

THE EU AND ITS LEGISLATION: PRISON OF PEOPLES OR CHICKEN COOPS?

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EXECUTIVE SUMMARY

1. “80% of laws come from Brussels”: a myth maintained for technical and political reasons

- It is difficult to measure the proportion of national laws of Community origin, even though many recent studies have helped to identify orders of magnitude closer to 20% than 80%.
- The “80% myth” is still maintained however, by a “conspiracy of extremes” uniting both Anti-Europeans and a certain number of “Europhiles”.

“ NATIONAL LAWS
OF COMMUNITY ORIGIN:
ORDERS OF MAGNITUDE
CLOSER TO 20% THAN 80%”

2. European legislation with a highly variable sectoral impact

- The Europeanisation of national laws is high in some sectors (agriculture, financial services, the environment, etc.) and very limited in others (education, social protection, housing, security, etc.).
- This contrasting state of affairs stems directly from the major sectoral concentration of legislative intervention by the EU, dealing mainly with agriculture, the internal market, followed by foreign relations.

3. A cross-cutting legislative impact: the supervisory power of the EU

- Member states must notify the EU of a large number of state aid measures that they grant. Despite EU supervision of this aid, tens of billions of euros are granted each year (banking and railway sectors, etc.).
- The distribution of powers within EMU allows the EU to supervise national policies, but it has not drastically limited the capacity of the member states to take action, particularly in terms of budget deficit.

4. European legislation having regulatory rather than legislative implications

- Only one quarter of directives transposed in France have legislative implications, as opposed to three quarters with purely regulatory implications (including on the size of chicken coops).
- Almost two-thirds of draft directives and regulations submitted to the Council of ministers have legislative implications, but this is the case for only 12% approximately of all directives and regulations adopted by the Council, the European Parliament and the Commission.

5. The subsidiary legislative impact of the EU: 20% rather than 80%

- All studies available converge towards a proportion of Europeanised national laws varying from between 10% and 33% according to countries.
- This proportion varies according to the calculation methods used, but remains within this law hypothesis as shown by studies concerning Germany and France.

It is not because the EU looks after what is “infinitely small” (the size of chicken coops) and that it also happens to intervene in what is “infinitely large” (the supervision of national budgets) that it looks after everything. It is not because the European elections are “subsidiary” that they are secondary.

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INTRODUCTION: DISPELLING THE 80% MYTH (BIS)¹

The idea that some 80% of national laws and legislation in force is of “European origin” sometimes appears to be a self-evident conclusion, for detractors of European integration as well as many of its champions. Yet, who could actually cite this 80% of national laws, considering that it would at first sight be a daunting task to identify even a dozen of them among the hundred-odd laws adopted annually by the member states?

This recurrent debate on the impact of European intervention in relation to national sovereignty was rekindled by the euro area crisis and developments in the governance of Economic and Monetary Union, which *de facto* and *de jure* led to a change in the distribution of powers between the EU and its member states. It is also fuelled by the criticisms made by many European countries on the supposedly imperfect application of the “Principle of Subsidiarity”, to the extent of point of maintaining an often negative image of EU legislation.

All the legislation produced by the EU was adopted by representatives of the member states when the Treaties were drafted and secondary laws adopted (regulations, directives, etc.). It all has its reason for being and helps to reach the objectives that have been set freely by the member states and citizens of the EU, in the same manner as budgetary or political interventions by the latter. It is however striking that, just as the real impact of EU budgetary interventions is often underestimated², the impact of European legislation is for its part, highly overestimated.

Assessing the impact of Community legislation is delicate from a technical standpoint, as we shall see, but if we have nonetheless strived to address this issue, it is firstly because this field is already full of political analyses tending to overlook such subtleties. It is also because it seemed appropriate to try to get a clearer picture of this at a time when Europeans are being called on to elect their representatives to the European Parliament for the next five years, in a context of overestimating the supposed influence of Community legislation in the lives of EU citizens. It is lastly and above all because several analyses and expert assessments are now available on the topic, allowing interesting orders of magnitude³ to emerge, and which could be summed up in a single formula by stating that the proportion of Europeanised national laws is overall closer to 20% than to 80%, with strong variations according to sectors⁴.

1. See Yves Bertoncini, “National Laws of Community origin: dispelling the 80% Myth”, *Policy Brief No. 13, Notre Europe – Jacques Delors Institute*, May 2009.

2. Based on the observation that the EU budget represents just 1% of EU GDP, whereas its impact is substantial in certain sectors (particularly agriculture) and in certain countries. On these points, see Yves Bertoncini, “What is the impact of the EU interventions at the national level?”, *Studies & Reports No. 73, Notre Europe – Jacques Delors Institute*, May 2009.

3. See for example Sylvain Brouard, Olivier Costa and Thomas König (eds), *The Europeanization of domestic legislatures - The empirical implications of the Delors' myth in nine countries*, Studies in public choices – NY Springer, 2012.

4. The following developments also echo two recent interventions during conferences co-organised by Notre Europe – Jacques Delors Institute: the conference entitled “Brussels, after Moscow?”, organised in Budapest on 23 April 2014 in partnership with the Institut Français and the conference entitled “European Union: which powers, which democracy?” organised in Paris on 30 April 2014 in partnership with the Gulbenkian Foundation.

1. “80% of laws come from Brussels”: a myth maintained for technical and political reasons

“THE “80% MYTH” IS STILL MAINTAINED BY A “CONSPIRACY OF EXTREMES” UNITING BOTH ANTI-EUROPEANS AND “EUROPHILES””

The intentional vagueness surrounding any accurate appraisal of the impact of national legislation on Community law has inspired assessments that are all the more extreme because of a scarcity of in-depth technical analyses on the subject. Such reports claim, at times, to back statements attributed to Jacques Delors, who notably announced, in 1988, before the British Trades Union Congress: *“By the year 2000, 80% of economic – and perhaps even fiscal and social – legislation will originate from European institutions.”* Such statements were undoubtedly more in line with the normative production of the late 1990s (implementation of the European Single Act, entry into force of the Treaty of Maastricht) than they are with that of today. In any case, they were presenting a forecast and not an actual situation, and concerned only a small fraction of national legislation, and not this legislation as a whole.

It is evident that another reason why such political and legal vagueness has surrounded the impact of Community law on national legislation for such a long time is that it is very difficult to precisely measure it from a technical standpoint, but also because the 80% myth is maintained by political stakeholders.

1.1. A complex assessment from a technical standpoint

If based on a quantitative approach, an assessment of the impact of EU interventions at national level can in principle be easier in budgetary matters (a direct equivalence can be established between a euro derived from the EU budget and a euro derived from a state budget) than in legislative matter: the number of legislative acts produced by the EU and a member state can be compared, but this gives no indication of the length of these legislative acts (in terms of the number of articles or even the number of words). A more qualitative assessment of EU interventions at national level is also delicate: a single law adopted by the EU can have a very strong cross cutting impact (for example the Stability and growth pact), but with particular effects only on member states which didn't respect it before its adoption or have problems complying with it afterwards (see part 3 below).

All researchers and experts who have endeavoured to evaluate the proportion of Europeanised national laws are well aware of the technical complexity of their task. They have however strived to do this with the objective of refuting major errors of assessment, while at the same time clearly expounding the methodology that they prioritised in order to reach results as highly corroborated as possible, based on data collected over a long period. Several methods have thus been used:

- the first ones consisted in comparing the flow of normative acts (of a legislative nature or not) produced at Community level and at national level, and then measuring their relative share⁵;
- the second ones led to the identification of all national laws containing at least one article of EU origin, a significant dose of articles of EU origin or the number of articles of EU origin in relation to the total number of articles of the laws⁶;
- the last ones, more sophisticated, were based on the use of a series of keywords (EU, common market, EMU, etc.) allowing the identification of the “European impulse” underlying legislative texts, this impulse being either binding (for example the transposition of a directive), or voluntary (reference to the EU in the legislative text)⁷.

5. See Yves Bertoncini, “What is the impact of the EU interventions at the national level?”, *op. cit.*

6. See Matthias Fekl and Thomas Platt, “Normes européennes, loi française : le mythe des 80%”, *Terranova*, January 2010.

7. See Sylvain Brouard, Olivier Costa and Thomas König (Editors), *The Europeanization of domestic legislatures*, *op. cit.*

It is striking to note that, whatever the method used, researchers and experts obtained percentages that were very far from the figure of 80%, as we shall see later. It is just as striking to note that the consistent findings of these technical assessments are hard pressed to be taken up at political level, where the proportion of Europeanised national laws is constantly overestimated both by Anti-Europeans and a certain number of “Europhiles”.

1.2. A conspiracy of the extremes: constant overestimation by Anti-Europeans and Europhiles alike

As a matter of fact, assessing the impact of EU interventions is not just another piece of technical data; to the contrary, it seems to be hampered by a deeply rooted projectionist logic which is helping to promote political myths, making them difficult to defuse.

This accounts for the existence of theories aimed at projecting onto the EU what people want it to be, or conversely, not to be. On this issue, we will quote Jean-Louis Bourlanges, who underlined the a priori paradoxical convergence which has emerged between federalists and “anti-Europeans” on what they view a bigger EU and consider it having much more responsibilities than it has in reality “*Contrary to a tenacious myth, 90% of policies and 98% of funding remain national. Whether the matter is education and research, labour laws and social protection, territories’ administrative organization, the judicial system or the police, defence and foreign policy, and even – despite Maastricht – budgetary and fiscal policies, the bulk of the power remains in the states. In these areas, Europe is pretending – pretending to be seen as a solution by its promoters and conversely, as a threat by its adversaries, who abusively blame it for all of the economic, financial, social and cultural upheavals resulting from globalization.*”⁸ Inasmuch as the political forces advocating for increased European integration and those vigorously opposed to it are the most active participants in public debates on Europe, it is inevitable that their overestimation of the impact of EU interventions should leave a lasting impression.

Moreover, these ideological projection mechanisms co-exist with responsibility transfer mechanisms which are also far from being the prerogatives of just the opponents of European construction. They are also prospering from a certain confusion maintained by both EU and national policymakers. The former has a known tendency to shift blame onto so-called “Brussels’ constraints” which are often real but frequently illusory, and very convenient in winning support for unpopular decisions. It should also be pointed out that, in an effort to strengthen their legitimacy and reputation by showing that they are taking action “in concrete ways in the field and for the daily lives of citizens,” EU authorities are often quick to “blow their own horn” by claiming to exercise political influence that has a substantial impact only within certain sectors, but which is limited, or even very limited, within most of the others.

This tendency by Europhiles to over-exaggerate can be seen in all EU countries, including in Finland, where the proportion of Europeanised national laws has nonetheless been estimated at 11.8% (see Table 10) by Matti Wiberg and Tapio Raunio⁹. These experts indeed quote, for example, the remarks of two MEPs from their country: “Brussels already decides half of Finnish legislation” claimed Ville Itälä, some years ago in a local newspaper (*Turkulainen*, 28 September 2005), while Carl Haglund claimed in a radio interview on 7 August 2009 that “70% of our law production comes from the EU” (Sommarprat Radio Vega 7 August 2009).

Such over-exaggeration is even more intense with the upcoming European elections, with the objective of encouraging more Europeans to take part in the voting, whereas the turnout rate is quite in line with the limited scope of EU competences and the powers of MEPs¹⁰. Viviane Reding, Vice-President of the European Commission, interviewed live on Euronews on 16 January 2014 in the programme “Global Conversation” provides an umpteenth illustration. When a viewer asked her if it was true that 80% of laws applied in the member states were of EU origin, she in fact replied the following: “I do not know if it is now 80% or if it is 75%, the

8. Jean-Louis Bourlanges, Interview by *Le Monde*, 2 December 2007.

9. Matti Wiberg and Tapio Raunio, “The Minor Impact of EU on Legislation in Finland”, in Sylvain Brouard, Olivier Costa and Thomas König, *The Europeanization of domestic legislatures*, op. cit.

10. On this issue, see Yves Bertoncini, “European Elections: the abstention trap”, Policy Paper No. 105, Notre Europe – Jacques Delors Institute, May 2014

truth is that most laws which are applied, and executed, implemented at national level are based on European laws, directives, which then have to be translated into national laws”¹¹.

2. European legislation with a highly variable sectoral impact

All the studies dedicated to the impact of EU legislative interventions at national level underscore the very strong variability of such impact from a sectoral standpoint, a phenomenon that itself refers to the concentrated level of EU legislative production in some sectors.

2.1. Europeanisation of national legislatures only important in some sectors

“THE EUROPEANISATION OF NATIONAL LEGISLATURES IS STRONG ONLY IN A FEW SECTORS”

Led by Sylvain Brouard, Olivier Costa and Thomas König, the baseline academic survey on the proportion of Europeanised national legislatures¹² clearly underscores such a phenomenon. Based on the conclusions of studies conducted in eight European countries (Austria, France, Germany, Italy, Luxembourg, the Netherlands, Spain and Switzerland), Thomas König and Lars Mäder¹³ reached the conclusion that, over a long period, the Europeanisation of national legislatures is no higher than 30% except in three major sectors, namely, agriculture, banking and finance, and the environment (see Table 1).

Table 1 ► Europeanisation of national legislatures in eight EU countries according to sectors (1986-2005)

PROPORTION	SECTORS CONCERNED
Between 30 and 40%	Agriculture Banking and Finance Environment
Between 20 and 30%	Energy Technology International affairs Transportation Macroeconomics Foreign trade Health
Between 10 and 20%	Civil rights Labour Government operations Law
Between 0 and 10%	Public lands Education Social Welfare Housing Defence

Source: Data Thomas König and Lars Mäder, in Sylvain Brouard, Olivier Costa and Thomas König, *The Europeanization of domestic legislature*, op. cit. The eight countries analysed in this book are Austria, France, Germany, Italy, Luxembourg, The Netherlands, Spain, and Switzerland.

11. See https://www.youtube.com/watch?v=c0lqaAhF_YA#t=68

12. See Sylvain Brouard, Olivier Costa and Thomas König, *The Europeanization of domestic legislatures*, op. cit.

13. Thomas König and Lars Mäder, "Does Europeanization change executive-Parliament relations? Executive dominance and parliamentary responses in Germany" in Sylvain Brouard, Olivier Costa and Thomas König, *The Europeanization of domestic legislatures*, op. cit.

2.2. A highly sectoral concentration of EU legislation

“THE EU LEGISLATIVE INTERVENTION DEALS MAINLY WITH AGRICULTURE, THE INTERNAL MARKET, FOLLOWED BY FOREIGN RELATIONS”

- This contrasting state of affairs is the direct consequence of the highly sectoral concentration of EU legislation, which is consistent with the distribution of directives and regulations over a long period (*see Table 2*):
- around half of the regulations and directives are concentrated in the Agriculture sector alone;
 - a large quantity of norms are also found in the Internal Market sector. If we consider only normative acts in force - the latter amounts to 11% of the grand total for the sole item “Industrial Policy and Internal Market,” yet amounts to 20% of this same total if we include normative acts relating to the “Free movement of goods” (9.8%), and even reach nearly one-fourth of the total if we add norms relating to the “Freedom of movement for workers and social policy” and the “Right of establishment and freedom to provide services”;
 - nearly 10% of the total number of Community normative acts in force, and more than 13% of the normative acts adopted between 1987 and 2006, are concentrated in the external relations sector¹⁴.

Given this high sectoral concentration, the relative share of EU normative acts within the total of the normative acts applied in France (legislative or not) vary strongly around a global average of 12% (*see Table 2*). It is slightly less than 50% in the sector of agriculture; around 20% in the sectors of economy and foreign affairs; slightly less than 5% in the sector of ecology; and at levels inferior to 2% in the 10 other sectors analysed.

Table 2 ▶ Relative share of Community and French normative flows per sector for the 1987-2006 period

SECTORS	DIRECTIVES AND REGULATIONS	LAWS, ORDINANCES, DECREES AND ORDERS	EU AND FRANCE ACTS	EU %/TOTAL
Foreign Affairs	89.6	340.2	429.8	20.8%
Agriculture	798.4	1,021.6	1820	43.9%
Culture	0	397.8	397.8	0%
Defence	0.9	534.4	535.3	0.2%
Ecology	19.75	434.9	454.65	4.3%
Economy	423.65	1,737.1	2,160.75	19.6%
Education, Youth & Sports	1.7	827.1	828.8	0.2%
Employment and Health	14.45	1,821.1	1,835.55	0.8%
Internal & Overseas	12.45	1,207.7	1,220.15	1%
Justice	1.05	689.7	690.75	0.2%
Transport & Equipment	21.75	1,167.2	1,188.95	1.8%
Grand Total:	1,383.7	10,178.8	1,1562.5	12%

Source: Yves Bertoncini, “What is the impact of the EU interventions at the national level?”, *op. cit.*

14. See Yves Bertoncini, “What is the impact of the EU interventions at the national level?”, *op. cit.*

A study by Annette Elizabeth Töller¹⁵, which includes all European “legislative impulses” underlying German laws, has also highlighted the strong variability of their importance according to the sectors as well as according to the periods (*see Table 3*). For the 2002-2005 period, she indicates that the proportion of Europeanised legislation is:

- dominant in two sectors (the environment and agriculture and food),
- high with regard to regional development, the economy, justice and transport (approximately 40% each time),
- limited with regard to home affairs (12.9%) and employment and social policy (15.6%),
- non-existent with regard to education and research.

Table 3 ▶ Proportion of “European impulses” in German legislature (in %)

DOMAINS	1987-1990	1994-1998	2002-2005
Home Affairs	2.3	11.9	12.9
Justice	35	21.6	42.2
Finance	25.6	25	36.2
Economy	15	34.8	40
Agriculture & Food	28.6	65	75
Employment & Social Policy	5.9	15.8	15.6
Family & Health	26.1	19.4	37.5
Transport	37.5	36.4	40
Post & Telecoms.	0	71.4	-
Regional Development	10	9.1	50
Education & Research	0	12.5	0
Environmental Policy	66.7	54.6	81.3
Average	19.9	25.9	34.6

Source: Annette-Elizabeth Töller, “How European integration impacts on national legislatures”, *op. cit.*

15. See Anne-Elizabeth Töller, “How European Integration Impacts on National Legislatures: The Europeanization of The German Bundestag”, *Working Paper Series 06.2*, Center for European Studies, 2006.

3. A cross-cutting legislative impact: the supervisory power of the EU

A more qualitative assessment of the impact of legislative intervention by the EU in national public policies should of course consider that some of these types of intervention can have not only sectoral but rather more cross-cutting effects. This is particularly the case for competition rules linked to the existence of the internal market and those relative to the functioning of Economic and Monetary Union, which are often widely discussed. As we shall later see, this legislation structures *de jure* and *de facto* the action of national authorities, but in general has relatively little impact on their capacity to take action.

3.1. Competition rules: state aids controlled, but not forbidden

The rules of competition concerning state aid were set by the Treaty of Rome, then specified by a series of directives and regulations. Their objective is to guarantee fair competition within the single market, in particular through the control of financing granted by the states to their producers; it is also about protecting workers who could be the victims of heavily subsidised competing businesses, but also to guard taxpayers against the excesses of public aid.

Article 107 TFEU provides for the prohibition of any aid granted by a member state which distorts, or threatens to distort competition, by favouring certain undertakings or the production of certain goods. But TFEU also mentions several categories of state aid that is by nature compatible¹⁶ or that may be considered to be compatible¹⁷ with the internal market: the conditions for granting this latter type of aid are set out in the guidelines adopted by the member states on a proposal from the Commission.

“ EU COMPETITION
RULES DO NOT AVOID TENS
OF BILLIONS OF EUROS
OF STATE AIDS TO BE
GRANTED EACH YEAR”

Article 108 TFEU stipulates that the Commission can review all systems of aid existing in the member states and can give notice to the states concerned to submit their comments in the case of aid deemed incompatible with EU regulations or if it is being misused. Member states must notify the Commission of any aid granted above a certain level, which gives rise to several hundred notification procedures each year (*see Table 4*). They are however, exempt from doing so for several types of aid, which mainly concerns SMEs, R&D, training or environmental protection, and for which they must simply inform the Commission afterwards¹⁸.

The Commission itself cannot sanction member states in the case of disagreement on the amount or the reason for the aid, but it can refer the matter to the Court of Justice of the European Union.

16. Aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; aid to make good the damage caused by natural disasters or exceptional occurrences; aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany.

17. Especially aid to promote the economic development of areas and regions where the standard of living is abnormally low or where there is serious underemployment, aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a member state, aid to facilitate the development of certain economic activities or of certain economic areas, aid to promote culture and heritage conservation.

18. All these information can be found on the DG Competition web site at the following address: http://ec.europa.eu/competition/state_aid/overview/index_en.html

Table 4 ► Number of state aid notifications per country and per year (2006-2013)

COUNTRIES/YEAR	2006	2007	2008	2009	2010	2011	2012	2013
Belgium	17	8	8	14	8	11	18	10
Bulgaria		13	3	8	4	2	2	5
Czech Republic	25	17	20	7	5	7	13	15
Denmark	11	10	16	8	11	14	8	11
Germany	74	74	80	76	52	41	44	76
Estonia	6	7	6	2	5		5	6
Ireland	9	7	5	6	2	6	5	7
Greece	3	7	5	8		13	22	16
Spain	40	56	53	43	49	24	22	17
France	50	39	30	35	23	26	16	47
Italy	56	52	41	43	33	33	31	21
Cyprus	8	3	2	3	1	3	5	2
Latvia	4	9	8	10	11	7	6	6
Lithuania	3	7	5	5	11	5	16	6
Luxembourg	1		2	3		2		2
Hungary	17	15	16	13	8	10	8	16
Malta	4	5	2	6	1	1	1	2
Netherlands	28	17	16	15	14	19	12	15
Austria	18	24	21	25	14	14	14	17
Poland	44	25	34	24	39	34	36	29
Portugal	12	6	4	3	6	3	6	8
Romania		3	2	11	4	3	4	7
Slovenia	5	6	8	7	9	3	3	2
Slovakia	44	5	5	8	5	5	10	5
Finland	9	9	5	14	4	6	14	17
Sweden	13	9	5	5	10	7	4	12
United Kingdom	32	21	22	29	15	21	22	19
Total	533	454	424	431	344	320	347	396

Source: European Commission, DG Competition.

One can state that such a control mechanism has not led to any prohibition of state aid within the EU, as we can in particular note that:

- the amount of state aid during normal times ranged from between €10 billion and €15 billion per year for all EU member states between 2007 and 2012, excluding the railway sector (*see Table 5*);
- for the railway sector alone, the amount of aid granted by EU member states came to over €39 billion for the year 2012 alone (€20 billion of which was earmarked for infrastructure and almost €19 billion for wages and pensions);
- lastly, the recent financial crisis led the member states to grant aid to the banking sector, which amounted to €53 billion for the year 2007 and €11 billion for 2008.

Such orders of magnitude seem to put into perspective any criticism emphasising the fact that the Community control system for state aid is a major hindrance to the ability of national authorities to intervene in the economic field.

Table 5 ► State aid amounts in the EU27 (in million euros)

	2007	2008	2009	2010	2011	2012
Aid granted to the agricultural sector	1,566.9	1,571.4	1,695.3	1,822.1	1,466.2	1,823.7
Aid granted to fisheries and aquaculture	16.3	77.4	91.7	74.6	56	30
Aid earmarked for horizontal objectives (employment, environment, R&D, etc.)	7,937.5	8,694.3	10,449.7	10,936.9	11,372.2	10,375.4
Sectorial aid	826.5	3,028.1	2,922.5	2,823.4	564.8	2,870.3
Transport aid (excluding railways)	555.4	654.5	414.8	293.6	385	266.7
Total non crisis state aid	10,346.5	13,371.3	15,040.2	15,542.5	13,347	14,983.3
Aid measures in response to the crisis	53,363.1	11,829	0	0	2,585	0

Source: European Commission, DG Competition.

3.2. The EMU: the coexistence of four political regimes with a variable impact

Beyond a strictly sectoral analysis, it is also important to pay particular attention to the nature and scope of powers exercised by European institutions within the EMU, without automatically validating the idea that “Brussels decides everything”¹⁹.

“WITHIN EMU, THE EU IS ALLOWED TO SUPERVISE NATIONAL POLICIES, BUT IT DOES NOT LIMIT THE CAPACITY OF THE MEMBER STATES TO TAKE ACTION”

The creation of the EMU has led the member states to adopt some common rules covering for example the management of their public finances, and in particular the objective not to breach the 3% public deficit threshold as regards domestic GDP. The objective is to prevent inflation and the uncontrolled evolution of public deficit and debt, which has recently led some countries to face an acute financing crisis. Because it is partly a “sovereign debt” crisis, the euro area crisis is indeed also a “sovereignty crisis”, which has led it to change how powers were distributed between the EU and its member states. Some of these states have been led to provide assistance to those whose private and public debts had become excessive, to the extent of alienating *de facto* their sovereignty, in exchange for increased EU monitoring of national fiscal and economic policies. In this context, the series of “memoranda of understanding”, “packs” and “pacts” seem however to have produced a political system based on poorly defined responsibilities, while EU treaties are based more traditionally on the principle of subsidiarity.

In order to measure the impact of this new legislation on the sovereignty of member states, it is therefore important to analyse in more detail the nature of the powers exercised by the EU under the new EMU governance with regard to those that international organisations exercise. It’s then possible to classify the relations between the EU and its member states under four different political regimes, in which national or popular sovereignties are being jeopardised to extremely variable degrees (see Table 6).

19. For more developments on this topic, see Sofia Fernandes, “Who calls the shots in the euro area? ‘Brussels’ or the member states?”, Policy Paper No. 111, Notre Europe – Jacques Delors Institute, May 2014 and Yves Bertoncini, “Eurozone and democracy(ies): a misleading debate”, Policy Paper No. 94, Notre Europe – Jacques Delors Institute, July 2013.

Table 6 ► The way powers are exercised in the EMU

PURPOSE	TOOLS	KEYWORD	EUROPEAN ACTORS	COMPARABLE ACTORS
Bailout	Memorandum of Understanding MOU	Condition	Commission / ECB European Council	IMF
Preventing/correcting fiscal excesses and macro-economic imbalances	Stability Pact TSCG « 6 pack »	Sanction	Commission Council	UN
Monitoring economic and social policies	Europe 2020 Euro + Pact TSCG	Incitation (political)	Commission Council	OECD
Promoting structural reforms	Reform financial aid	Incitation (financial)	Commission Council	World Bank

Source: Yves Bertoncini, "Eurozone and democracy(ies): a misleading debate", *op. cit.*

It is just as striking to note that the political scope of the four regimes illustrated above vary considerably in terms of geography and time:

- the "IMF regime" led to drastic adjustments in 4 of the 28 EU countries that had to agree to the conditions set by the member states that helped them; but two of these countries have now been bailed out (Ireland and Portugal), whereas the two others are expected to be in the same situation by 2015 (Greece) and 2016 (Cyprus);
- the "UN regime" relative to the correction of fiscal excesses, currently has 17 of the 28 EU countries and 12 of the 18 euro area countries (*see Table 7*) undergoing the excessive deficit procedure which leads to real adjustment efforts²⁰; while it sets "medium-term budgetary objectives" (MTOs) for a return to equilibrium, it did not however prevent over three-quarters of EU member states²¹ from having their deficit overstep the 3% of GDP threshold since 1997²², without any financial sanction being imposed on them;
- the "hyper-OECD regime" and the "World Bank" regime mainly have an incentive-based rather than a coercion-based impact, and can hardly be seen as encroaching on the sovereignty of the EU member states : to recommend is not to command.

These points of analysis, which are both political and factual, also encourage better assessment of the impact of these various regimes and put into perspective the impact of "cross-cutting" Community legislation on the sovereignty of member states.

20. Only the euro area countries can face financial sanctions.

21. Only Estonia, Finland, Luxembourg and Sweden have never overstepped the 3% of GDP reference value for government deficit.

22. For certain EU countries, respecting the 3% reference value has been the exception rather than the rule, for example, France only respected this criteria 7 times in 17 years, Portugal, never.

Table 7 ► Budgetary indicators for euro area member countries

	MEDIUM TERM OBJECTIVE (ESTABLISHED IN 2013)	PUBLIC STRUCTURAL BALANCE		PUBLIC NOMINAL BALANCE		DEADLINE FOR CORRECTING EXCESSIVE DEFICIT (NOMINAL DEFICIT)
		2012	2013 (FORECAST)	2012	2013	
Belgium	0.75	-2.9	-2.2	-4.1	-2.6	2013
Germany	-0.5	0.3	0.6	0.1	0.0	EDP completed in 2012
Estonia	0.0	-0.2	-0.5	-0.2	-0.2	No EDP
Ireland	0.0	-7.7	-6.4	-8.2	-7.2	2015
Greece	n/a	-0.1	1.7	-8.9	-12.7	2016
Spain	0.0	-5.1	-4.3	-10.6	-7.1	2016
France	0.0	-3.6	-2.8	-4.9	-4.3	2015
Italy	0.0	-1.4	-0.8	-3.0	-3.0	EDP completed in 2013
Cyprus	n/a	-6.4	-3.8	-6.4	-5.4	2016
Latvia	-0.5	-0.2	-1.3	-1.3	-1.0	EDP completed in 2013
Luxembourg	0.5	1.0	1.0	0.0	0.1	No PDE
Malta	0.0	-3.8	-3.1	-3.3	-2.8	2014
Netherlands	-0.5	-2.7	-1.8	-4.1	-2.5	2014
Austria	-0.45	-1.6	-1.5	-2.6	-1.5	2013
Portugal	-0.5	-4.0	-3.6	-6.4	-4.9	2015
Slovenia	-0.0	-2.6	-2.2	-4.0	-14.7	2015
Slovakia	-0.5	-3.9	-2.3	-4.5	-2.8	2013
Finland	-0.5	-1.0	-0.9	-1.8	-2.1	EDP completed in 2011

Source: Sofia Fernandes, "Who calls the shots in the euro area? 'Brussels' or the member states?", *op. cit.*

4. European legislation having regulatory rather than legislative implications

An assessment of the relative impact of the Community's normative legislation on French law also led to an analysis of the "material" influence of such acts, while taking into account whether they are of a legislative or regulatory nature. This is how one can differentiate between highly technical legislation produced by the EU for reasons of harmonisation (including the size of chicken coops) and legislation framing or even restricting the field of action of national authorities.

To make this distinction, it has been possible to draw from data relative to legislation applicable in France, as the Fifth Republic Constitution clearly separates what is essential, and therefore dealt with by the law, from what is less important, and therefore regulatory. Based on this example, two types of analysis have been developed:

- an analysis of available data on the transposition of Community directives in France from 2000 to 2010, which is meticulously monitored by the General Secretariat for European Affairs (SGAE)²³;
- an analysis of the material nature of draft normative legislation submitted to the Council of ministers, and thus to French national authorities from 1992 to 2008: the SGAE did indeed forward these draft acts to the

23. I would like to thank the SGAE, and Veronique Fourquet in particular, for the data made available to me.

Council of state over a fifteen-year period²⁴ so that the latter could indicate whether they had a legislative dimension and should therefore be submitted to Parliament for consideration.

This dual assessment was carried out with the full awareness that it was likely to greatly overestimate the impact of Community normative legislation on French laws²⁵: the mere presence of a legislative component suffices to place the Community act concerned (a directive or regulation) in the “law” category, while all provisions of a French law are by nature legislative²⁶. In order to limit this overestimation, it was indicated that the directives and regulations concerned merely had “legislative implications” and an evaluation was presented postulating that only part of their content was legislative in nature (see Table 12).

4.1. The nature of national acts used to transpose directives in France: an overwhelming majority of non-legislative acts

“ ONLY 1/4 OF DIRECTIVES
TRANPOSED IN FRANCE
HAVE LEGISLATIVE
IMPLICATIONS, AS OPPOSED
TO 3/4 WITH PURELY
REGULATORY IMPLICATIONS”

Analysis of the data provided by the SGAE on the transposition of directives in French law for the period 2000-2010 showed that (see Table 8):

- the ratio of directives transposed by means of at least one act having legislative implications amounted to around one-fourth of the total (23.8% to be precise, since this concerns 236 directives out of 993);
- against more than three quarters of the directives transposed in France by means of acts of regulatory nature only.

This analysis of the data pertaining to the 2000-2010 period also showed that, on average:

- 14% of French normative acts used to transpose these directives were of a legislative nature;
- as opposed to 86% of a regulatory nature, which underscores the mainly regulatory nature of the EU directives.

Table 8 ► Number and material nature of acts transposing Community directives in France for the 2000-2010 period

Type of act	LEGISLATIVE ACTS			REGULATORY ACTS			TOTAL
	DDADC*	Laws	Ordinances	Decrees	Orders	Diverse**	
Number of acts	62	224	67	788	1,356	34	2,531
Total legis./reg.		353			2,178		
Proportion of acts Leg/Reg (%)		14%			86%		
Number of directives concerned		236			757		993
Number of directives concerned/year		21.4			68.8		90.2
Proportion of directives/year (%)		23.8%			76.2%		100%

Source: SGAE data, Y. Bertoincini's computations.

* “DDADCs” (“Diverses Dispositions d’Adaption au Droit Communautaire”) are laws on diverse provisions for the adaptation to Community Law.

** “Diverse” acts with regulatory implications include, for example, decisions made by an independent public service authority.

24. This assessment began on 1 November 1992 (the date on which Article 88.4 of the Constitution entered into force) and was completed on 23 July 2008 (since that date, all of the Community's draft normative acts must be submitted to Parliament). I would like to thank Juliette Clavière, Head of sector at the SGAE, for kindly sharing with us the raw data concerning the outcome of this Council of state review.

25. On this subject, see Yves Bertoincini, “What is the impact of the EU interventions at the national level?”, *op. cit.*

26. Using French laws as an example undoubtedly has the converse effect of minimizing the impact of EU interventions on legislative matters in terms of what would be observed in other EU countries in view of the fact that the scope of law is restrictively defined in France. Taken as a whole, this “national bias” limits only to a slight degree the upward trend described above.

4.2. Analysis of nature of Community draft legislation submitted to the Council: a dominant legislative dimension

The analysis of the material nature of draft normative acts submitted to the Council of ministers from 1992 to 2008 led to some other very interesting findings (see Table 9), which notably include the following:

- some two-thirds (68%, or 62.8% excluding external relations) of the draft normative acts submitted to the Council from 1992 to 2008 included at least one legislative provision;
- whereas the remaining one-third could all be classified as regulatory (a globally similar ratio was noted with regard to regulations and directives).

“ AROUND 12% OF ALL DIRECTIVES AND REGULATIONS ADOPTED BY THE COUNCIL, THE EP AND THE COMMISSION HAVE LEGISLATIVE IMPLICATIONS ”

Draft normative acts submitted to the Council, however, represent only a small part of the total Community normative acts, the great majority of which are adopted by the Commission, the latter being assisted by member state representatives within the framework of committees set up to that end (the so-called “comitology” procedures). To take these committees into account, we retained the working hypothesis according to which the normative acts adopted by the Commission are of a somewhat secondary (i.e. regulatory) nature, and very few of them might include provisions of a legislative nature. We therefore assumed that a maximum of 5% of the directives and regulations adopted by the Commission might have legislative implications: this figure corresponds to the number of acts which it does not adopt on the basis of prior derived legislation (and which can therefore not be considered an “implementing order”). It is in line with the ratio of Commission directives having legislative implications (which amounted to less than 4% of the total for the 2000-2008 period). Such assumption made it possible to estimate the percentage of Community acts which include a legislative provision, all sectors combined, at about 12%, with strong variation between Agriculture on the one hand (7.1%) and Justice and Home affairs (57.5%) on the other hand (see Table 9).

Table 9 ► Presumed material nature of draft directives and regulations produced by the EU from 1992 to 2008 *

SECTOR	COUNCIL (+/- EUROPEAN PARLIAMENT)		COMMISSION		EU	
	TOTAL ACTS	LEGISLATIVE ACTS	TOTAL ACTS	LEGISLATIVE ACTS*	LEGISLATIVE ACTS COUNCIL + COMMISSION	% OF TOTAL LEGISLATIVE
All Sectors	1,999	1,357	14,984	749.2	2,106.2	12.4%
“AGRAP”	547	253	10,242	512.1	765.1	7.1%
“TREG”	187	125	306	15.3	140.3	28.5%
“JAI”	73	44	19	9.5	53.5	57.5%

Sources: SGAE/Council of state data, EUR-Lex data, Y. Bertoncini's computations.

AGRAP: Agriculture and Fisheries, TREG: Transport and Regional Policy; JAI: Home and Judicial Affairs

Note: These “AGRAP” figures exclude animal protection.

* Reference period: 1 November 1992 to 23 July 2008. The Commission's acts considered during this same period are those which were adopted and published,

** The retained working hypothesis is that 5% of the total number of normative acts adopted by the Commission may contain provisions having legislative implications.

5. The subsidiary legislative impact of the EU: 20% rather than 80%

The common thread in all of the analyses and studies is that they underscore the major complexity of assessing the proportion of Europeanised national laws, and therefore of determining an overall percentage. As previously indicated, if we have nonetheless strived to address this issue, it is firstly because this field is already full of political analyses tending to overlook such subtleties, and because there are now sufficient elements of solid, corroborated expertise, allowing convergent and convincing orders of magnitude to emerge.

5.1. Looking for a global percentage: between 11.8% and 35% of national laws according to the countries

“THE PROPORTION OF EUROPEANISED NATIONAL LAWS VARIES FROM BETWEEN 10% AND 33% ACCORDING TO COUNTRIES”

Analyses conducted as part of the collective work published by Sylvain Brouard, Olivier Costa and Thomas König provide a baseline academic evaluation with regard to the percentage of Europeanised national laws (see Table 10). They focused on a sufficient number of European countries to make it possible to draw overall and relatively consistent orders of magnitude: the proportion of Europeanised laws can in fact vary in relation to the number of national laws produced, which is linked to the legislative “activism” of governments, varying according to country.

These analyses were based on the use of a series of keywords (EU, common market, EMU, etc.) making it possible to identify “the European impulse” underlying legislative texts, this impulse being either binding (for example the transposition of a directive), or voluntary (reference to the EU in the legislative text)²⁷. They resulted in figures varying from between 11.8% and 12.3% in Finland and the Netherlands to 35% in Spain (the only country above 30%), the other countries being situated within a bracket of 18% to 28% (see Table 10).

Table 10 ► Proportion of national laws of EU origin in 7 EU countries (in %)

COUNTRIES	PERIOD	% NATIONAL LAWS OF EU ORIGIN
Spain	1986-2007	35
Luxembourg	1986-2006	28.8
Germany	1986-2005	28.7
Austria	1992-2007	26
France	1986-2007	18.75
Netherlands	1981-2009	12.3
Finland	1995-2009	11.8

Source: Data Sylvain Brouard, Olivier Costa and Thomas König, *The Europeanization of domestic legislatures*, op. cit.

5.2. A proportion that varies according to the calculation methods used, but which remains low

A comparison of estimates calculated for Germany and for France confirms that evaluation of the legislative impact of the EU can vary according to the calculation methods, but also that this impact remains limited in any event.

27. See Sylvain Brouard, Olivier Costa and Thomas König, *The Europeanization of domestic legislatures*, op. cit.

The proportion of Europeanised laws in Germany for the 1986-2005 period was evaluated by Lars Mäder and Thomas König using a double-counting system (*see Table 11*): the first count measured EU impulse based on references underlying the national legislation, the second count measured the degree of Europeanisation of German laws in relation to the keywords they contain. In the first case, the proportion of Europeanised laws was estimated at 28.7%, in the second at 19.3%, with very substantial variations each time according to the sectors analysed.

Table 11 ► Number and proportion of Europeanised laws per policy area according to EU impulse/EU keywords (Abstract) in the time period between 1986 and 2005

POLICY AREAS	EU IMPULSE		EU KEYWORDS		TOTAL (NUMBER)
	NUMBER	%	NUMBER	%	
Macroeconomics	66	30.0	44	20.0	220
Civil Rights	9	13.4	7	10.4	67
Health	30	29.7	24	23.8	101
Agriculture	77	58.8	54	41.2	131
Labour	36	20.5	25	14.2	176
Education	12	21.4	10	17.9	56
Environment	28	62.2	19	42.2	45
Energy	15	48.4	9	29.0	31
Transportation	43	35.2	32	26.2	122
Law	44	23.0	21	11.0	191
Social Welfare	13	8.0	11	6.7	163
Housing	4	10.3	3	7.7	39
Banking & Finance	81	45.0	51	28.3	180
Defence	16	18.4	9	10.3	87
Technology	10	40.0	6	24.0	25
Foreign Trade	0	0.0	2	100.00	2
International Affairs	3	60.0	1	20.0	5
Government Operations	7	9.3	3	4.0	75
Public lands	1	12.5	1	12.5	8
Total	495	28.7%	332	19.3%	1,724

Source: Thomas König and Lars Mäder in Sylvain Brouard, Olivier Costa and Thomas König, *The Europeanization of domestic legislatures*, *op. cit.*

Analyses conducted for France by Sylvain Brouard, Olivier Costa and Eric Kerrouche were also based on the use of a series of keywords making it possible to identify the “European impulse” underlying legislative texts, this impulse being either binding (for example the transposition of a directive), or voluntary (reference to the EU in the legislative text)²⁸. These analyses resulted in an overall figure of 18.5% (*see Table 12*).

A study published by Terranova and conducted by Matthias Fekl and Thomas Platt²⁹ resulted in comparable orders of magnitude. By counting all laws comprising at least one Europeanised article, they reached the figure of 24.36%. By identifying only the “laws with a sufficient ‘dose’ of Europeanisation” (by choosing a threshold of 10% of articles), they reached the figure of 8.67%. By opting for “the sharpest and the most accurate measurement”, which consisted in examining each and every article, they came up with the figure of 7.35%, but made it clear that it was a “rather low assumption” given the analysis method used (*see Table 12*).

²⁸. See Sylvain Brouard, Olivier Costa and Thomas König, *The Europeanization of domestic legislatures*, *op. cit.*

²⁹. See Matthias Fekl and Thomas Platt, “Normes européennes, loi française : le mythe des 80%”, *op. cit.*

Table 12 ► National laws with EU origin: variable assessments but low results

	NOTRE EUROPE – JACQUES DELORS INSTITUTE Y. BERTONCINI	TERRANOVA M. FEKL AND T. PLATT	S. BROUARD, O. COSTA, E. KERROUCHE
Method used	Comparison of flows of laws and normative acts produced at both national and EU levels	Assessment of content of laws and sections of legislation	Assessment of content of laws and sections of legislation
Period analysed	1992-2008	1999-2008	1986-2007
Law with EU origin	38% (High hypothesis) 23% (Medium hypothesis) 10.9% (Low hypothesis)	24.36% (High hypothesis) 8.67% (Low hypothesis) 7.35% (articles)	18.5%

Source: Data Yves Bertoncini, "What is the impact of the EU interventions at the national level?", *op. cit.*; Matthias Fekl and Thomas Platt, "Normes européennes, loi française : le mythe des 80%", *op. cit.*; Sylvain Brouard, Olivier Costa and Eric Kerrouche, in Sylvain Brouard, Olivier Costa and Thomas König (Editors), *The Europeanization of domestic legislatures*, *op. cit.*

A study conducted by the author in 2009 consisted in comparing normative flows (legislative or other) produced at EU level and in France, then in measuring their relative share³⁰ made it possible to state that the share of Community norms having legislative implications could not, in any event, exceed:

- slightly more than half (55.1%) of the total normative legislation in force in France, if we retain the very high hypothesis, according to which the entire content of Community acts having legislative implications would be legislative in nature;
- slightly more than one-third (38%) of the total normative legislation in force in France, if we consider the high hypothesis that only half of Community acts having legislative implications are legislative in nature.

On examining the two other previously cited studies, it seems that this last working hypothesis was probably too extensive, and considering that (*see Table 13*):

- only one quarter of the content of Community acts having legislative implications is legislative in nature would have resulted in an overall figure of 23% of Europeanised national laws;
- only one tenth of the content of Community acts having legislative implications is legislative in nature would have resulted in an overall figure of 10.9% of Europeanised national laws.

Table 13 ► Average annual number of draft regulations and directives having legislative implications, compared to the total number of French legislative acts

NORMATIVE ACTS	AVERAGE/YEAR
Regulations having legislative implications per year*	108.3
Directives having legislative implications per year*	22.4
Laws and ordinances per year*	106.35**
% of EU "legislative" norms / total legislation Very high estimate***	55.1%
% of EU "legislative" norms / total legislation High estimate***	38%
% of EU "legislative" norms / total legislation Medium estimate***	23%
% of EU "legislative" norms / total legislation Low estimate***	10.9%

Source: SGAE/Council of state data; Y. Bertoncini's computations.

* Reference period for the regulations = 1992-2008 / * Reference period for the directives = 2000-2008 /* The reference period used for French national laws and ordinances is 1987-2006.

** This total does not include the laws and ordinances adopted in the sectors "Public Service and state Organization" (2.45 per year) and "Prime Minister" (0.7 per year): including them would yield a total of 109.5.

*** A very high case scenario consists in considering that all Community acts having legislative implications are legislative in nature; the base case scenario consists in considering that only half of the provisions of Community acts having legislative implications are legislative in nature; low and very low case scenarios consider that only 25% and 10% respectively of the of Community acts having legislative implications are legislative in nature.

30. See Yves Bertoncini, "What is the impact of the EU interventions at the national level?", *op. cit.*

CONCLUSION: RESISTING A TWOFOLD TEMPTATION

The complementary and concurring points of analysis presented above must lead us to resist an initial temptation, namely, that of considering that, as the EU looks after what is “infinitely small” (the size of chicken coops) and that it also happens to intervene in what is “infinitely large” (the supervision of national budgets, and therefore the financing of all national policies), it occupies the full field of public action and that it therefore encroaches on the sovereignty of the member states and the freedom of their people. Legislative interventions by the EU are firstly concentrated in just a few sectors; their cross-cutting scope is real but with a limited impact; European legislation has mainly regulatory implications, to such an extent that around 20% of national laws, at most, are Europeanised, as all studies available on the subject have proven. The EU is therefore not a “prison of peoples” – and they are in fact free to leave it if they so wish.

**“ IT IS NOT BECAUSE
THE EUROPEAN ELECTIONS
ARE “SUBSIDIARY” THAT
THEY ARE SECONDARY ”**

Such studies must also lead us to resist another vain or even counterproductive temptation, i.e. to “oversell” the EU’s importance to its citizens, particularly intense in the perspective of the European elections. Of course, the EU can “change the life” of farmers and fishermen (and indeed farmers and fishermen are fully aware of that fact); it can take decisions with a major impact on European citizens’ lives, for instance in the fields of enlargement, trade agreements, deepening the single market, consumer and environmental protection, the framing of national budget or industrial policy or the funding of networks and projects with a transnational character. It is those kinds of decisions that need to be highlighted and debated if we are to kindle voter interest in May 2014.

But we should not forget to stress the fact that the EU does not actually govern its member states and that it is firstly at national or even local level that the majority of decisions affecting the daily lives of Europeans are made, particularly in the fields of education/training, housing, social protection, taxation and security. We can vote and encourage others to vote in May 2014 by recalling that the EU is not a “prison of peoples”, but simply a union of peoples called on to exercise their right to elect those who will represent them in Strasbourg and in Brussels and who will make decisions on their behalf for the next five years. It is not because the European elections are “subsidiary” that they are secondary.

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