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“Key Elements in the EU Institutional Reality for Strategic Regulation”

Meeting with students - "Strategic role of EU regulation"

Sciences Po Paris

7.12.2023, Brussels

There are certain elements in the European institutional reality which I see as important for our reflection on the EU strategic regulation.

First, we should bear in mind that the EU is a community of law and the law, the way we make it, implement and enforce provides the foundation and the main mechanism to keep us together. The body of European law expands and over time its relevance has gone beyond the European borders. Ann Bradford wrote a book about the Brussels effect. Indeed, if one looks for symptoms of Europe as an influential superpower, its legislative powers can be seen as a real instrument and source of political influence. But it is also true that the world looks at Europe in particular in the context of regulatory shaping of business environment. The challenge is how to make cooperation with other like minded jurisdictions effective in standard setting. Achieving a shared regulatory space would facilitate business functioning. Bottom up standard setting, in particular in the area of AI, could be a way to strengthen Brussels effect. Of course, even if standards are proliferated in a non coercive manner, this can have some geopolitical consequences. I would also say that global businesses are more open to the regulatory European “nudging” through the Brussels effect than political leaders who see their political interest in exploiting the link between their domestic and international policies.

Second issue I would find useful for our reflection is about understanding of the concept of the open strategic autonomy. The strategic autonomy approach to European policies had emerged in the context of defence policy and the military independence of Europe, and it was enhanced by Brexit and pandemic. It has become an effort toward making the EU more assertive in defending its international interests. In particular in trade policy it has added political assertiveness to Europe’s actions. An ambitious tool kit of defensive instruments in the area of international

trade has been developed. The economic security concept has become part of our policy agenda, to a certain extent inspired by closer transatlantic relationship. The obvious need of reacting to the coercive actions of China as well as the global context of geostrategic polarization and concern have added new dimension to the strategic autonomy agenda. Not all the politicians add while considering strategic autonomy the adjective “open”. It matters because it underlines the difference between protection of our interest and the protectionism. The first is the capacity of reacting to coercive type of instruments used by others, the second is a policy of building competitiveness based on factors other than economic efficiency. Shifting away from efficiency based and toward resilience and security based investment in supply chains has become a path toward a new business model.

Thirdly, let me say that when reflecting on strategic regulations the central issue is to be aware that the most important European asset is the Single Market with its four freedoms. For its functioning, the legal framework is crucial. Unfortunately, while we have noted an enormous progress in the single market of goods, the most advanced one, when it comes to the Capital Market Union it is definitely the least advanced and a matter of political and economic concern.

Fourthly, it is worth mentioning that the way we legislate has been evolving over decades. Indeed, there have been efforts aiming at better law making. There is an inter institutional agreement on Better Law Making. Still the process deserves farther reflection regarding simplification and the burden legislators put on businesses, in particular small and medium size ones. The current Commission has proposed to cut these burdens by 25%. The second Jean Claude Juncker Commission made the introduction of new legislation conditional withdrawing one of those already existing. There has been an effort to avoid gold plating by member states when transposing directives into the national legal order. Now we clearly move toward regulations and away from directives, which of course has its pros and cons. Transposition of European directives usually led to a visible national debate raising the awareness of the legislation. It led, however, as well to sometimes meaningfully different national versions of the European law.

Fifthly, there are issues related to the very prescriptive character of European legislation. In the jurisdictions based on common law we see more principle based

approach to legislation, allowing regulators for more flexibility and this way also offering regulators and supervisors a much more fundamental role in steering economic processes. Compared to the US norms and standard setting, in the European Union we see very clear top down approach and a very prescriptive character of the legislation. The role of secondary level legislation, that would bring more flexibility and facilitate taking into account changing environment, is relatively limited and seen by member states as restricting their role. Recently, in the context of capital market legislation, efforts have been made by the European Parliament to move in a more decisive manner to expanding the space for the second level legislation, in particular delegated acts. One can admit that in the initial stage of single market building a prescriptive legislation can be a legitimate choice to accelerate alignment. Later on, however, a move to a more principle based legislation can be advantageous for the market participants.

My six point is related to the fact that the EU is not a unified jurisdiction. In every legislation there is a choice to be made between putting European institutions at the steering wheel or leaving national competent authorities in charge of 27 processes. An example can be here the process of building the European capital market with ESMA as supervisor across the national borders or continuing with 27 national capital markets. These choices have huge long term consequences for the competitiveness of the European economy and financial market, and at the end for the well being of us, European citizens. Looking at the history of the European legislation, I would also point to continuous rebalancing between periods when community method and preferences for Europe level common solutions to challenges we all face dominate and periods of intergovernmentalism and national interests. These days we see on the one hand an increasing number of issues not respecting national borders and, on the other, elections at national level bringing to power politicians with strong nationalist preferences. In short, at the same time we see a rebalancing toward intergovernmentalism while geo strategically polarised world requires European solutions providing power and security.

For the way we legislate, the fact that the right of initiative stays with the European Commission is seen by some as questionable. For years, the European Parliament has been insisting on opening the legislative initiative also for them. While in principle it seems legitimate and justified, it also brings the risks well known to the US

Congress where only 5% of individual legislative proposals make it through the Congress, absorbing a lot of political energy and generating costs. In my point seven I would therefore encourage the legislators to reflect deeply on the necessary conditionality based framework that would accompany the right of initiative solution.

In my point number eight, I would like to mention an important difference between the way European and national parliamentarians work. At national level, there are parties in the chambers that are politically linked with the government. And there are parties which are in clear opposition to the government. This is not the case in the European Parliament.

Building from scratch a majority for every piece of legislation is the reality in our case. Traditionally, in the EP majority supported compromise has been based on the centrist majority. It is not, however, that simple anymore and can become even more difficult after 2024. But we also function in the time where more challenges, threats and opportunities require European solutions. This comes on the top of all other differences needed to be overcome when looking for a majority compromise.