



European Civil Liberties Network

Essays for civil liberties and democracy in Europe

Checking and balancing polity-building in the European Union

Deirdre Curtin

“Is the Council aware of any website maintained by a European public authority which is better designed to frustrate the ability of citizens to access information than that of the Council of Ministers?” [1]

From Market to State?

The days of the European Union being what some termed a “market without a state”[2] or a “stateless market” [3] is long past. Back in the days before the Treaty of Maastricht and the leap to more overtly *political* integration, the European integration process could indeed be conceived as in its core about the construction and consolidation among the constituent Member States of a free market (an “internal market”). It was a fairly win-win scenario with markets being opened up for the benefit of traders and consumers by a combination of judicial activism, legislative harmonization, mutual recognition of (product) standards and technical standardization. There were of course inroads made into national sovereignty and national laws had to be disapplied on occasion but the inroads were in the field of economic law (and later some “flanking” issues such as the environment and consumer protection). Of course all of this could be considered necessary foundations in order to achieve the long term goal of a more political federation. This is certainly what the federalists and neo-functionalists believed, the integration process was moving forward step-by-step towards - some day - a more overtly *political* union. In the meantime what was termed (and largely accepted by the so-called passive

consensus that existed among the national political classes) “integration by stealth” could progress, little by little, with the bureaucrats (and at times the judges) firmly in the driving seat.

The Treaty of Maastricht can in many ways be considered the very explicit crossroads, the moment that the EU’ s politicians signalled both internally and externally that it would henceforth also be integrating areas such as justice and home affairs within the institutional framework originally conceived for purely market integration. Gradually as the decade of the IGC’ s advanced (in the 1990’s) changes were made in the legal frameworks and the legal instruments in a manner that consolidated ambitions in this - qualitatively different - area. The scenario shifted at the same time from a relatively optimistic win-win one to a more troubled scenario with very clear winners and *losers*.

The winners in this incremental process have this time not been individual citizens or companies but rather their statal executive counter-parts in the constituent Member States themselves and at times at the central EU level too. Thus we have seen the powers increased and the role strengthened of sub-state authorities such as the police, customs and enforcement authorities more generally. Moreover we have seen the establishment of more operational executive type bodies at EU level itself (such as Europol and the External Borders Agency) as well as extensive databases being administered by EU institutions (for example in the case of SIS II it is proposed that

it will be managed jointly by the Commission and the Council General Secretariat [4], in explicit recognition it seems of the split nature of the EU executive). The losers, sadly, have tended to be the individual citizens and non-citizens who have seen their rights and interests adversely affected by the changes that have been made and their civil liberties often challenged and eroded.

For more than a decade then the European Union has as a matter of empirical and normative fact been more than a market with or without a state. That “more” has ever so incrementally grown to the point that one can in my opinion consider the EU to have inched closer towards what it means to be a “state” in today’s world. This is not to say that the EU can be compared in all respects to a state - this is clearly not the case. But what it has done is in the past decade or more is two-fold. On the one hand it has at the centralized EU level acquired certain specific trappings of “states”. On the other hand it has taken the logic and the instruments of the internal market and sought to transplant them beyond the market and the world of companies, traders and consumers to the very core of state power, criminal law, the powers of enforcement authorities and intelligence actors etc. In the manner of its so doing the hypothesis might well be that it has shifted the paradigm of the EU: from market to - dare one put it in such politically incorrect terms these days - to (non-) state.

Refining the paradigm: enter trans-governmental networks

At the same time even as a hypothesis this is too strong in terms of the absolute images it sketches. The EU is clearly not on the road to becoming a (federal-type) state as such, at least not in the short or medium term. The Member States have not overtly delegated their powers say in the field of criminal law or of internal security to the EU so that the EU can now assert itself as such in their place in these fields. The EU is as dependent as ever on the judges, the courts, the administrations, the police, the intelligence actors etc of the individual Member States. It has not replaced

these as such at the central level.

The point is rather to frame what is happening in terms of the type of polity that is emerging as a matter of empirical and normative practice. The EU is as a matter of legal and institutional practice increasingly empowering (sub-) state actors and national authorities in various fields to integrate their practices. What is happening is however not so easy to see and to evaluate as the process of integration by stealth shifts even further underground as a result of the failure to ratify the Constitutional Treaty. It entails the imposition at the EU level of the institutional parameters and requirements mandating what can be termed advanced “trans-governmentalism” among various core state actors. A good example of this phenomenon is the recent draft Framework Decision on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union (not yet available in PDF file on the Council’s Register of its Documents [5]). The basic idea is the free movement of information held in databases that are owned by the competent enforcement authorities or information that is “available” to them (including information available in other State and private databases). The principle of availability requires that authorities in one Member State exchange all information available with other authorities in other Member States in the same way and under the same conditions as they do within their own jurisdiction. The definition of a “competent enforcement authorities” in the current draft is:

“a national police, customs or other authorities, that is authorized by national law to detect, prevent or investigate offences or criminal activities and to exercise authority and take coercive measures in the context of such activities”

and clearly seems to include within its scope security and intelligence agencies. The Framework Decision does not prohibit use of information supplied in this fashion as evidence in criminal proceedings nor does it

restrict it by setting either procedural or substantive conditions. This is a complex subject which clearly raises important issues with implications for civil liberties of affected individuals. Apart from these substantive issues it highlights the problematic manner in which the Council reaches its decisions in such highly sensitive areas: very largely behind closed doors.

Checks and balances?

In the aftermath of the “Non” and the “Nee” and the feelings of consternation that prevail there does seem to be some growing sense that this situation opens a window of opportunity to discuss why the gulf between the continuing processes of “integration by stealth” meets with incomprehension and outright rejection by (many) of the citizens. Moreover, leaving the C word to one side with all its state-like baggage what can be done to ensure that it is not just business as usual but in the absence of a Constitution ? In other words, what can be done now in the absence of any grand project of reform to ensure that nonetheless the integration process that proceeds at the level of “low politics” in Brussels and Member State capitals can operate within a more accountable framework, with some more measures checking and balancing the on-going exercise of power?

In my view a lot more can be achieved on the subject of freedom of information in the EU especially at this critical juncture of a constitutional impasse. There is no reason why the Council cannot, in line with a recent recommendation from the European Ombudsman, decide quite simply itself (and revise in this sense its own internal Rules of Procedure) to henceforth meet *in public* whenever it is acting in its legislative capacity. In the example I gave above of the (draft) Council Framework Decision this is *legislation* which will bring about quite far-reaching substantive harmonisation in the manner in which law enforcement authorities (as broadly defined) in the Member States are obliged to make information available to their transnational counterparts. This seems to be a

very basic first step that can be followed by some serious discussion and debate on the scope of the Council’s executive (and even) operational tasks and to see to what extent such processes and the underlying information and documents can also be opened up or at the very least be made available publicly.

In the context of the European Union it seems particularly appropriate to focus on the issue of the *public* nature of decision-making given its bad reputation for secretive decision-taking behind closed doors. One aspect deserving to be highlighted is the fact that a very crucial part of the executive and legislative structures in the EU, namely those involving the Council of Ministers and the increasingly important European Council are often set apart from debates on increasing public deliberation in various processes of the EU. In other words not only is the Council not engaging with non-bureaucratic actors in a deliberative fashion prior to decision-taking, there are entire largely non-public conclaves nestling within its institutional structures. This is true not only in relation to the newer policy areas of foreign and security policy and justice and home affairs although these policy areas have certainly helped to bring the problem more to the fore. There is a mis-match between the rhetoric and practice on transparency and public access to its documents and the Council’s secretive structures and rule-making processes, especially in the more executive sphere of activity.

At the launch of the ECLN by Statewatch it seems to be very timely to raise as they have done the need - anno 2005 - for an EU Freedom of Information instrument that would impose tailored obligations on both the EU level (all institutions, actors and networks) on the one hand and on the Member State level (all authorities and actors implementing or fulfilling Union obligations). Surely the time has come to re-launch the debate in a holistic fashion by focusing on the various sites within the institutional configuration of the EU where executive tasks are carried out with the ambition of formulating and applying horizontal principles on publicity, debate and participation?

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Footnotes

1 Parliamentary Question by Chris Davies, MEP to the Council, 14 July 2005. The question is slightly disingenuous given the fact that both the European Parliament itself and the Council have far from perfect web-sites themselves.

2 C.Joerges, The Market Without the State? The “Economic Constitution” of the European Community and the Rebirth of Regulatory Politics”, European Integration Online Papers, vol 1, no.19, <http://eiop.or.at>

3 P.Kapteyn, *The Stateless Market. The European dilemma of integration and civilisation*. (Routledge, 1996)

4 SIS II: Resource management and increased support to improve national co-ordination, Council Document 12721/05, 5 October 2005.

5 But see, Statewatch, www.statewatch.org

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