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EDITORIAL

The EU post-regulatory state and its deregulation agenda

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For more than three decades, European studies have been describing the European political system as a regulatory state. It is now time to question the relevance of this concept and to rethink it in the light of recent developments in European politics and policies. In the face of repeated attacks on the essential characteristics of the regulatory state, and of combined efforts to 'cut the red tape' (at the European level, by Member States and by third countries), a question is beginning to emerge: are we facing the advent of a European deregulatory state?[1]

Since the seminal work of Giandomenico Majone,[2] a body of research in the field of social sciences, and in particular political science, has attempted to define the contours and characteristics of the European regulatory state, whose genesis can be traced back to the 1970s and which developed during the 1980s and 1990s. This notion has been thought of as 'the emergence, institutionalisation and transformation of an autonomous political capacity at European level'.[3] Legal scholars, historians and political scientists have studied this deregulation/re regulation process,[4] focusing on its institutions (the Commission and the Court of Justice) and its actors, both within and outside these institutions (judges, civil servants, lawyers). This process translated into the deployment of new modes of governance but also into new relationships with the private sector (co-constitution and interdependence).

The years 1990–2000 witnessed transformations of this regulatory state: the multiplication of its institutions, the rise of new government knowledge (economics, management) and new intermediaries (lobbyists, consultancy firms), the reconfiguration of the relationship between the private and public sectors (transparency policies, ethics policies, widespread consultation of stakeholders). Its modes of operation have changed. The regulatory state no longer mainly relies on a Commission with extensive powers to draw up and apply public policies (or oversee their application), but also on a range of heterogeneous institutions known as agencies.

[1]This editorial is an extension of the thoughts initiated with Céleste Bonnamy, 'Face au refus d'Elon Musk et de Mark Zuckerberg de respecter les législations européennes, la Commission semble répondre par . . . moins de régulation', available here: <https://www.lemonde.fr/idees/article/2025/03/07/face-au-refus-d-elon-musk-et-de-mark-zuckerberg-de-respecter-les-legislations-europeennes-la-commission-semble-repondre-par-moins-de-regulation_6577067_3232.html>. It also owes much to the collective discussions initiated as part of the activities of the 'Regulation' research axis of the *Groupe de recherche sur l'Union européenne* (GrUE).

[2]G Majone, 'The Rise of the Regulatory state in Europe' 17 (3) (1994) West European Politics 77–101.

[3]C Halpern, 'Les politiques de régulation' in O Costa and F Mérand (eds.), *Études européennes* (Bruylant 2017) 247–98.

[4]D Kelemen, *Eurolegalism: the Transformation of Law and Regulation in the European Union* (Harvard University Press 2011).

'Agencification'[5] redefined the boundaries and powers of the EU post-regulatory state.[6] By now, there are some 30 European authorities, some of which independent and most claiming a certain proximity to the markets they aim to regulate. Regulation has thus taken on a new form, with even greater emphasis on the co-construction of public policies and regular contact with the private sector. At the same time, a new set of rules has been adopted to 'regulate regulation' ('meta-regulation'),[7] particularly regarding public/private relations. While the rules on ethics and transparency would appear to establish a clearer boundary between the public and private sectors, research has shown that, on the contrary, this configuration helps to legitimise increasingly permeable boundaries.[8] The 'defining characteristic' of this 'post-regulatory state' would thus be a 'blunting of the sharp distinction between states and markets and between the public and the private'.[9]

Against this background, what can we learn from the 'simplification' effort that seems to have gained momentum since the advent of the new Commission and Von der Leyen's second term as President? Firstly, it must be said that criticism of European regulation is nothing new. Facing these challenges, the European regulatory state has never ceased to evolve and reinvent itself, from its judicialisation in the late 1970s to the 'Better Regulation' initiated in the early 2000s, whose stated aim was already to reduce the regulatory burden. Yet, whereas previous reforms had consisted of establishing procedures legitimising the regulatory role of the State (enhacing their transparency and participation) and its intervention, the current situation seems, on the contrary, to call this intervention into question and to roll back the standards adopted in recent years.

Reflections on the 'post-regulatory state' are not new and have been analysed since long.[10] The point here is not to claim that challenges to public regulation have appeared *ex nihilo* in recent months. What deserves attention, however, is the particular configuration in which these criticisms are now taking shape and finding an unprecedented echo, taking the neo-liberal agenda that informed the regulatory state one step further.

The convergence of several long-term or medium-term dynamics (new political alliances, rise of the competitiveness narrative and redefinition of public/private relations) is creating the conditions for political and institutional success for critics challenging the European regulatory State. Studying the link between these long-term dynamics and contemporary changes provides an insight into its transformations, and opens up, or reinforces, a number of ongoing avenues of research for the social sciences.

Let's start by looking at the succession of legislative initiatives aimed at 'simplification' or deregulation. In just a few months since the new Commission began its work, the appetite for deregulation seems to affect a wide range of European policies. First, the Commission published a draft omnibus directive, which aims to simplify three key texts governing corporate responsibility: the Corporate Sustainability Reporting Directive (CSRD), the Duty of Vigilance Directive (CSDD) and the Green Taxonomy Directive. The revision of the REACH chemicals regulation and the next Common Agricultural Policy have been announced as important opportunities for further 'simplification'. In each case, the aim is to reduce the obligations placed on companies and

[5]D Levi-Faur, 'Regulatory Networks and Regulatory Agencification: Towards a Single European Regulatory Space' 18 (6) (2011). Journal of European Public Policy 810–29.

[6]C Scott, 'Regulation in the Age of Governance: The Rise of the Post-regulatory State' in J Jordana and D Levi-Faur (eds), *The Politics of Regulation. Institutions and Regulatory Reforms for the Age of Governanc*e (Edward Elgar Publishing 2004) 145.

[7]J Jordana and D Levi-Faur, *The Politics of Regulation* (n 6).

[8]C Robert, 'La politique européenne de transparence (2005–2016): de la contestation à la consécration du lobbying. Une sociologie des mobilisations institutionnelles, professionnelles et militantes autour des groupes d'intérêt à l'échelle européenne' 1 (1) (2017) Gouvernement et action publique 9–32.

[9]C Scott, 'Regulation in the Age of Governance' (n 6).

[10]As the literature cited above demonstrates.

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industries. In each case, the consequence will be to speed up the 'dismantling' of environmental regulation.[11]

This is combined with the competitiveness paradigm. Far from new – it has supported the deployment of a neo-liberal agenda on a European scale[12] – this paradigm is gaining ground within the institutions, as evidenced by the Draghi report.[13] delivered in September 2024, and by the launch of a competitiveness compass in January 2025, The latter consists of a strategic framework that aims 'to make business easier and faster and ensure Europe's prosperity'[14] and which will result in several legislative proposals.

In addition, the balance of political power has changed. After the June 2024 elections, the number of right-wing MEPs (EPP, RCE, ID and right-wing Non-attached Members) rose from 45.8 per cent in 2019 to 52.2 per cent of the seats in the European Parliament. While the European Parliament's right-wing turn has been progressive, these results make it now possible, in an unprecedented way, to form alternative coalitions on the right to the grand coalition between the centre-left, the centre and the centre-right. Studying this transformation of the balance of power and the politicisation of European polity is key to understanding the transformations of the regulatory state.

The current moment is also marked by a redefinition of the relationship between the EU institutions and non-institutional actors, particularly civil society organizations and NGOs. This reconfiguration calls into question the longstanding paradigm of European participatory democracy, which has consistently struggled to acknowledge and address the structural imbalances between organised interests. Rather than correcting these asymmetries, recent institutional developments appear to reinforce them. This is especially evident in the ongoing marginalisation of NGOs in the EU's governance framework. While scholars such as Roederer-Rynning and Greenwood had envisioned a post-regulatory state in which civil society actors, including NGOs, would play a more central role in shaping and overseeing policy implementation,[15] recent discursive and procedural shifts suggest otherwise. For example, the Competitiveness compass suggests that each Commissioner hold regular 'implementation dialogues' with stakeholders – explicitly framed around understanding implementation challenges, hearing business concerns, and identifying opportunities for simplification and burden reduction – and makes no mention of civil society.[16] At the same time, non-market voices are marginalised. For instance, NGOs that receive funds from the European Commission (even though they are essential for defending interests other than commercial or industrial ones in Brussels) no longer have the right to use these funds to lobby the institutions.

All this shows the relevance of multidisciplinary research agendas on the relationship between the public and the private, the notion of regulation, but also the place and role of law in the European deregulation process. These are rich and fascinating prospects for scholars, but more worrying for Europe's citizens.

[11]V Gravey and A Jordan, 'Policy Dismantling at EU level: Reaching the Limits of 'an Ever-Closer Ecological Union'?' 98 (2020) Public Administration 349–62.

[12]B van Apeldoorn, 'European Unemployment and Transnational Capitalist Class Strategy: The Rise of the Neo-liberal Competitiveness Discourse' in H Overbeek (ed), *The Political Economy of European Employment: European Integration and the Transnationalization of the (Un)Employment Question* (Routledge 2003) 113.

[13]F Costamagna, 'Editorial. The Long March of Competitiveness in the EU Legal Order' 3 (2024) European Law Open 221–5.

[14]<https://www.consilium.europa.eu/en/policies/competitiveness-compass/>.

[15]J Greenwood and C Roederer-Rynning, 'Organized Interests and Trilogues in a Post-Regulatory Era of EU Policy-Making' 28 (2021) Journal of European Public Policy 112.

[16]Communication from the Commission COM(2025) A Competitiveness Compass for the EU 29 January 2025.

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In this issue

'Integration-through-Law' has had an iron grip on European legal scholarship for decades, and in many ways it still does: assessments of more or less recent qualitative change in the nature of EU Law still take the paradigm of ITL as the point of departure. Robert Schütze's point is not that ITL is no longer a plausible explanation for the nature of the relationship between 'normative' and 'decisional' supranationalism, but that it never was. Rather than 'equilibrium' in the zero-sum logic suggested by ITL – more normative supranationalism leads to less decisional supranationalism – Schütze suggests, the constitutional development of supranational law and politics has been driven by internal self-reinforcing dynamics in the respective spheres.

Nothing more radical than asking perfectly reasonable questions. Can European private law 'deal' with intersectionality – that is, can we imagine and work towards understandings and settlements in private law theory that address structural injustices? Hesselink and Tjon Soei Len give it their best, but ultimately ask: what if 'contract' constructs the market-based economy in which gendered racialised 'others' are structurally exploited? If that is what contract *is*, then perhaps contract needs to be abolished.

There is no dearth of analysis on the Digital Services Act (DSA). Griffin's, however, does not follow the prevailing strand of scholarship on the regulation. Rather than focusing on fundamental rights, accountability, efficiency or possible corporate capture, Griffin questions the very framing of the manifold problems that digital platforms raise as 'risks' that must be 'managed'. She starts from the premise that risks are socially constructed. Hardly a novelty, she admits, but neither is the DSA's regulatory approach, she argues. This is precisely the problem: what happens, she asks, when approaches and tools of risk regulation are deployed to delimit the spheres of intervention of public and private actors in media and communication? Drawing on literature that is well-known to regulation scholars, she identifies the regulatory traditions that are visible in the DSA's legal regime and what they say about the relative role of the market and of public actors. While the DSA gives room to different degrees of public intervention, Griffin identifies a clear bias that privileges private-sector expertise and corporate freedom over public oversight and intervention. She also shows: how this conceptual framework masks the distributive decisions inherent in the management of what, under risk regulation, become objective harms; how those decisions enshrine power imbalances, given access and the resources implicated in risk regulation; and how the institutions and actors involved in the DSA regulatory process shape a legal regime that is heavily indebted to corporate risk management and due diligence obligations, despite public actors' involvement. At the end, the definition of both problems and solutions might be dominated by the preferences of the industry that is presumably being regulated. And all this is happening in a field that is crucial to uphold (or undermine . . .) democracy.

Postwar Germany has produced many 'national champions' in the industrial field (in plain contradiction with the theoretical implications of ordoliberalism's vision of an 'economy at human scale'). Much less polemical tends to be the supremacy of German courts as the most avid users of the preliminary reference. Spieker challenges this widely held view on the basis of the proper working out of numbers, including population size and total number of judges. The author identifies three main obstacles that hinder effective use of preliminary references in German courts: an ill-equipped procedural framework, judicial reluctance, and instrumental or strategic uses of references. No analysis of the matter could be complete without the appearance of the German Federal Constitutional Court as guest star. Spieker notes that the two senates which make up the Court have adopted divergent attitudes toward the reference procedure: one embraces cooperation with the CJEU, while the other asserts national constitutional primacy. On such a basis, we are advised to conclude that the perception of Germany as a 'model interlocutor' in the (real or imaginary) 'dialogue between courts' is overstated. According to the author, it is more appropriate to use a different range of adjectives to characterise the approach of German courts: selective, cautious, and sometimes adversarial. We are sure the piece will stir up debate, as the

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implicit understanding of what loyalty to democratic constitutional law requires is far from being uncontroversial, as the many skirmishes between the European Court of Justice and the German Federal Constitutional Court prove

To paraphrase a very young Mark Tushnet, Marxist theories of law are either distinctively Marxist or good, but seldom both.[17] As the revival of Marxist legal scholarship in, especially, international law, attests to, a lot has changed in the forty years since. EU Law, however, remains virtually untouched. We are delighted to publish a symposium on Marxism and EU Law, put together by Robert Knox, Eva Nanopoulos and Andrew Woodhouse, and with further contributions by Dimitrios Kivotidis and Maria Tzanakopoulou. It is long overdue.

Constitutional imaginaries are a key part and parcel of the normative dimension of reality in societies in which the law, and in particular constitutional law, plays a fundamental part in the process of integration. In the words of Přibáň, author of the essay that opens up the symposium, constitutional imaginaries allow modern, functionally differentiated societies to still perceive themselves as unified political communities. They are thus the delicate pieces that reconcile plurality with unity. The contributions to the symposium (Jiří Přibáň himself, Paul Blokker, Marija Bartl and Paul Linden-Retek and Francesca Scamardella) discuss in particular the role that constitutional imaginaries play in EU law, on the basis of Přibáň's identification of four dominant imaginaries: legal pluralism, administrative rationality (calculemus), economic prosperity (prosperous imperium), and transnational political community (demoicracy).

[17]M Tushnet, 'Is There a Marxist Theory of Law?' 26 (1983) Nomos: American Society for Political and Legal Philosophy 171–88.

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