33] The use of violence by the state and republican and loyalist paramilitaries throughout the three decades of the conflict led to the

30. Id.
31. Brendan McAllister, A Brief History of "The Troubles" PeaceBuilder, (Feb. 25, 2009) https://emu.edu/now/peacebuilder/2009/02/a-brief-history-of-the-troubles/.
32. Id.
33. Id.; Marina Koren, An Arrest in the Bloody Sunday Massacre, The Atlantic (Nov. 10, 2015) https://www.theatlantic.com/international/archive/2015/11/bloody-sunday-arrest/415182/.

loss of 3,500 lives and thousands more injuries.[34] The conflict was "a 30-year period when our conflict was expressed in violence and a generation grew up in the shadow of the gun and the bomb." [35]

The border was an ever-present part of the conflict. Author Fintan O'Toole writes: "[the border] had the effect of enclosing both parts of the island. In the south, you had this enormous collective psychological withdrawal from the north because of the violence, but also because of the sheer presence of the border. If you approached it from the south, you were acutely aware that you were entering dangerous terrain. There was a sense of scrutiny and surveillance that created a definite anxiety the closer you got to it. Since the Troubles ended, that mental border has diminished dramatically, to the point where people are no longer, as it were, bordered by the border." [36]

B. Role of the European Union

Accession to the European Union by the United Kingdom and the Republic of Ireland occurred concurrently with The Troubles conflict. Yet, the conflict was surprisingly invisible during the accession proceedings. In fact, on January 22, 1972, Ireland and the United Kingdom both signed the Treaty of Accession, "Jack Lynch for Ireland and Edward Heath for the United Kingdom made speeches in praise of a new Europe based on the unity of its people, on understanding and friendship . . . Remarkably, the speeches in January 1972 contained no mention of Northern Ireland and its troubles. In the prolonged Accession negotiations in 1970 and 1971 no one – the Irish, the British, nor anyone in the Community – made any reference whatsoever to the events in Northern Ireland."[37]

So while the impetus for joining was not the resolution for the conflict and the European Union made no indication it would

34. McAllister, supra note 31; see generally Fionnuala Ni Aolain, The Politics of Force: Conflict Management and State Violence in Northern Ireland (2000), David McKittrick, et al., Lost Lives: The Stories of the Men, Women and Children who Died as a Result of the Northern Ireland Troubles (2001).
35. McAllister, supra note 31.
36. O'Hagan, supra note 1; see generally Bernard McClaverty's work of fiction Cal, where the young protagonist contemplates the violence of the conflict symbolized by the border.
37. "Significantly, [t]here was [] no indication that the European Community saw itself as playing any significant political role in resolving the Northern Ireland problem, or that either of the two Governments had any expectations in that direction." Dennis Kennedy, Europe and the Northern Ireland Problem, in: Living with the European Union: The Northern Ireland Experience 148-49 (2000).

play any sort of role in resolution or cessation of hostilities[38], there were undeniable consequences and changes to the Northern Irish setting due to both the UK's and Ireland's membership of the European Union. EU membership by both states has "helped transform Anglo-Irish relations" through the removal of barriers and the facilitation of cooperation between the North and South.[39] Further, Mary Murphy writes, "In the years since the United Kingdom joined the European Union in 1973, Northern Ireland has endured bloody conflict, confronted profound political challenges, and more recently, experienced remarkable change. The journey from violent political conflict to a tentative peace has been long and arduous. It has demanded great compromise and sacrifice from all sections of Northern Ireland's society. The result has been the removal of large-scale and widespread violence and the creation of new and legitimate devolved political institutions built around consociational principles. This process of peace-building has been accompanied by improved community relations and some degree of economic progress . . . This same twenty-year period coincides with an era of wider change across Europe. The widening and deepening of the European integration process has been apparent since the drive to complete the single market intensified[.]"[40] The culmination of these coinciding processes has led to an invisible border and greater economic cooperation and social cohesion.

C. Post-Conflict Border

Since the Good Friday Agreement signaled the end of the conflict in 1998, "the border has become invisible"[41] and the "old British army checkpoints, security barriers and observation posts that became emblematic of the Troubles are long gone."[42]

38. Yet, for some, the move towards the European Union underscored a move towards a united Ireland. Dennis Kennedy explains some of the nationalist attitudes towards the European Union as being connected to united Ireland, "Irish nationalist attitudes towards European union have always included a vague idea that their inclusion of both parts of the island of Ireland within a European Community destined for 'ever closer union' must, inevitably, provide a favourable context for their own aspiration towards a united Ireland. . . it was argued that the removal of barriers to trade, to free movement of goods, people and services and the levelling up of economic and social conditions, would all facilitate moves towards reunification by removing practical obstacles to it. Greater commercial and social intercourse in the island, plus a growing shared sense of European identity, would also help. Beyond this was the view, frequently asserted by John Hume, that the whole European project was about solving the problems of division in Europe by creating innovative structural arrangements which would allow former enemies to live and work together in a framework leading to union." Id. at 163.
39. It has, of course, created some barriers as well, such as currency. Id. at 167.
40. Mary C. Murphy, Northern Ireland and the European Union: The Dynamics of a Changing Relationship (2016).
41. Lisa O'Carroll, How Does the Irish Border Affect the Brexit Talks? The Guardian (Jun. 1, 2017).
42. Id.

Indeed, "[t]he only clues to drivers that they have moved from one jurisdiction to the other are roadside speech-limit signs changing from kilometers (Ireland) to miles (Northern Ireland) and different colored number plates."[43] The removal of these components of the border has led to a flourishing of the trade and services between the North and South, as 23,000-30,000 people commute across the border daily.[44] There are approximately 200 border crossing points with an estimated 177,000 trucks, 208,000 vans, and 1.85 million cars traversing the border each month.[45] Truly, "[t]he free flow of people on the new motorway is perhaps the most vivid symbol of the new Ireland of cross-border co-operation and painstaking bridge-building between the governments in the north and south of the island."[46] Many fear harm from the imposition of a new, hard border; from tariffs to commuters and all other aspects of Irish business and trade. Perhaps most significantly, many fear how a resurrected border could detrimentally affect the continuing peace process.[47] The Taoiseach, the Irish prime minister, Leo Varadkar has stated during the period of Brexit negotiations that, "[t]he border between Ireland and Northern Ireland is no longer a symbol of division, it is a symbol of cooperation and we cannot allow Brexit to destroy this achievement of the Good Friday Agreement."[48] The impending Brexit has caused anxiety for many about the future of the country.[49]

IV. NEGOTIATING THE BORDER

This Section will explore proffered solutions to the border issue currently being grappled with by UK and its negotiations with the EU. The UK will soon need to present a solution on the

43. Id.
44. "All-island trade in Ireland has flourished since peace, with production – particularly in food and drink – involving processing on either side of the border. About a third of milk from cows in Northern Ireland is transported across the border for production into butter, cheese and infant
45. O'Hagan, supra note 1.
46. Id.
47. Id.
48. Brexit Offer 'Must be Acceptable to Ireland', BBC (Dec. 1, 2017) http://www.bbc.com/news/world-europe-42202830.
49. Yasmeen Serhan, Northern Ireland Could Be Brexit's Biggest Casualty, The Atlantic (Dec. 1, 2017) https://www.theatlantic.com/international/archive/2017/12/northern-ireland-is-falling-between-the-cracks/546875/; Lisa O'Carroll, How Brexit Looms Over the Irish Border: 'It's Berlin Wall Approaching Us', The Guardian (Nov. 22, 2017) https://www.theguardian.com/uk-news/2017/nov/22/how-brexit-looms-over-the-irish-border-its-the-berlin-wall-approaching-us. Human rights concerns play a role in this concern, as well, as the EU provides significant human rights frameworks that may be eroded, neglected, or abandoned upon withdrawal. See Colin Harvey, Brexit, Borders and Human Rights, QPOL (Jun. 8, 2017) http://qpol.qub.ac.uk/brexit-borders-human-rights/.

border issue in order to move to the next phase of negotiations in their separation from the EU. [50]

In the days and weeks following the Brexit referendum, the notion of a "hard" border reminiscent of the one prior to the Good Friday Agreement, described by John Sheridan as "soul-destroying," instilled fear and anxiety in many.[51] Current Prime Minister of the UK, Theresa May, has reassured Ireland there will be no hard land borders and that the Common Movement Area will remain. She has stated she is firmly committed to a "frictionless, seamless border," however, the practicality of this commitment has been called into question, and it has been argued that "[t]he British government can decide not to have customs checks, but EU law requires Ireland to have them. While they said there would be no need for 'barbed wire and gun post[s]' there would need to be checks."[52] Writer Fintan O'Toole laments that "[t]he notion that you would even consider implementing a hard border here again seems ludicrous . . . It is not just that it was so porous even when it was heavily policed, but that it would be read here as the British government not giving a damn about the legacy of the Troubles and the terrific progress of the years since the Good Friday agreement."[53]

The EU has signaled in negotiation guidelines that the Common Travel Agreement should be included in any final agreement. Further, Donald Tusk, the president of the European Council, in talks with Varadkar, has stated that "sufficient progress" must be made on the Irish border before negotiations can move on, emphasizing the importance of Ireland's consent to any proffered solutions, "This is why the key to the UK's future lies - in some ways - in Dublin, at least as long as the negotiations continue."[54] He has further stated that "[i]f the UK offer is unacceptable for Ireland, it will also be unacceptable for the EU."[55]

50. Brexit Offer 'Must be Acceptable to Ireland', BBC (Dec. 1, 2017) http://www.bbc.com/news/world-europe-42202830; Lisa O'Carroll, et al., Brexit Negotiators Believe End to Irish Border Impasse is Near, The Guardian (Nov. 29, 2017) https://www.theguardian.com/politics/2017/nov/29/brexit-negotiators-believe-end-irish-border-impasse-near?CMP=Share_AndroidApp_Tweet.
51. Saphora Smith & Ziad Jaber, Old Border, New Worries, NBC (Oct. 17, 2017) https://www.nbcnews.com/specials/brexit-ireland-border.
52. O'Carroll, supra note 41.
53. O'Hagan, supra note 1.
54. Brexit Offer 'Must be Acceptable to Ireland', BBC (Dec. 1, 2017) http://www.bbc.com/news/world-europe-42202830.
55. Id.

Many solutions have been proffered for the 310-mile border issue in the wake of the Brexit negotiations. There are, of course, "a number of post-Brexit options for the devolved nations[.] These include the potential for the reverse Greenland option whereby Scotland, Northern Ireland and Gibraltar remain in the EU while England and Wales leave."[56] Some have argued in favor of this idea, that "[t]he obvious answer is to give Northern Ireland a special status and locate the Border in the Irish Sea" and that "[w]hat Dublin is asking for should be well within London's capacity to deliver – a declaration that there will be no physical border in Ireland."

Yet, there is opposition to the notion of an all-island customs solution, particularly from the Democratic Unionist Party of Northern Ireland, whose members have been vastly in favor of leaving the European Union and quitting the customs union.[57] Further, this solution has been criticized by Westminster leader Nigel Dodds as "forc[ing] Northern Ireland more and more . . . further and further away" from its main markets in the UK and more reliant on the EU" and "causing real damage to Anglo-Irish relations."[58] Others have responded by stating that "special status post-Brexit [] would give Northern Ireland a huge economic advantage over the rest of the UK at a time when it needs every bit of help it can get" and that "Northern Ireland already has a special status that was enshrined in the Belfast Agreement." [59]

Finally, "[a]nother option is that parts of the UK leave and become independent states in their own right and apply for accession to the EU[.]"[60] Of course, perhaps most exemplified by this solution, each of these proffered plans flows through a rapid undercurrent of national identity and rival futures. The ultimate agreement will determine the next chapter in Northern Ireland's history.

56. Morphet, supra note 19 at 29; O'Carroll, supra note 41.
57. Brexit: Imperilling a Fragile Peace, The Irish Times (Nov. 30, 2017) https://www.irishtimes.com/opinion/editorial/brexit-imperilling-a-fragile-peace-1.3309765.
58. Amanda Ferguson, Brexit: DUP Rails Against 'Aggressive' Border Stance by Dublin, The Irish Times (Dec. 3, 2017) https://www.irishtimes.com/news/politics/brexit-dup-rails-against-aggressive-border-stance-by-dublin-1.3314194; Irish Trade Convergence 'Not Way Forward' - Paisley, BBC (Nov. 30, 2017) http://www.bbc.com/news/uk-politics-42177905.
59. Brexit: Imperilling a Fragile Peace, The Irish Times (Nov. 30, 2017) https://www.irishtimes.com/opinion/editorial/brexit-imperilling-a-fragile-peace-1.3309765.
60. Morphet, supra note 19 at 29.

V. CONCLUSION

Sean O'Hagan writes that "[s]o solidly permanent did [the border's] presence seem back then that I never thought I would see it disappear in my lifetime. But, in the wake of the IRA ceasefire in 1994 and the signing of the Good Friday Agreement in 1998, disappear it did, along with all the other checkpoints on the many roads that traversed the border."[61] The post-conflict period in Northern Ireland has demonstrated that peace is possible in the country, where many are focused on truth-telling processes, justice, truth commissions, and psychological and medical care for wounded, victims, survivors, and their families. Northern Ireland still faces significant challenges deeply embedded within its highly segregated society. The resurrection of a border between the North and the South has a very real possibility of halting forward progress in the post-conflict state and, at the very worst, could catalyze conditions ripe for a return to violence.

As George Mitchell, a former US Senator who negotiated the peace agreement, stated, "any reintroduction of a land border between Northern Ireland and Ireland would be a very retrogressive step."[62] Three thousand individuals perished during the protracted conflict and thousands more were negatively affected. A stroll through Belfast and the visuals and perceptions of the conflict painted as murals alongside its walls serve as visceral reminders of the horrors of the conflict. The symbolic legacy and lived reality of the border during this time demonstrate that any resurrection of it, even if just for customs purposes as required under European Union law, carries the potential to bring back to life many things the peace agreement hoped to put to rest.

Amanda McAllister is a graduate of the University of Minnesota Law School, specializing in international and human rights law.

61. O'Hagan, supra note 1
62. Morphet, supra note 19 at 26.

Addressing long-term challenges in times of multiple crises?

The case of the European Innovation Council

SUBMITTED BY

Guillermo Tosca Díaz

Abstract

In recent years the EU has been in a multi-crisis mode. The European Innovation Council (EIC), a possible future body intended to facilitate the funding of innovative startups in Europe, appears to have made it onto the European Commission's (EC's) agenda. This paper examines the mechanisms that allowed for the inclusion of the EIC in the Commission's agenda, despite this context of multiple crises. The study employs the Multiple Streams Framework developed by Kingdon and relies on a series of interviews and archival research. It concludes that the EIC became an item on the EC's agenda because the Commissioner for Research and Innovation, Carlos Moedas and his cabinet, (1) managed to justify the need for an EIC by matching their proposal to current societal problems; (2) designed a policy proposal that was well enough developed for it to be accepted by the Commission Vice-Presidents; and (3) capitalized on opportunities provided by the Brexit crisis and the subsequent drafting of the White Paper on the Future of Europe.[1]

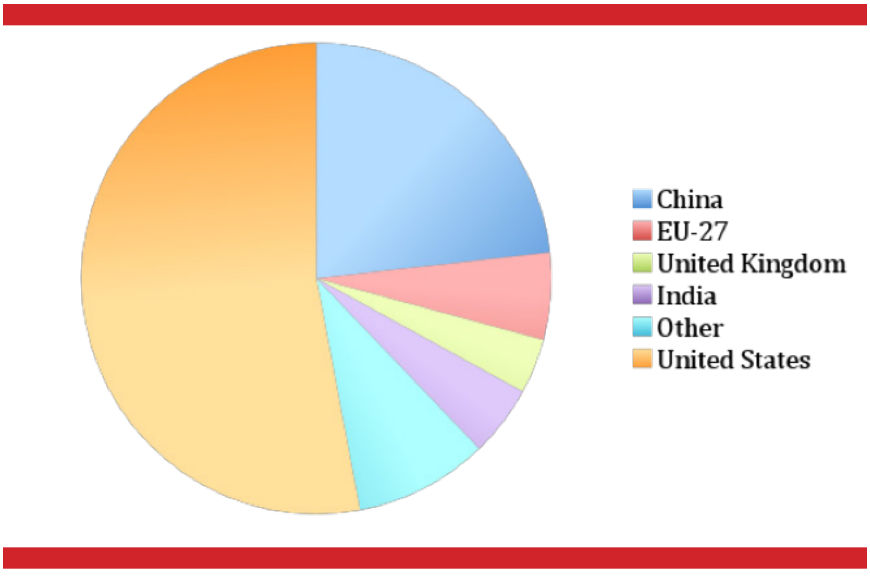
1. This article is based on Guillermo Tosca Díaz's master's thesis

I. Introduction

When asked by *Politico* to summarize "Europe's approach to startups,"[2] Daniel Ek, the founder, and CEO of Spotify responded with just a link to a playlist containing a single song, "Wake Up" by Rage Against the Machine.[3] Ek's reply seems to connect well with a striking reality. Of all 185 existing startups valued at over 1 billion US dollars (known as unicorns) in March 2017, only 10% are based in the EU, and only 6% are based in the EU-27 countries (i.e. excluding the United Kingdom).[4] This figure differs noticeably from 53% in the US and 23% in China.[5]

The data are even more remarkable from the EU's standpoint if one looks at the number of unicorns per 100 million people (see chart 2).

Chart 1: Startups valued at over $1 (USD) billion in March 2017 by Geographical entity

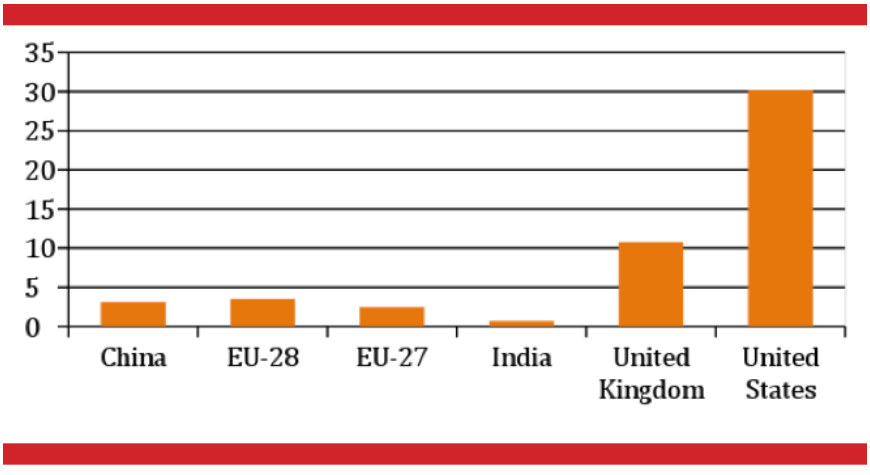


Source: Elaborated by the author based on data from CB Insights.[6]

2. "Daniel Ek: the record spinner", Politico, 2016, retrieved on 3 March 2017, http://www.politico.eu/list/politico-28-class-of-2017-ranking/daniel-ek/
3. Ibid.
4. The Unicorn List: Current Private Companies Valued At $1B And Above", CB Insights, 2017, retrieved on 3 March 2017, https://www.cbinsights.com/research-unicorn-companies/
5. Ibid.
6. Ibid.

While the United States hosts 30.19 unicorns per 100 million people, the EU hosts only 3.53. The EU-27's figure (2.47) is also smaller than that of China, which hosts 3.12 unicorns per 100 million people.

Chart 2: Number of startups valued at over $1 (USD) billion in March 2017 by geographical entity per 100 million people



Source: Elaborated by the author based on data from CB insights [7]

Innovation is a key explanatory factor behind the success of unicorns. Often developing a business model based on existing inventions, these firms have found new ways of taking existing technology to market. In fact, most unicorns have not invented any revolutionary technologies but used existing inventions to generate new products.[8]

Innovation is thus far from being synonymous with invention. Joseph Schumpeter is often credited as first having made the distinction between invention and innovation. As he stated in his book *Business Cycles*[9], published in 1939:

> "Although most innovations can be traced to some conquest in the realm of either theoretical or practical knowledge, there are many which cannot. Innovation is possible without anything

7. Ibid.
8. For an example, see the account of Airbnb's early days by Leigh Gallagher: Leigh Gallagher, The Airbnb Story: How Three Ordinary Guys Disrupted an Industry, Made Billions ... and Created Plenty of Controversy, Boston, MA, Houghton Mifflin Harcourt, 2017.
9. Joseph Schumpeter, Business Cycles: A Theoretical, Historical and Statistical Analysis of the Capitalist Process, New York, McGraw-Hill Book Company, 1939.

> we should identify as invention, and invention does not necessarily induce innovation, but produces of itself no economically relevant effect at all"[10]

From this perspective innovation, contrary to invention, is conceived as namely pertaining to the economic realm. As such, innovation can be expected to have significant societal implications. From a social standpoint, innovation matters for two main reasons. First, economists have long contended that innovation is a key driver of economic growth.[11][12] Second, a broad consensus exists among scholars, backed by extensive empirical evidence, that innovation promotes the competitiveness of the economic systems that experience it.[13]

The 1990s saw an increase in interest by policymakers in the structural conditions in society which influence innovation.[14] Within this context, a series of agencies aiming at fostering structural conditions favorable to an innovative environment began to emerge[15] and, at present, more than 50 national agencies and foundations of this kind exist worldwide.[16] An EU-level agency for innovation was proposed by Carlos Moedas, Commissioner for Research, Science, and Innovation, on 22 June 2015. He named it the European Innovation Council (EIC).[17] The EU thus appeared set to follow the path of some of its Member States in that it seemed bound to incorporate a body devoted to innovation into its institutional structure.

However, it would be precipitous to equate this announcement by Moedas to an inclusion of the EIC in the European's Commission's agenda. As Kassim argues, the EC's agenda (i.e., the pipeline of proposals set to become public policies) has increasingly been controlled by the President, in parallel with an increased concentration of power in the Presidency of the

10. Ibid., pp. 84-86.
11. See for instance: OECD, Managing National Innovation Systems, Paris, OECD Publishing, 1999, pp. 18-19.
12. See also: Bart Verspagen, "Innovation and economic growth", in Jan Fagerberg, David C. Mowery, and Richard R. Nelson, (eds.), The Oxford Handbook of Innovation, Oxford University Press, 2005, p. 492.
13.
14. Ibid., pp. 8-9.
15. Ibid., p. 14.
16. Stephen J. Ezell, Frank Spring, and Katarzyna Bitka, The Global Flourishing of National Innovation Foundations, Washington DC, Information Technology and Innovation Foundation, 2015, p. 1.
17. Interview, Brussels, 17 March 2017.

Commission.[18] As he explains:

> *"Sectoral actors, both Commissioners and the directors general of Commission services, used their autonomy to pursue their own policy agendas. Since the late 1990s, however, the Commission Presidency has been transformed, and Commission Presidents imposed central control over the organization."*[19]

This increased control has been accentuated since the advent of the Juncker Commission.[20] In it, team-leading Vice-Presidents and Vice-President Timmermans have come to play a central role in the vetting of initiatives coming from Commissioners or the DGs and thus defining the Commission's agenda.[21] As Kassim explains:

> *"Interviews conducted with senior officeholders in the Juncker Commission suggest that he has succeeded in creating a more presidential decision-making system than Barroso . . . Proposals are rigorously screened first by the Vice-Presidents for compliance with the Commission President's priorities, then by Vice-President Timmermans – a process which the secretary general conducted under Barroso, but which has been raised to the political level under Juncker."*[22]

It can be concluded therefore that for an issue to be considered as being on the EU's agenda, the leadership of the College of Commissioners (namely the Vice-Presidents leading the corresponding Project Team) must express their approval.

European Commission Vice-President Jyrki Katainen gave a speech at the College of Europe; Bruges campus, on 21 March 2017 entitled "The Future of Europe."[23] Katainen is the team leader of the project team for Jobs, Growth, Investment and Competitiveness, on which Commissioner

18. Hussein Kassim, et al., "Managing the house: The presidency, agenda control and policy activism in the European Commission", Journal of European Public Policy, vol. 24, no. 5, 2017, p. 657.
19. Ibid.
20. Ibid. p. 667.
21. Ibid.
22. Ibid.
23. Katainen, loc. cit.

Moedas sits. Therefore, any proposal that Commissioner Moedas, or any other member of the project team, wishes to include on the agenda is screened by him. In the Q&A section of his speech, Katainen indicated that:

> *"The EU Innovation Council is moving quite nicely forward . . . My dear colleague Carlos Moedas who is in charge of this is working very hard on this. His idea and our idea is . . . that it could be a platform for innovator financiers and innovators."*[24] [25]

On the other hand, as Princen contends, Commission preparatory documents, such as Commission communications, signal a likely inclusion of the issue at hand in the EU's agenda.[26] [27] As he states, they constitute "preparations . . . for actual decision-making."[28] The Commission's Communication *Investing in a smart, innovative and sustainable Industry: A renewed EU Industrial Policy Strategy*, announced by Jean-Claude Juncker in his 2017 State of the Union speech[29] and published on 13 September 2017, formally marked the introduction of the EIC—albeit in a pilot[30] stage—in the European Commission's agenda.

Despite being on the EC's agenda, the EIC will most likely only make a significant impact several years after its creation. The effects of innovation policy take years to materialize.[31] Impact analyses of the activities of such bodies suggest that major effects become visible five to eight years after they have begun implementing policies.[32] It is for this reason that innovation agencies such as the would-be EIC can be considered as mostly having a long-term focus.

Yet, a plethora of short-term crises was besieging the EU in the months leading-up to the formal inclusion of the EIC in the Commission's agenda in September 2017. As Jean-Claude Junck-

24. Ibid.
25. Emphasis added by the author of this thesis.
26. Sebastiaan Princen, , Agenda-setting in the European Union, Basingstoke, Palgrave Macmillan, 2009, p. 58.
27. Ibid., p. 154.
28. Ibid.
29. European Commission, President Jean-Claude Juncker's State of The Union Address 2017, Brussels 13 September 2017.
30. Later sections in this thesis will develop the idea of the pilot stage of the EIC.
31. Jakob Edler and Jan Fagerberg, op. cit., p. 17.
32. Lennart Elg and Staffan Håkansson, Impacts of Innovation Policy - Lessons from VINNOVA´s impact studies, Stockholm, VINNOVA, 2012, pp. 9-33.

er stated in a speech to the European Parliament in January 2016:

> *"From migration to terrorism, from the Economic and Monetary Union to the United Kingdom, going through external relations, I believe that these are perfect examples of a Europe in multiple crises. We have talked a lot in recent months about the Greek crisis, the refugee crisis, and other crises. But in reality, Europe is confronted with a combination of multiple, complex, multi-stratified crises, coming from outside or inside the European Union, all of which occur at the same time."*[33] *(Author's translation).*

Few would indeed question the fact that "multiple crises" have been besetting the European Union in recent years. In 2015, the EU saw a surge in the number of incoming migrants, many of them fleeing armed conflicts in their own countries. On the other hand, the 2008 global financial crisis morphed into a sovereign debt crisis in Europe and the Eurozone Member States had to agree on a multitude of programs to prevent Greece from defaulting.

The Brexit referendum result, in June 2016, only added to the existing conundrums that the Commission President enumerated in his address. In a close contest; 52% for, 48% against, UK citizens voted for their country to leave the Union. This kick-started a tumultuous period of political in-fights within the UK government, and from March 2017 a turbulent negotiation period between the EU and Britain began.

Given this scenario of multiple crises, the following question arises: what mechanisms allowed for the EIC, a policy with long-term effects, to make it onto the Commission's agenda even when we could reasonably expect this context of multiple short-term crises to be less conducive to policies with a long-term impact?

As a preliminary response to this question, our working hypothesis will be that the EIC was introduced onto the Commission's agenda because Commissioner Moedas and his team managed to build a convincing case by arguing that lack of inno-

33. European Commission, Speech by President Jean-Claude Juncker – EP Plenary session – Conclusions of the European Council meeting of 17 and 18 December 2015, Brussels, January 2016.

vation is a problem in Europe, designed a policy proposal that was well enough developed for it to be accepted by the Commission Vice-Presidents and President, and capitalized on the opportunities provided by contemporary political events in EU politics.

The study relies namely on qualitative research. On the one hand, it employs 6 original and exclusive interviews with EU officials, representatives of interest groups, and entrepreneurs, and is coupled with publically available interview material. In parallel, it relies on insights obtained through research performed in EU electronic archives.

This paper is organised into four chapters. After this introduction, Chapter 2 presents the theoretical framework (i.e. the Multiple Streams Framework developed by John Kingdon). Subsequently, Chapter 3, the analytical section, aims to explain through the prism of MSF how the EIC managed to make its way onto the EC's agenda. The final section concludes.

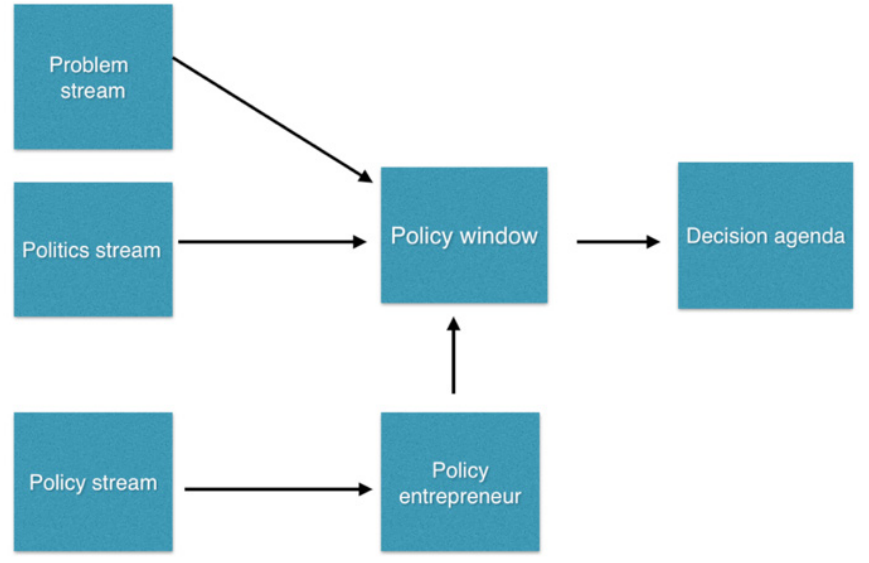
II. A LENS TO UNDERSTAND AGENDA-SETTING: THE MULTIPLE STREAMS FRAMEWORK

As indicated in the introduction, this paper will use the Multiple Streams Framework (MSF) developed by John W. Kingdon in his book *Agendas, Alternatives, and Public Policies,* with the intention of structuring the answer provided to the research question.

Agendas, Alternatives, and Public Policies focuses on the topic of agenda-setting.[34] The book's (and by extension the MSF's) core message is relatively easy to encapsulate: whether an item enters the decision agenda of a public institution depends on the confluence of three separate independent factors (called streams in the book). These factors are (1) the *problems* that are considered important by public institutions and people around them; (2) the *policy* solutions available that would be useful to address public problems; and (3) the state of *politics* at a particular point in time.[35]

34. If one were to employ political science jargon, it would perhaps be more appropriate to talk about "the federal level of the US State."
35. Ibid., pp. 196-208.

Chart 3: Diagram of the multiple streams framework



Source: Adapted from Jones et al.[36] *and Zahariadis* [37]

First, the *problem stream* refers to the list of challenges people in and around public institutions pay serious attention to.[38] These people may shift their focus of attention towards a particular problem due to a significant (usually sudden) change in a politically relevant indicator, for instance, an increase in the number of deaths due to car accidents.[39] Alternatively, problems are brought into the political spotlight via the personal experiences of policymakers.[40]

Second, the *policy stream* refers to the production and advocacy of proposals by policy entrepreneurs.[41] Policy entrepreneurs are specialists[42] in a particular policy field who advocate a

36. Michael D. Jones, et. al., "A River Runs Through It: A Multiple Streams Meta-Review", The Policy Studies Journal, Vol. 44, No. 01, 2015, pp. 13-36.
37. Nikolaos, Zahariadis, Ambiguity and choice in public policy: Political decision making in modern democracies, Washington D.C., Georgetown University Press, 2003, cited in Zahariadis, Nikolaos, cited in Zahariadis, Nikolaos, "The multiple streams framework: structure, limitations, prospects", in Paul A. Sabatier and Christopher M. Weible (eds.), Theories of the Policy Process, 2nd edition, Boulder (Colorado, USA), Westview Press, 2007, p. 71.
38. Kingdon, op. cit ., p. 90.
39. Ibid., pp. 90-94.
40. Ibid., p. 96.
41. Ibid., p. 116.
42. Ibid.

policy proposal[43] and who can be placed in a variety of positions, in the private or public sector.[44] When backing their proposal, these entrepreneurs may be motivated by their prospects of career progression, money, power, their values, and beliefs, or merely because they enjoy the process of taking part. [45]

Despite being championed by policy entrepreneurs, policy proposals are not fully developed by the entrepreneurs themselves. [46]In fact, most policy initiatives taken up by entrepreneurs are combinations, reformulations or gradual improvements from already existing proposals.[47] The MSF framework claims therefore that it is futile to attempt to find the origin of policy ideas. In Kingdon's words, "when we try to track down the origins of an idea or proposal, we become involved in an *infinite regress* . . . there is no logical place to stop the process." [48] [49]

Third, the *politics stream* refers to developments in the electoral, partisan or pressure group factors.[50] A central element in the politics stream is changes in public institutions themselves. [51]According to Kingdon, these changes mostly take place because the priorities of politicians in positions of authority change or because the politicians in these positions change themselves (due to elections) bringing with them new priorities.[52] Regular mandatory revisions of current legislation are another central component of the politic stream. As a US Senate staffer put it when asked why he pays attention to one item rather than another, "Nine out of ten times we are occupied with expiring legislation. I know that doesn't sound very inspiring, but, frankly, that's the truth."[53]

Finally, the *policy window* refers to a situation where policy entrepreneurs have the opportunity to bring together the politics, policy, and problem streams to push for the introduction of an item on the agenda of public institutions.[54] As Kingdon explains, after having developed their solution, entrepreneurs wait

43. Ibid.
44. Ibid., p. 179.
45. Ibid.
46. Ibid., pp. 141-142.
47. Ibid.
48. Ibid., p.73.
49. Emphasis added.
50. Ibid, p. 145.
51. Ibid, p. 153.
52. Ibid.
53. Ibid., p. 186.
54. Ibid., p. 165

for the right circumstances in the problem and politics streams to emerge.[55] In the problem stream, entrepreneurs will try to look for problems with which they can justify the necessity of their proposed solution.[56] In the politics stream, they will also wait for the political situation to be favorable for the inclusion of their solution.

III. How did the EIC make it onto the Commission's agenda?

3.1 The policy stream

3.1.1. Commissioner Moedas: a policy entrepreneur?

In the case of the EIC, Commissioner Moedas seems to fit well with the ideal type of policy entrepreneur put forward by Kingdon in *Agendas, Alternatives and Public Policies*.[57] As explained in Section 2, policy entrepreneurs are specialists[58] in a particular policy field who support a policy idea.[59] Moedas is a specialist in investment banking and technology.[60] Apart from having been a politician for the Portuguese Socialist Party before joining the College of Commissioners, he was trained as an engineer[61] and had several professional experiences in investment firms such as Goldman Sachs.[62] He is therefore well placed in terms of expertize in exercising his role as the head of the Commission's portfolio on research and innovation, which is mostly centered on facilitating funding for science and innovation in Europe.

Personal background seems to play a significant role in shaping the beliefs Commissioners hold, and, eventually, the decisions they take. One of the interviewees for this paper told an enlightening story about how Barroso's background had shaped his interest in science and innovation:

55. Ibid., p. 186.
56. Ibid., p. 123
57. Kingdon, op. cit., p. 129.
58. Ibid.
59. Ibid.
60. "Curriculum Vitae of Commissioner Carlos Moedas", European Commission, retrieved on 4 May 2017, https://ec.europa.eu/commission/commissioners/sites/cwt/files/cv_moedas_cw_final_review.pdf
61. Ibid.
62. Ibid.

> *"I moderated [Barroso] at a conference in Lisbon at the end of his term where he told us his personal story about his background. And his mother was a high school physics teacher, and he told this long teary story saying 'I did it for my mother,' [meaning] his interest in innovation and education and things like that. There's a personal dimension in politicians, you know?"*[63]

Moedas' beliefs played a critical role in his decision to advocate the EIC. While he was an MBA student at Harvard Business School, he attended a course by Henry Chesbrough that greatly influenced his conception on innovation. Chesbrough distinguishes between a Closed Innovation Paradigm and a new Open Innovation Paradigm that he contends emerged in the US towards the end of the 20th century. [64]

The closed innovation paradigm understands innovation as a funnel-like process within companies (see chart 4).[65] These processes are independent of each other (i.e., companies do not sell or buy their discoveries to other firms) and selective within the business (only the discoveries with expected commercial success make it onto the market).[66] In other words, and as the author himself states, this model is characterized by the fact that "although there were many ideas, few of them were available outside the walls of [large] firms."[67]

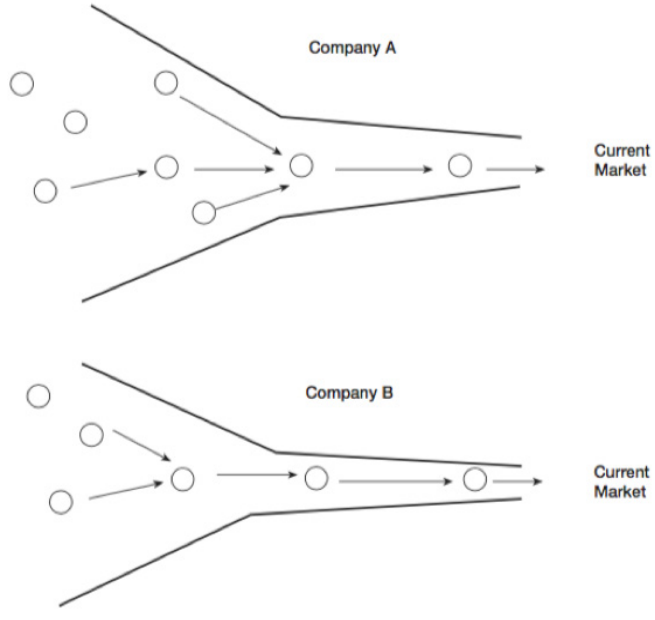
On the other hand, the Open Innovation Paradigm is characterized by the fact that ideas and the people that created them are exchanged between companies.[68] As Chesbrough puts it, in this paradigm "[i]deas abound . . . not only within each firm but also outside the firms."[69]

Although the closed innovation paradigm was the norm for much of the 20th century, Chesbrough contends that several factors have eroded its viability for firms in the US since the end of the 1990s.[70] These factors are mainly "the increased mobility

63. Interview, Brussels, 24 February 2017.
64. Henry Chesbrough,"The era of open innovation", MIT Sloan Management Review, 15 April 2003, retrieved on 3 May 2017, http://sloanreview.mit.edu/article/the-era-of-open-innovation/
65. Ibid., p. 30.
66. Ibid.
67. Ibid
68. Chesbrough, Chesbrough, Open Innovation: The new imperative for creating and profiting from technology, op. cit., p. 43.
69. Ibid.
70. Henry Chesbrough,"The era of open innovation", loc. cit.

of workers, more capable universities . . . and growing access of startup firms to venture capital." [71]

Chart 4: The knowledge Landscape in the Closed Innovation Paradigm



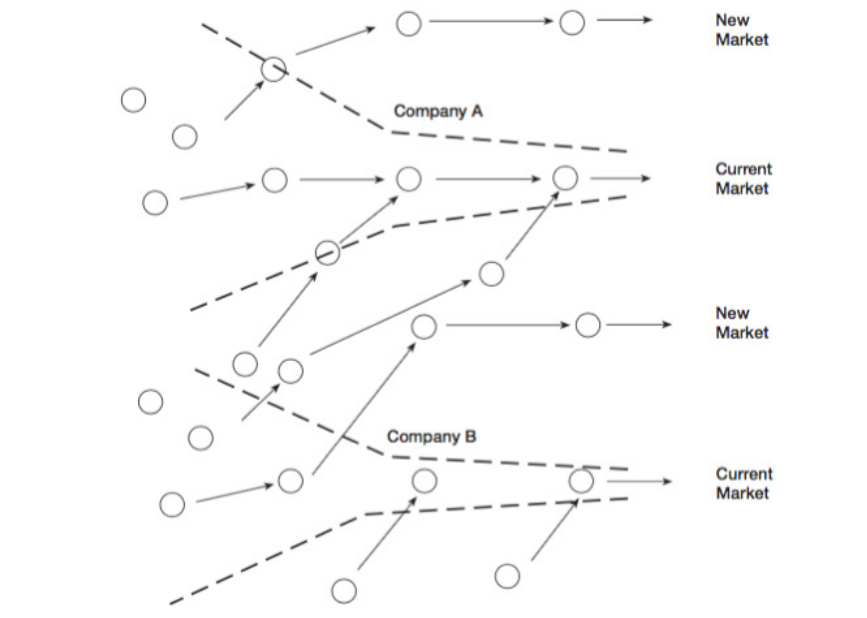
Source: Chesbrough

Moedas explained the influence that Chesbrough's ideas had on his thinking in an interview in November 2016,

> *"I was very lucky because . . . in the year 2000, I had as a Professor Henry Chesbrough, which was the man who basically is the father of Open Innovation, at a time where people really didn't understand what Open Innovation was about. And a lot of people at the time, if you remember . . . just thought that we were in this Schumpeterian kind of way that you would just create something and push it from the producer to the user. And Henry Chesbrough was the first man to say that 'look this is not a linear process' . . . and I think that today everybody understands that."* [72]

71. Henry Chesbrough and Marcel Bogers, "Explicating open innovation: Clarifying an emerging paradigm for understanding innovation", in Henry Chesbrough, Wim Vanhaverbeke, and Joel West (eds.), New Frontiers in Open Innovation, Oxford, Oxford University Press, p. 16.
72. "ESPAS 2016: Game Changers for Inclusive Innovation - Carlos Moedas", European Political Strategy Centre EPSC YouTube channel, 23 November 2016, retrieved on 4 May 2017, https://www.youtube.com/watch?v=i-AQrYOi1-NA

Chart 5: The knowledge Landscape in the Open Innovation Paradigm



Source: Chesbrough[73]

The idea of Open Innovation is at the core of why Moedas believes that the EIC is necessary for Europe. In practice what this determines is that to supplement the lack of venture capital in Europe (which is at the center of the US's paradigm of open innovation) the EIC would facilitate funding for new startups with the potential for growth.

3.1.2. A NEW IDEA?

As we have seen in Section 2, most policy initiatives that policy entrepreneurs advocate for are combinations, reformulations or gradual improvements of existing proposals.[74] In his book *Agenda-setting in the European Union*[75] Sebastiaan Princen argues that frequently this is also the case in the European Commission, which often "picks up what is in the air."[76]

The EIC was not a new idea either. As Moedas put it in a panel discussion organized by Science Business, "frankly, I mean

73. Ibid., p.44
74. Kingdon, op. cit., pp. 141-142
75. Sebastiaan Princen, op. cit., 2009.
76. Ibid.

the idea [of the EIC] was not at all mine. I mean this is an idea that has been floating for a long time. I'm just as a politician trying to put it and pull it together."[77] In fact, in 2002, Hans Wigzell, the director of the Center for Medical Innovations at the Karolinska Institute in Sweden, had already proposed the creation of an EIC in an opinion piece in *Science*. [78]

3.1.3. An evolving proposal

As demonstrated in Chapter 2, policy proposals continuously evolve.[79] We also saw in Chapter 2 that Moedas first proposed the creation of the EIC in a speech on 22 June 2015. This fragment of his statement shows he initially thought about the project in broad terms,

> *"Europe does not yet have a world class scheme to support the very best innovations in the way that the European Research Council is the global reference for supporting excellent science. So I would like us to take stock of the various schemes to support innovation and SMEs under Horizon 2020, to look at best practices internationally, and to design a new European Innovation Council. This is not for tomorrow, but I believe we should discuss it as a major element under the mid-term review of Horizon 2020."*[80]

As a Commission official explained, at the time Moedas did not have a concrete plan on what the EIC would become,

> *"The normal process in the Commission is that we would spend a year, maybe two years, preparing, doing various analyses, doing stakeholder consultations and then we would propose something. The approach we took for the European innovation Council was a different approach. Commissioner Moedas decided to take a risk and so he actually announced it before we'd done any . . . preparatory work because he wanted to set out an ambition.*

77. "Q&A with Carlos Moedas: An open dialogue on the future shape of the European Innovation Council", Science Business YouTube channel, 16 February 2016, retrieved on 12 March 2017, https://www.youtube.com/watch?v=KHc7ec0OwHg
78. Hans Wigzell, "Back to the feature Index", Science, vol. 295, no. 5554, 18 January 2002, p 446.
79. Kingdon, op. cit, pp. 141-142.
80. Carlos Moedas, Open Innovation, Open Science, Open to the World, loc. cit.

> *But it was a risk.* Because we didn't know what the European Innovation Council was at all when he made the announcement *and I think you need a certain amount of time . . . to see what people think and rather than that being done before the announcement it was done afterwards. So we kind of announced the concept or, you know, just a statement that he thought we needed to do something on innovation, 'We have a problem here; we need to recognise the problem. We also need to recognise that we are not really helping this[these] kind[s] of companies in our current research and innovation programme. We don't have anything like the brands, the prestige, the importance that we have when it comes to science funding.' And so it was very much a statement that that's what he wanted to change and he put a label on it called the European Innovation Council."*[81]

Or, as Moedas himself explained in an interview a few weeks later, "it's food for thought . . . it's an idea that came from conversations I've had in the first eight months . . . I'm not going to lose face if the idea at some point becomes something different."[82]

Between July and December 2015, the Commission initiated a brainstorming phase in which details on how the EIC should operate began to be developed. In parallel, the EC received preliminary position papers sent by civil society organizations such as the European Association of Research and Technology Organisations and from Commission advisory groups, like the Future & Emerging Technologies Advisory Group.[83] As a Commission official stated,

> *"We . . . had a period of about, say about six months, where we were having some discussions, and some organisations sent us some ideas. So that's what took us to the end of 2015. And what we were also doing at that stage was to do kind of fact finding on what was going on in the US and around the world [and] what was go-*

81. Interview, Brussels, 17 March 2017.
82. Ibid.
83. "European Innovation Council, Your Ideas", The Internet Archive [Originally from the European Commission website], 26 February 2016, retrieved on 09 August 2017, https://web.archive.org/web/20160226234255/http://ec.europa.eu:80/research/eic/index.cfm?pg=your-ideas

ing on in the [Member] States."[84]

On 16 February 2016, at the end of the brainstorming phase, Moedas participated in a Conference organized by Science Business, a Brussels-based consultancy firm focusing on research and innovation. In this, he gave details about the proposal that was being drafted by the Commission.[85]

First, at the conference, Moeadas clarified that the primary objective of the EIC would be to facilitate the emergence of market-creating innovation.[86] Market-creating innovation is a term coined by Clayton Christensen and refers to innovations "that transform complicated or costly products so radically that they create a new class of consumers or a new market."[87] As a Commission official explained in an interview, the term market-creating innovation is often juxtaposed with the concept of incremental innovation. Incremental innovation involves innovative actions that result in greater efficiency in the production process (e.g., the robotization of an assembly line), and in contrast, market-creating innovations are expected to create new professions and new jobs.[88]

Second, with the intention of favoring market-creating innovations, Moeadas announced that the Commission would aim at making existing instruments to finance innovations more "bottom-up."[89] Currently, under Horizon 2020 the Commission's primary tool to support innovators is the so-called SME instrument which requires applicants to indicate the sector of their venture (e.g., ICT, biology, chemistry). The Commissioner consequently announced that with the EIC the Commission would not require applicants to state which field their venture would focus on, therefore allowing for ideas that cut across disciplines to be selected.[90]

Third, Moedas stated that the EIC would introduce interviews in the selection process to incorporate some of the practices that are employed by venture capital firms in this regard. As he

84. Interview, Brussels, 17 March 2017.
85. "Q&A with Carlos Moedas: An open dialogue on the future shape of the European Innovation Council", loc. cit.
86. Ibid.
87. Clayton M. Christensen, and Derek Van Bever, "The capitalist's dilemma", Harvard Business Review, vol. 92, no. 6, 2014, pp. 60-68.
88. Interview, Brussels, 17 March 2017.
89. "Q&A with Carlos Moedas: An open dialogue on the future shape of the European Innovation Council", loc. cit.
90. Ibid.

stated,

> *"If you talk to any [venture capital firm], they will tell you more important than the idea, more important than what's in the paper is that 'I met that group of people that . . . have a passion, have a really unique way of looking at the idea, and so they will make it happen. They don't know yet what, but they will make it happen."*[91]

A Commission official elaborated further on the idea of introducing interviews in the selection process for funding,

> *"People [currently] come to us with a proposal, we look [at] it on the paper, and we decide. Shouldn't we be interviewing these people as venture capitalists do? So the first change is that we will put interviews in the new programme . . . Why? Because the people . . . for me are much more important than the idea. And so this is a simple change that can make a difference in terms of catching people that come to us with an idea on a paper, but we know they have a bigger potential."*[92]

Finally, Moedas indicated that the EIC would provide mentorship to innovators.[93] As he explained, "The idea of the European Innovation Council somehow . . . should be also to have a group of people that are mentors to these young people."[94]

In this brainstorming phase the Commission also reduced its ambitions for a budgetary reform of Horizon 2020. Commissioner Moedas had initially announced in his speech in June that the EIC should be discussed "as a major element under the mid-term review of Horizon 2020,"[95] implying significant changes in Horizon 2020's budget and rules. However, the Commission's services were wary of the political risks that attempting to perform these changes would entail. At the Science Business conference in February 2016, the Director-General of Research and Innovation (DG RTD), Robert-Jan Smits, explained,

> *"There is . . . one fundamental problem which we should*

91. Ibid.
92. Interview, Brussels, 17 March 2017.
93. Q&A with Carlos Moedas: An open dialogue on the future shape of the European Innovation Council", loc. cit.
94. Ibid.
95. Carlos Moedas, Open Innovation, Open Science, Open to the World, loc. cit.

> *not overlook if we are going to revise Horizon 2020 and we're going to say: 'We are going to add a little more budget in this part and perhaps take it away from there' . . . First of all, this requires codecision . . . And that can take up to two years and then we're already in Framework Programme 9. And, secondly, I have been doing the negotiations for Horizon 2020 over two years, and every comma, every word, every euro cent is the result of a political compromise, and breaking that open will be extremely difficult."*[96]

As a Commission official explained, Moedas' cabinet seems to have taken Smit's advice on board.

> *"The decision we took was that if we want to do a sort of serious European Innovation Council, this would require changes in our programme [, Horizon 2020], changes in the rules, changes in how we manage the funding . . . and we can't do this without changing the legislation."*[97]

Moedas and his cabinet consequently decided to make changes within Horizon 2020 that would not require legislation and to postpone the reforms which affected the budget for the drafting of the next Framework Programme. As the Commission official explained, "changing the legislation as you probably know is kind of a 2-3 year process, so the decision we took was that we would include this in the proposal for the next Framework Programme."[98]

Yet, Moedas' cabinet realised that even without changes in the Horizon 2020 budget, they could still make many of the qualitative modifications they had envisioned. Moedas and his cabinet consequently decided to reform the SME instrument together with other existing programs within Horizon 2020 to create an EIC pilot. Thus, the Commission chose to "proceed step by step, with a preparatory phase in 2018-2020 and a full-scale EIC in the next programme."[99] As an EC official explained,

96. "The future of Horizon 2020: Budget politics and survival strategies ", Science Business YouTube channel, 18 February 2016, retrieved on 4 May 2017, https://www.youtube.com/watch?v=ucxEyMM-NZs
97. Interview, Brussels, 17 March 2017.
98. Ibid.
99. "European Innovation Council – next steps", European Commission YouTube Channel, 12 October 2016, retrieved on 12 August 2017, https://www.youtube.com/watch?v=8Si16j28uyk&t=185s

> "*We saw that actually, we have flexibility within the existing rules to make quite a lot of changes already. So, we identified ten changes that we thought would be serious changes and that would be doable without changing the legislation.*"[100]

In October 2016, Moedas gave a speech in which he presented the list of 10 changes aimed at creating the pilot version of the EIC, some of which had already been announced at the February conference organised by Science Business.[101] The proposed changes are summarized in the table below.

Table 3: The EIC during the pilot phase

Diagnosis and overarching objective
Europe does poorly in disruptive/market-creating innovation (i.e. radical transformation of products, creating new markets, e.g. Facebook, Netflix, AirBnB). That is why the overall objective of the proposed EIC would be to promote market-creating innovation.
Measures to be taken during the pilot phase
1. Presentation of existing financial instruments to support innovation in a one-stop-shop format on the Commission's website.
2. Making the SME instrument fully bottom-up to support the most innovative ideas without forcing applicants to choose a predefined topic.
3. Adaptation of the evaluation criteria to target market-creating innovation.
4. Mentoring and coaching for innovators.
5. Introduction of face-to-face interviews.
6. Measures aimed at helping firms scale-up and bring in private investors.
7. Gathering of data to draw lessons based on financed projects to improve future support or identify regulatory barriers.
8. Stronger coordination with existing initiatives such as the European Institute of Technology to avoid overlaps.

100. Interview, Brussels, 17 March 2017.
101. "European Innovation Council – next steps", loc. cit.

9. Changes in the user interface through the Commission's website and guidance to ensure that the EC "speaks the same language as the innovators."
10. Establishment of a High-Level Group of innovation advisors which will help fine-tune the measures to be adopted to plan a major overhaul of future Framework Programmes, including changes in the budget.

Source: created by the author based on interview material and an October 2016 speech by Commissioner Moedas.[102]

3.2 The problem stream

As we observed in Section 2, policy entrepreneurs seek public problems that can serve to justify their policy solutions. In an interview, an official at the European Commission stressed the importance of finding a societal challenge that can justify the need to give innovation a space in the EC's agenda:

> *"You need to tell a story for which there is political will. I think that's the answer. So it's this sort of marketing problem . . . This is not just about the substance of innovation; it's also about the behavioral science of political decision-making, it's about the role of framing in political campaigning and policy-making."*[103]

Commissioner Moedas has attempted to justify the necessity for an EIC with several public problems. In November 2016, during a speech at the Lisbon Council, he linked the EIC to the rising opposition to globalization, which seemed to be prominent at the time—with the Brexit referendum just having taken place in June 2016 and an apparent growing support for populist movements throughout Europe. [104]

Within this context, he proposed the creation of the EIC as a way to facilitate the emergence of firms in sectors other than ICT, so that wealth can trickle down to people that possess skills different from those required in the ICT sector. He also presented it as a way to facilitate the emergence of new firms in the less developed regions of Europe.[105]

102. Ibid.
103. Interview, Brussels, 24 February 2017.
104. "The 2016 Guglielmo Marconi Lecture: Carlos Moedas", The Lisbon Council YouTube Channel, retrieved on 01 August 2017, https://www.youtube.com/watch?v=HR_THF8xs1U
105. Ibid,

Moedas and his cabinet are also making references to current trends in the ICT sector to justify the need for an EIC. In an interview in March 2017, a Commission official stressed that the fact that ICT is going to become prevalent in traditional "physical world" sectors, such as the automotive industry, poses a threat to Europe's firms:

> *"If you look at the statistics of company growth in Europe and companies that really made it into new market leaders, the statistics are extremely poor, and they've been very poor for the last 20-30 years. If you look at the top, the Fortune 500, you look at US companies; most of them are from the last 20 years. You look at East Asian companies; all of them are new companies. If you go to Europe all of these companies, [they] are over one hundred years old. We don't... we simply haven't had new companies that have grown up into world leaders in new markets and new technologies . . . A lot of the innovations in the future will not be consumer Internet, they won't be the Googles, this's all been done, but it will be this combination of physical and digital . . . And then if you look at what's happening in the next 20 years, and the kind of revolutions that are going to happen in the automotive industry, which is a traditional strength in Europe; we could be In real trouble, unless we get much better at moving quickly in new technologies in scaling up companies and taking the market lead in these new markets that are emerging."*[106]

Moedas and his team have also attempted to justify the need for the EIC by highlighting the necessity for a public body aiming at facilitating funding for innovation *at the EU level.* As we have seen, several government bodies analogous to the EIC exist in EU Member States. The Commission is therefore presented with the challenge of finding problems that Member State agencies face and that can only be solved at the EU level. One of these problems is the lack of capacity on the side of national innovation agencies to facilitate the emergence of "global champions." As a Commission official explained in an interview for this paper:

> *"**Interviewer:** And this is linking it to the European level question . . . We see programs that try*

106. Interview, Brussels, 17 March 2017.

to help finance companies. I think especially you could look at Sweden and what they are trying to do: finance . . . innovative companies through the help of the government. Why should we do it at the European level if it's working in the case of Sweden nationally?

European Commission Official: *So, it's a good question, and we had meetings with Member States, but also the innovation agencies. We had a very interesting meeting with Vinnova from Sweden, Tekes from Finland, with Innovate UK from the UK, this kind of innovation agencies. And this was exactly the question we discussed. And what struck me was a very strong consensus from the national agencies to say: 'yes we can support our local companies. Yes we know this, we can do this very well. But if you want scale companies up and really making global champions, this is not something that we can do in the Swedish innovation agency or Finish innovation agency. This is really where we need the European Union to come in. So we would see the reason for doing this at European level based on two things. One, the idea of having competition at the European level. So if we really want to find the best innovators, it's much easier to do that if you have a competition at European level than a competition at national level. And this is something that we very much see with the European Research Council. So that's one point. And then the second point is that if you want to have companies that can really scale up . . . they need more funding; they need to be attractive to private investors across Europe. This is something that we are better able to do at European level than in a national funding. And it's been very interesting that [in] the discussion with these national innovation agencies, they did not contest that. They were asking for it and saying: 'we would very much welcome this and we see it as something that we can't do nationally.'"*[107]

107. Ibid

In Section 2, we have seen that policy entrepreneurs often utilize politically relevant indicators to show the existence of societal problems that may help justify the necessity for their proposal.[108] Moedas and his cabinet seem to have followed a similar strategy, namely by focusing on the gap between the number of unicorns between Europe and the United States. As the Commissioner explained at the Science Business conference,

> *"The other night I was looking at the number of companies that are above one billion in the United States, and there are more than one hundred of these unicorns. And I looked at the number for Europe and, suddenly, I saw less than twenty. And this is just something that we cannot afford. And there's no logic about it because we have the way, and we have the assets, and we have the people, and we have the knowledge, and we've talked so much about how to capture this value. We have the industry; we have a great health industry, you have, the environmental industry, we have the technology, and then we don't do it."*[109]

On the other hand, as explained in Section 2, policy entrepreneurs also employ personal experiences to highlight the existence of societal problems.[110] Commissioner Moedas appears to have been using similar strategies. At the Science Business conference he stated,

> *"I had this great visit in Berlin a couple of weeks ago, and I decided to go undercover to visit a company there that is called Rocket Internet. And I went there to this company, and I decided to talk to these people. They're amazing people; they create companies. They have eight floors, and they start on the top floor with ideas, and the company comes down, and eighteen months later basically, there's a company running! And people just go away with a company, and they create their own life and their own ideas, and it's a fantastic business. And very young . . . brilliant, German young people. And so I told them: 'Look, why don't you come to our pro-*

108. Kingdon, op. cit., pp. 90-94.
109. "Q&A with Carlos Moedas: An open dialogue on the future shape of the European Innovation Council", op. cit.
110. Kingdon, op. cit., p. 96.

grammes? Why don't you come to the European Union?' And they basically told me . . . 'We need speed to get actually to eighteen months to have a company running, and that [is] something that we feel that we have with the [Venture Capital firms] and we don't know . . . Do you have that kind of speed? Can you help us on that?"[111]

3.3 The politics stream, the policy window, and coupling

In the two previous Sections, we have seen how Commissioner Moedas and his cabinet have progressively developed their proposal on the European Innovation Council. We have also seen how they have attempted to find several societal problems such as discontent with globalisation or a lack of startups in Europe to justify the need for the EIC. This Section will look at which developments in the politics stream Moedas and his cabinet may have used to their advantage to advocate the inclusion of the EIC in the Commission's agenda.

As was explained in Section 2, reviews of current legislation offer excellent windows of opportunity for policy entrepreneurs who want to introduce their proposal onto a public institution's agenda. As we have seen, on 22 June 2015 Commissioner Moedas announced in a speech that the EIC should be discussed "as a major element under the mid-term review of Horizon 2020."[112] However, as we have observed, because Moedas' initial proposal entailed changes in Horizon 2020, which was politically unrealistic, the policy window of opportunity was missed.

In Section 2, we also saw that changes in public institutions themselves are a central element in the politics stream.[113] It was explained that these changes mostly take place because the priorities of politicians in positions of authority morph, or because elections change the course of politics.[114]

On 23 June 2016, the British people voted in favor of leaving the European Union. As a response, the Commission started a reflection process on the future of the EU-27 in which the compe-

111. "Q&A with Carlos Moedas: An open dialogue on the future shape of the European Innovation Council."
112. Carlos Moedas, Open Innovation, Open Science, Open to the World, loc. cit.
113. Kingdon, op, cit,, p. 153.
114. Ibid.

tencies the Union was to focus on were reassessed.[115] In this context of reflection about the future of Europe, in September 2016, during the State of the Union speech, Juncker announced that the EC would be issuing a White Paper in March 2017. The aim of the paper, as announced by Juncker, was to steer a debate between the EU-27 heads of state and governments on the future of the Union on the occasion of the 60th anniversary of the Treaty of Rome.[116]

This reflective environment seems to have increased the prominence of innovation within the European Commission's priorities. As an EC official stated,

> *"I think Juncker himself and the College are changing to a different mode where because of everything going on, people see the need that they have to think about the future, that we need some clarity about what Europe is and what it should be focusing on. And this is bringing research and innovation back up the political agenda."*[117]

This climate of reflection, in which innovation seems to be gaining prominence, appears to have facilitated the inclusion of the EIC in the EC's preparatory actions for decision-making. As we have seen, Princen argues that EC preparatory documents, such as Commission communications, signal a likely inclusion of the issue at hand on the EU's agenda.[118] This political climate, in which innovation gained prominence in the College of Commissioners, appears to have facilitated the mentioning of the EIC in the EC's Communication *Europe's next leaders: the Start-up and Scale-up Initiative* published in November 2016.[119] As we have seen, in this document the Commission stated that it intended to "make changes to Horizon 2020 for the period (2018-2020) . . . [More specifically,] the EC will consider creating a European Innovation Council for future programmes."[120] Therefore, judging from the Communication's content, the EIC appeared likely to make it onto the Commission's agenda.

115. Ralf Drachenberg, et al., From Bratislava to Rome: The European Council's role in shaping a shared future for EU-27, European Parliamentary Research Service, 2017, p. 6-11.
116. European Commission, President Jean-Claude Juncker's State of The Union Address 2017, Brussels 13 September 2016.
117. Interview, Brussels, 17 March 2017.
118. Sebastiaan Princen, op. cit., p. 58.
119. European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Europe's next leaders: the Start-up and Scale-up Initiative, op. cit.
120. Ibid. p. 8.

After the publication of the *Scale-up Initiative*, the EIC, however, continued its journey towards the EC's official agenda. In a College of Commissioner's meeting held on 22 February 2017 Juncker explained that the purpose of the White Paper whose draft "he was preparing"[121] was "to start an exercise in collective thinking that he would outline in his 2017 State of the Union speech."[122] The European Council could then "draw the first conclusions in December and decide on a line of action to be implemented in good time for the European Parliament elections in June 2019." [123]He went on to add that "to stimulate the debate, the Commission would present a series of reflection papers in the coming months, all of which would focus on the perspective of Europe in 2025."[124] He stressed that the "reflection papers would be drawn up under the steer of the Vice-Presidents together with teams of Commissioners."[125]

In the same meeting, the College of Commissioners engaged in a policy debate on the preparation of the White Paper that the Commission would adopt the following week. Juncker encouraged the Commissioners to come forward with proposals on what policy areas the EU-27 should focus on. According to the minutes of the meeting, Commission Members stressed the "the desirability of considering new tasks for Europe which would mobilize its citizens and make them proud, for example in the field of research and *innovation*."[126] [127] Some Commissioners appeared to have thus advocated during this meeting an inclusion of innovation policy in the White Paper. The text of the *White Paper on the Future of Europe* a week later shows that innovation was consequently included in the document. As such, the White Paper, which Juncker presented to the European Parliament on 1 March 2017, envisioned for 2025 a possible expansion of the EU's competences in several domains, one of them being innovation policy.[128] Therefore, with this inclusion in the *White Paper* innovation appears to have confirmed its ascension in the EC's policy priorities.

121. European Commission, Minutes of the 2201st meeting of the Commission held in Brussels (Berlaymont) on Wednesday 22 February 2017 (morning), op. cit., p. 34.
122. Ibid.
123. Ibid.
124. Ibid. p.29.
125. Ibid.
126. Ibid. p. 32.
127. Emphasis added.
128. European Commission, White Paper on the Future of Europe: Reactions and scenarios for the EU27 by 2025, Brussels, 1 March 2017, p. 22.

The Commission later confirmed this increase in the relevance of innovation among its long-term priorities in the May 2017 *Rome Declaration*. During the 60th anniversary celebrations of the Rome Treaties, the EU 27 Member States, the European Council, the European Parliament, and the European Commission drew on the Juncker's White Paper to issue the so-called *Rome Declaration*, where they set out their shared vision for the future of Europe. In the document, innovation was also presented as one of the areas where the EU should intensify its work in the long run. As the Declaration stated:

> *"We, the Leaders of 27 Member States and of EU institutions, take pride in the achievements of the European Union: the construction of European unity is a bold, far-sighted endeavour . . .We . . . pledge to work towards . . . open avenues for growth, cohesion, competitiveness, innovation, and exchange."*[129] [130]

This rise of innovation in the EC's priorities for the long term was confirmed by an ensuing EC Communication, which developed some of the ideas put forward in the White Paper. In essence, a May 2017 EC communication entitled *Reflection Paper on Harnessing Globalisation*, stated that,

> *"Policies need to help businesses continuously innovate. Only by creating products and services that meet consumers' evolving demands can they thrive on global markets and create prosperity and jobs . . . [Innovation] should help European companies become global players and quickly pick up on new technological trends."* [131]

This ascension of innovation in the EC's priorities in the long term was confirmed by the Commission Vice President Jyrki Katainen on 28 July 2017. In an interview with Science Business he stated that,

> *"There are two obvious areas in which the EU's*

129. European Council, European Parliament and European Commission, The Rome Declaration Declaration of the leaders of 27 member states and of the European Council, the European Parliament and the European Commission, Rome, 25 May 2017.
130. Emphasis added.
131. European Commission, Reflection Paper on Harnessing Globalisation, COM/2017/240 final, Brussels, 10 May 2017. P. 17.

> *added value is greatest. The first is security, and another one is innovation or research. Just from a pragmatic point of view, what do we need in Europe more than what we have at the moment? We need more security cyber, hybrid [and] traditional . . . The second thing is [that] . . . science is global, and innovation networks are global. That's why would be reasonable to invest in this issue, because it's the way we can improve added value, because we believe in a social model economy which is based on the highest possible added value."*[132]

This rise in the importance of innovation among the EC priorities seems to be palpable in the day-to-day interactions between Commissioners as well as a markedly political matter. As a Commission official stated,

> *"That's about politics. I mean, where you put your time. We are having a lot more meetings now in the College of Commissioners, in the project teams, particularly the Vice President Katainen. It's not just us; he is very much saying 'this is what the Commission needs to focus on.' The same with Ansip… So, you see a lot of this. It's not just the portfolio of innovation. You see a lot of these people around the College, [for example] Oettinger, who's now doing the budget resources is saying: 'this is an area that we really need to focus on, and we haven't had time to focus on in the first two years, but the second half of the mandate [we should focus on this].'"*[133]

In this context of an increase in prominence of innovation within the EC's political priorities, the EIC formally made it onto the Commission's agenda. On 13 September 2017, the EC issued the *EU Industrial Policy Strategy*. As was explained in the introduction, in this document the Commission stated that the 2018-2020 Work Programme for Horizon 2020 was "endowing a European Innovation Council Pilot with a budget of over €2.6 billion to more effectively support projects focused on market-creating innovation."[134]

132. "€120 billion a 'good target' for research and innovation need in next budget, says EU Vice President", Science Business YouTube Channel, 28 July 2017, retrieved on 14 September 27, https://www.youtube.com/watch?v=hdgTICuMhUg/

133. Interview, Brussels, 17 March 2017.

134. European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, Investing in a smart, innovative and sustainable Industry: A renewed EU Industrial Policy Strategy.

The evidence analyzed in this Chapter, therefore, appears to suggest that the rise in the importance of innovation within the Commission's political priorities has facilitated the formal inclusion of the EIC on the EC's agenda. Commissioner Moedas seems to have played an active role in making innovation a more prominent priority of the EC. In an informal discussion, a Commission official stated that the main reason why innovation was considered as one of the areas for a future expansion of EU competences was that Moedas had "made a very strong case for it." [135]It would seem as though Commissioner Moedas, aided by his cabinet, capitalized on the changes in the political mood caused by Brexit to advocate innovation to have a more prominent role in the Commission's long-term priorities, and for it to appear on the White Paper on the future of Europe. This seems to have paved the way for the formal inclusion of the EIC on the Commission's agenda.

IV. Conclusion

On 22 June 2015, the European Innovation Council (EIC) was proposed as an exploratory initiative by Commissioner Carlos Moedas for an EU-level agency of innovation, which would be analogous to bodies of this kind that exist in the EU Member States. Two years after Moedas' announcement, in mid-2017, measures aiming at the establishment of the EIC are formally on the European Commission's agenda.

As we observed, the EIC, as is the case with other innovation agencies, will most likely only have a significant impact after several years of its creation and can thus be considered as a policy with a mostly long-term focus.

However, as this paper has pointed out, a plethora of short-term crises, from migration to terrorism, and going through Brexit, was besieging the EU in the months leading up to the formal inclusion of the EIC in the Commission's agenda. Given this scenario of multiple crises, we aimed at answering the following question: what mechanisms allowed the EIC, a policy with long-term effects, to make it onto the Commission's agenda even when we could reasonably expect this context of multiple short-term crises to be less conducive to policies with a long-term

135. Bruges, 21 March 2017.

impact?

To assist in this endeavor, we have employed the Multiple Streams Framework developed by John Kingdon, which examines how policy entrepreneurs capitalize on societal problems and political events to introduce a policy proposal they champion onto a public institution's agenda. To that aim, Kingdon structures his theory around three core concepts: the policy stream, the problem stream, and the politics stream. The ensuing analysis we have carried out has therefore revolved around these three terms.

From the policy stream perspective, the analysis of the evidence has yielded several results. First, we have observed that Moedas appears to fit well with the ideal type of a policy entrepreneur. His beliefs relate strongly to the proposal at hand. In fact, the core of why he contends that the EIC is necessary for Europe stems from a course he took at Harvard Business School in the year 2000 taught by Henry Chesbrough, which strongly influenced the Commissioner's perspective on innovation.

Second, we have been able to observe that the EIC as a proposal has evolved continuously. As the MSF predicts, the idea of an EIC has long been floating around the European institutions. The first known appearance of the concept was in a 2002 opinion piece by Hans Wigzell, the director of the Centre for Medical Innovations at Karolinska Institute in Sweden, in the academic journal *Science*. The idea remained in European institutions for 13 years, with no formal concrete steps taken. However, on 22 June 2015, Moedas declared his intention of creating an EIC. Since then, the proposal has evolved within the Commission with several additions being made during a process of two years.

In the Junker Commission, Vice-Presidents and Vice-President Timmermans have come to play a central role in the vetting of initiatives coming from Commissioners or the DGs and thus defining the Commission's agenda. In Section 2 we saw that before proposals can be included on the agenda of public institutions, policy entrepreneurs must have thoroughly developed their initiatives. Moedas and his team have progressively refined their proposal on the EIC, which evolved from being a vague concept to a concrete list of 10 actionable items. This appears to have paved the way for facilitating an acceptance of the EIC proposal by Vice Presidents Katainen and Timmermans and for the gradual inclusion of the EIC in the EC's agenda, which culminated formally on

13 September 2017.

From the problem stream perspective, the evidence that has been analyzed also allows us to draw some conclusions, which give us a better understanding of how the EIC could make its way onto the EC's agenda. First, we have seen how Commissioner Moedas made use of existing indicators on the lack of highly successful startups to claim the existence of an innovation problem in Europe. Also, we have observed how he has made references to some personal anecdotes to further support this case. Finally, the analysis of the evidence gathered has shown that Moedas and his team have contended that some particular problems regarding innovation span across Europe and that therefore a European Innovation Council is needed besides the already existing national innovation councils.

On the politics stream side, the evidence we have analyzed has also shed light on the mechanisms that have allowed the EIC to make it onto the EU's agenda. First, we have seen that Moedas and his cabinet attempted to capitalize on the mid-term review of Horizon 2020 to push for the EIC to be included in the Commission's work programme. This attempt failed because Moedas' initial proposal entailed changes in Horizon 2020, which was politically unrealistic. An interesting turn of events came with the Brexit referendum in June 2016. Brexit opened a window of opportunity in that it kick-started a reflection process within the Commission on what domains the European integration process should focus on. Commissioner Moedas and his team took advantage of this window of opportunity which allowed them to make a case vis-a-vis the Commission President and Vice-Presidents for innovation to have a more prominent role in the EC's priorities for the future of the EU 27. This appears to have paved the way for the introduction of the EIC in the 2018-2019 Work Programme for Horizon 2020.

Hence from the preceding discussion, we can affirm that the hypothesis set out in the introduction appears to be overall verified. Yet, an important caveat needs to be highlighted. There is unquestionable evidence that Commissioner Moedas and his team have attempted to justify the necessity for a European Innovation Council by making references to societal problems that the EIC could solve. There is also clear evidence that Moedas and his cabinet have progressively developed the EIC proposal, and we can safely assume that this exercise of concretization has been a requirement for the proposal to be able to formally make it onto

the EC's agenda. However, the evidence is less conclusive when it comes to political variables. This paper has shown that Moedas has actively pushed for innovation to be considered as one of the areas in which the European Union should expand its activity in the long run. It is not clear, however, whether even without such advocacy endeavors by the Commissioner the EIC would have made it onto the Commission's agenda. Additional interviews with Commission officials and further in-depth archival research might be able to elucidate this point.

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