Introduction

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RISK AND RISK CONTROL MECHANISMS

Although the assessment and management of risk has always been an integral part of government and private decision-making, it has acquired particular importance in contemporary politics. Multiple factors, such as the openness of liberal societies, market competition, the constant endeavour to innovate, globalisation and new technologies, have increased the types and diversity of risks as well as the potential magnitude of their undesirable effects. Furthermore, risk awareness and with it the struggle to prepare, pre-empt and confront have also increased.

A series of recent events have brought to the fore the importance of risk management. In 2008, the world experienced the deepest financial crisis since the 1930s. Its effects, which are still unfolding, have been compounded by the on-going Eurozone crisis. Events such as terrorist attacks, international health scares and natural disasters poignantly illustrate that sudden and unpredictable events may have far-reaching consequences in economic, social and political life at a global level. The financial crisis, in particular, is set to have a long-lasting impact on the regulatory regime in Europe and the US. Although risk is an innate element of economic and political life, a worldwide discussion is taking place with a view to facilitating better prevention and suppression mechanisms in modern complex societies.

Risk regulation is well established in various sectors, such as health and safety, food and medical law, but is also gaining pace in other areas, such as financial services and contract governance, where it has been less prominent. The possible transfer of models from established areas of regulation to new sectors invites us to revisit our understanding of risks, how they should be managed, the respective roles of preventive control mechanisms and post-market remedial models, and, last but not least, the shape and structure of institutional design. In parallel, since the terrorist attacks of 9/11, there has been a heated debate among scholars, and a lively constitutional conversation between judges and politicians, on how

to manage security risks. Citizen expectations, public security, economic prosperity and human rights are some of the parameters within which institutional actors form their decisions.

The interaction of EU law with risk control has inevitably increased. The transnational character of many economic, social, security and political threats leads Member States to entrust more risk control responsibilities to the EU. The Union's intervention is further enhanced by its own institutions' appetite for power and empire building. EU law now has presence in all areas of risk regulation, broadly understood, including food and health law, consumer protection, product liability, environmental protection, counter-terrorism and financial markets supervision. EU law, being an important source of norm creation and peremptory regulation for the Member States, poses itself a legal risk for Member States and private actors. From that perspective, the normative function of EU law may become as much the problem as it is the solution.

A comparative analysis of risk regulation in various sectors is beneficial in enhancing our understanding of risk, facilitating cross-fertilisation of ideas and, ultimately, contributing to better solutions. Such an analysis should take into account a number of key concepts and questions. These include the following:

- *The concept of risk.* Whilst risk may generally be defined as the possibility of occurrence of a harmful event, a number of classifications may be made. Risk can be seen as incomplete information, complexity or indeterminacy. In a historical perspective, distinctions may be drawn between danger, stemming from experience, risk, as systematised knowledge generated by societal networks, and advanced control mechanisms provided by private or public law normative frameworks.
- *The objectives of risk regulation.* Prevention and suppression are the twin goals of risk regulation but any legal intervention would need to identify specific goals and mechanisms and enter into a balancing exercise weighing different risks and taking into account other competing interests. A correlation may be drawn between the mode of risk regulation (self-regulation, shared regulation and mandatory regulation) and the types of risk posed or the sector where they arise. The gradual disappearance of the public/private divide seems to be a common denominator.
- *The parameters of decision-making.* Effective risk control can only take place within a set system of governance and rational decision-making. Whilst the distinction between risk assessment and risk

management appears clear cut from a theoretical perspective, the two are closely intertwined and in practice they may be fused. A number of questions arise here as to who should take decisions (authority boundaries), the institutional and procedural safeguards available (process and accountability), the balancing between risk prevention and economic freedoms (politics), and the justiciability of outcomes (the role of the judiciary).

- *The trigger mechanism of risk regulation.* Key events, such as crises or scandals, political activism, state paternalism and even media attention, push the regulatory impulse one step further. But do they do so in the right direction? Are they, perhaps, too focused on regulating past events rather than coping with future mutating risks? What is the optimum time of intervention? Regulatory responses triggered by specific events may be a more efficient way of legislating but do they make for good law?

PERSPECTIVES ON RISK REGULATION

This volume brings together contributions from different disciplines and with various perspectives dealing with selected aspects of EU risk regulation. They seek to address the questions listed above. The first group of chapters (1 to 3) looks at risk regulation in context. It deals with broad, horizontal issues focusing on epistemological, economic and sociological aspects of risk. The second group (Chapters 4 to 10) provides legal and economic perspectives in specific areas of risk regulation.

The identification and management of risk is not an easy process. *Vieweg* sets the scene by raising a number of key questions that should guide the risk prevention and management inquiry. What is the object of protection? What risks should we safeguard against? Which authority should take decisions and by what process? How is the probability of occurrence of an undesired event to be determined? How can risk be quantified? To what extent and at what stage should cost-related aspects be included? There is a need for consistency and coherence between EU and national action, and also between legislative and executive responses. Uniformity in the methodology for the identification, assessment and suppression of risk should be encouraged.

Vieweg offers a grid which identifies sources of risk and regulatory models for their prevention and management. Whilst such systematisation does not do away with the need to calibrate responses to the specificities of uncertainty, it provides a framework for transversal action. Sources of

risk include human error, technical error, natural occurrence and interference by an unauthorised third party. In relation to regulatory models, Vieweg distinguishes self-regulation, where a private actor seeks protection by contract against a perceived risk; cooperative regulation, where private networks develop common responses or power is shared between public and private actors; and classic imperative regulation through orders and prohibition. He provides a systematic list of factors to be taken into account in drawing risk regulation and argues that risk-determination and prevention processes should be transparent.

Based on economic analysis, *Oehler, Herberger, Höfer and Wendt* point to the dangers arising from simplified or incomplete assumptions made in risk modelling. Risk management is a cybernetic process which includes its identification, measurement, evaluation and control. The use of risk models, whilst necessary to mitigate the lack of information, gives rise to enormous challenges. Economic literature identifies three economic paradigms for the management of risk. The neoclassical paradigm starts from the premise that the idealised *homo economicus* takes rational decisions to maximise utility. In perfect market conditions, individuals are fully able to make assessments and can adjust their risk levels to reflect their preferences with little need for the introduction of externally imposed risk management protocols. The new institutional economics paradigm accepts that market participants possess incomplete information and that information is unevenly distributed. Such asymmetries lead to agency conflicts which in turn require institutional intervention. Under this model, risks include informational risks, delegation risks and risks with respect to asymmetric distribution of economic consequences which vary depending on the circumstances and conduct of individuals. The behavioural economics paradigm asserts that the cognitive limitations of individuals result in their decisions falling short of full rationality. Focusing on individual conduct, this paradigm asserts that individuals will not be able to assess all threats and their risk perception will differ even in identical situations.

Oehler, Herberger, Höfer and Wendt point out the limitations of the neoclassical paradigm and the institutional paradigm in risk modelling. By relying on the efficiency of market mechanisms under idealised conditions, the first model gives results which deviate from reality. The second model assumes that the reduction of information asymmetries will lead to risk reduction. Given, however, that the perception of risk among individuals differs even in identical situations, models should take into account variations arising from factors such as information overload, choice overload and overconfidence.

Model risks may also arise from poor data quality or data processing where mathematical calculation and quantification leads to erroneous estimates. The authors identify three types of model risk: the use of a model that does not fit the situation (over-optimism); the use of a model in a different way from or another purpose than intended (ignorance); and the failure to use a suitable model (agnosticism). The failure to identify the risk of modelling gives rise to an illusion of control. The mitigation of model risk requires the implementation of governance and control procedures and techniques such as model validation and back testing.

Ladeur seeks to analyse epistemological aspects of risk management focusing on the interrelationship between the legal system and the societal knowledge base. Risk regulation can be seen as a process of homogenisation of the social knowledge infrastructure. Norm creation crystallises risk control experience developed in a fragmented way at the local level, thus universalising knowledge. But in modern democracies, the internalisation of uncertainty is much more complex. In a liberal society where innovation is a virtue, uncertainty is the inevitable result of progress. Risk is a bridging concept establishing links between experience and normativity. The bridging takes place through complex and sophisticated mechanisms. The shift from *ex post facto* private law remedies to public law *ex ante* preventive mechanisms and the corresponding increase in institutions and specialised agencies is well documented. Science has replaced experience as a more advanced form of knowledge. This in turn requires intermediation through the establishment of institutions to translate scientific information to normative outcomes.

Ladeur identifies the emergence of new models of governance where risk assessment and management no longer take place within the unitary and largely homogeneous hierarchical channels of the nation state but at supranational level through networks which disperse power and bring down the public–private law divide. He places particular emphasis on the establishment of networks and the growth of new objectives-oriented epistemic communities necessitated by the need to process and articulate the normative implications of specialist knowledge. Such developments make the process of standardisation more complex and call for a redefinition of the role of public authorities.

Cremona's chapter brings to the fore the interdependence between internal and external EU action, and the different types of risk involved in decision-making in the external relations sphere. Tracing the travails of the EU–US Agreement on the Processing and Transfer of Financial Messaging Data, *Cremona* identifies risks at three different levels: legal risk, namely legal uncertainty arising from different regulatory

approaches to data protection; constitutional or political risk arising from the vicissitudes of the political process which is exacerbated by the EU's complex institutional architecture; and factual risk, which arises from the need to balance conflicting policy objectives, *in casu* the need to have in place a meaningful anti-terrorism regime and maintain the EU's relevance on the international stage with the need to protect personal data.

Two aspects, perhaps, stand out in Cremona's analysis. As she points out, although it is commonly considered that transferring more powers to the EU would increase its voice as an international political actor, it may in fact lead to the opposite result. The complex EU institutional set-up and the posturing of different political actors may inhibit decisive action and executive discretion which are necessary for the swift conduct of international negotiations. Secondly, her analysis highlights the difficulty in striking a balance between security and data protection in the sphere of international negotiations, especially in the light of competing security models that prevail at the national level. The multiplicity of the actors involved, the dispersal of power and the need to pursue various and diverse objectives increase the possibilities of sub-optimum results. Yet, somehow, the EU's complex decision-making procedures appear to be working and may overall be said to be a success.

Wouters and Duquet examine whether and, if so, how the EU advances risk-oriented approaches in its management of counter-terrorism. Although counter-terrorism action has been integrated into both the Area of Freedom, Security and Justice and the Common Foreign and Security Policy, it retains prominent inter-governmental features. Since 2005, strategic thinking grounded in risk analysis has slowly found its way into EU policy making. Its implementation, however, has often occurred in an uncoordinated way. The authors propose a dual approach based on threat reduction and vulnerability mitigation measures. The first relate to the reduction of terrorist threats (focus on the 'other') whilst the second relate to measures and policies necessary to make the EU less vulnerable in the event of a terrorist attack (focus on the 'self').

When it comes to the assessment and prevention of terrorism, primary responsibility lies with the Member States but the EU has gradually built a supportive and coordinating role. Prevention has become a constitutive part of the EU's counter-terrorism strategy. The EU plays a role, for example, in coordinating national intelligence services and facilitating the collection, analysis and exchange of data. The authors argue that the EU must also enhance its vulnerability reduction measures. Taking a risk-based approach to counter-terrorism goes beyond analysing and diminishing potential threats. Prospective targets also have to be made less vulnerable to terrorism. The development of defence mechanisms

requires the adoption of policies and instruments which include measures not specific to terrorism such as cooperation in the field of criminal law and the European Arrest Warrant. The EU's efforts are here hampered by competence limitations in the field of criminal law, the principle of minimum harmonisation under Article 83 TFEU and the patchwork of available opt-outs. The European Public Prosecutor's Office and the solidarity clause of Article 222 TFEU may offer promising possibilities but they are not unproblematic. The prosecutor does not directly cover terrorism and it has proved very difficult to adopt measures under the solidarity clause. In a nutshell, despite a great effort to embed risk regulation in the EU's counter-terrorism strategy, the EU's policy remains fragmented.

Van Asselt and Vos examine the role of science in decision-making and explore the 'uncertainty paradox' in the field of food regulation. In an effort to cope with risk and uncertainty and strengthen the objective basis of regulation, decision-makers turn to science, thus leading to the scientification of law. This in turn leads to an expert dependency syndrome. Specialised agencies tend to be entrusted with extensive powers sometimes going beyond risk assessment. The Commission, as the EU executive, tends to over-rely on advice provided by such agencies, leading to a blurring of the boundaries between risk assessment and risk management. The authors demonstrate the central position of the European Food Standards Agency in decision-making and the technocratic dominance in taking GMO decisions despite the societal and political controversies surrounding them.

Whilst risk assessment is a *sine qua non* for sound management of risk, and has to be carried out in a transparent, objective and competent manner, it is not a substitute for risk management, which is perforce a political act. The force of science as a neutral arbiter may distort the decision-making process, especially in cases of scientific uncertainty. Science cannot provide answers where scientific evidence is uncertain. Yet, decision-makers may rubber-stamp risk assessment based on inconclusive evidence even where political support for the chosen solution may be lacking. Two further points arise from *Van Asselt and Vos's* analysis. Whilst the European Court of Justice (ECJ) increasingly pays attention to the scientific base of market regulation, it continues to be deferential to EU choices. *Van Asselt and Vos* caution against judicial bodies becoming 'super experts' on scientific matters. Ultimately, risk assessment is itself a political exercise. It does not occur in a policy vacuum but is determined by answering a number of specific questions regarding the appointment of experts, the scope of their mandate, the process of collecting evidence and their role in executive decision-making.

Alemanno and Garde explore the EU's increasing presence in the field of lifestyle risk regulation. EU intervention is interesting from many points of view. Recent EU measures suggest a policy shift. Whilst in earlier years EU law was preoccupied with facilitating free movement, the emphasis increasingly appears to be on regulating undesirable products. Just as in a previous era the expansive interpretation of Article 34 TFEU sought to challenge entrenched consumer habits by liberalising inter-state trade, a new policy generation is emerging where regulation rather than liberalisation seeks to change consumer behaviour. This in turn raises important points about personal freedom, the role of government and the outreach of the EU.

EU measures in the field of lifestyle regulation share some features but also present important and marked differences. They seek to promote an environment conducive to public health and are based on coordination and concerted action at multiple levels seeking to engage stakeholders from a wide spectrum. But they vary in terms of instruments, intensity and scope. The EU has adopted a hard approach in relation to tobacco consumption, a soft strategy to combat alcohol abuse, and a somewhat intermediate approach in relation to nutrition.

The central pillar of EU intervention remains the 'information paradigm'. Consumers must be adequately informed to be able to take responsibility for their health choices. This achieves a golden balance. By placing the onus on consumers to take decisions, it limits interference with personal freedom. At the same time, the EU's approach to information is a qualitative one placing emphasis on the requirement that the information supplied must not be misleading. Given the limitations on the information paradigm, it is supplemented by other techniques provided at EU and national level. Those include marketing bans, measures affecting product availability, product reformulation through ingredients regulation, and fiscal measures. The need to take action in several sectors along with the fragile and fluid division of powers between the EU and the Member States point to the need for coordination and coherence.

The authors focus on an aspect which lies at the core of risk regulation, namely the evidence required to justify a restriction and the burden of proof. Providing evidence, however, raises important challenges. Given that undesirable outcomes are the result of multiple factors, it is often impossible to establish with any certainty a cause and effect relationship between a specific risk and a specific outcome. How much obesity is caused by advertising of foods containing sugar? How much health harm is caused by allowing the sale of tobacco by automatic vending machines? Also, given that lifestyle regulation tends to include many interconnected initiatives, it becomes very difficult to isolate the specific

effects of a measure which forms part of a comprehensive regulatory network. Such difficulties make the application of the principle of proportionality difficult. How can a judicial body determine the suitability of a measure? How is it possible to establish if there are less restrictive alternatives? Balancing becomes more difficult when one adds the precautionary principle to the factors to be taken into account. A distinct aspect of recent case law is the enhancement of process aspects in proportionality analysis. The need for impact assessments and the articulation of criteria which they must fulfil inevitably will increase their value as objective yardsticks which the courts will take into account in determining the proportionality of a measure. The authors argue in favour of evidence-based judicial review. Such an approach will promote a 'broader culture of proof, evidence and rationality' and may open the judiciary to evidence based on other disciplines such as statistics, economic analysis and psychology.

Cafaggi analyses a relatively new phenomenon, namely transnational risk regulation in global supply chains. Supply chains are interlinked via up-stream and down-stream contracts. Contracts, however, are not only a means of building supply chains vertically but also a means of interconnecting them horizontally. Transnational private regulation has a long history, reaching back to the Middle Ages and, maybe, even further. What is really new is the combination of risk regulation and contracting. Building on previous research, *Cafaggi* provides a deep insight into how various public and private actors in global supply chains are interconnected, interact and develop techniques to manage product risks via contract governance. His analysis focuses on food safety and the management of food risks in supply chains. There are other domains of product regulation where similar phenomena could be observed, such as supply chains in chemical products, pesticides, pharmaceuticals and technical products where risks to health and safety are inherent. It seems, however, that the debate around risk regulation and contract governance is most advanced in the area of food supply chains.

Cafaggi argues that the integration of risk regulation into contracts leads to mutual transformation from transnational private regulation to contract governance and also from risk assessment and risk management via public authorities to risk assessment and risk management through a whole variety of public and private actors who are interconnected horizontally and vertically. This does not mean privatisation of risk assessment and risk management, as cooperation between the public and the private sector is crucial in transnational risk regulation. The public/private divide, however, is vanishing away. There is another argument, which stands out from the analysis of global supply chains in the food

sector. This is the key role that standard and certification bodies have gained in transnational risk regulation. They are gradually turning from mere compliance managers into risk managers, monitoring and surveying not only the production process but also distribution and marketing. This brings the third-party impact of risk regulation through contract governance to the fore. One cannot agree more with Cafaggi's plea for more research in order to get a deeper understanding of contractual practice.

Allen and Carletti provide an economist's perspective focusing on the concept of systemic risk in the context of the global financial crisis of 2008. They identify six types of such risk, namely exposure to asset price bubbles, particularly property bubbles; inefficient liquidity provision and mispricing of assets; multiple equilibria and panics; contagion; sovereign default; and currency mismatches in the banking system. They argue that microprudential regulation focusing on the risks of individual credit institutions is not sufficient to prevent crises because it ignores systemic risk. Its inadequacy was spectacularly exposed in the 2008 crisis. They outline a number of policies to advance macroprudential supervision.

Three elements, perhaps, stand out from Allen and Carletti's analysis. The first pertains to contagion. Although there can be no doubt that contagion was an important contributing factor to the 2008 crisis, our understanding of the effects of contagion risk remains limited. Whilst empirical literature suggests that close connection between credit institutions via network structures reduces the likelihood of widespread default, the authors caution against the claim that contagion is unlikely to occur where financial institutions are closely linked. Secondly, the authors highlight the close relationship between sovereign default risk and banking crises as evidenced by the Eurozone crisis, especially in Greece, Ireland and Portugal. As Alexandre Lamfalussy famously pointed out, the EMU is characterised by a strong 'M' and a weak 'E'. Whilst the EU Treaties framework provides the structures and disciplines for centralised Monetary policy, competence on Economic policy and fiscal matters remains a national competence. The tension proved impossible to manage as markets misread the potency of the EMU construct to guarantee discipline. The Eurozone crisis also illustrated the difficulties caused by the lack of a common resolution procedure and agreed arrangements on burden sharing.

Finally, although the authors outline specific initiatives that could be taken with a view to putting in place an effective system of macroprudential supervision dealing with each type of systemic risk, the challenges of such an exercise should not be underestimated. Measures which may be appropriate for a region with a homogeneous economy may be more difficult to implement in heterogeneous environments such

as the Eurozone. Thus reliance on increasing interest rates to counter a property bubble may come at the price of slower growth or recession in another part of the Eurozone. Effective management requires the employment of a combination of measures including targeted use of taxes, tightening monetary policy, and putting in place a more coherent and representative system of international supervision. As a practical solution to the global imbalance problem, the authors recommend elevating the Chinese Rmb to a reserve currency. The authors are critical of the ability of deposit guarantee schemes to increase stability and suggest that the problem of bank runs could be dealt with through lender of last resort policies. Furthermore, they point out that financial institutions hold little capital relative to other industries and suggest measures to reduce their reliance on debt, such as counter cyclical capital regulation and the use of contingent convertible debt.

Kobrak and Brean discuss attempts to introduce a system of financial regulation at the supranational level focusing on the role of the G20 and the EU's efforts to establish a banking union. Although many changes were introduced in the aftermath of the 2008 crisis, they doubt that the reform has been robust enough and prefer to view the glass as half empty. Many G20 initiatives have in fact not been followed up and a number of reforms remain unimplemented. The gap between rhetoric and reality suggests that the G20 forum is an ineffective mechanism to push forward the solutions needed. Whilst recognising the inevitability of national political priorities as a dominant force, they argue that closer international cooperation is the only course capable of addressing the needs of citizens and the markets. In that respect, the global financial crisis and the ensuing Eurozone crisis may be seen as a lost opportunity. They did not precipitate the effective and decisive action for which one might have hoped.

Kobrak and Brean identify two problems: the cumbersome decision-making process at G20 level which requires unanimity, and the subordination of sound international reform and coordination to divergent national objectives. In relation to Europe, the authors applaud banking union as an effective and efficiencies-generating risk mitigation strategy. They consider that banking union is a welcome development, with centralisation in bank oversight fulfilling the subsidiarity criteria. The establishment of banking union can be seen as a new stage in the management of risk in financial markets. It is not only retrospective, seeking to avoid the Eurozone crisis that beset Europe, but also prospective: by subjecting banks to common supervision and earmarking funds for rescue it seeks to limit the vice of contagion and break the vicious circle between weak banks and weak sovereigns. However, whilst a

technocratic efficiency-driven analysis of the virtues and vices of banking union would suggest that the case is clearly made in its favour, its political dimensions and repercussions for the nation state pose enormous challenges and may change the reading of the scales.

In conclusion, Kobrak and Brean consider that, despite the recent dramatic challenges to global finance on both sides of the Atlantic, regulation remains largely the privilege of state action. National priorities, especially in countries in which the financial sector plays a very large economic role, have curtailed cross-border coordination. A formal or informal consensus among major economies about the appropriate rules of the game for national and international financial organisations is still elusive.

GENERAL TRENDS

Looking at the evolution of EU risk regulation across sectors, one could identify a number of salient features and trends. These include the growth of agency power at EU level, the prevalence of reactive, ‘events driven’ legislative intervention, the fusion between management crisis and law reform, the decline of the public/private divide, the tension between EU and national competence, and the evolution of proportionality review. Another feature, which transcends specific areas, is the integration risk paradigm built by the case law.

Growth of EU Agencies

The enhanced presence of the EU in the field of risk regulation has led to the proliferation of EU agencies. The growth of agency power has been remarkable. Whilst there were just two Community agencies in the 1970s¹ and only four in 1993, there are currently more than 40 agencies.² This has made for a qualitative change in EU governance. The growth of independent agencies and the substantial increase in their powers lead to profound issues pertaining to accountability and democracy, and raise the

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¹ These were the European Centre for the Development of Vocational Training and the Foundation for the Improvement of Living and Working Conditions.

² See http://europa.eu/about-eu/agencies/index_en.htm; last accessed on 1 June 2015.

spectrum of the emergence of a ‘headless fourth branch of government’.³ Traditionally, the *Meroni* doctrine⁴ imposed severe limitations on the power of EU institutions to establish agencies by prohibiting them from being vested with discretionary powers. More recent case law appears to have relaxed the *Meroni* criteria, recognising that agencies have an important role to play in the internal market and can be delegated some discretion provided that their powers are well circumscribed and subject to process and substantive requirements.⁵ In some cases, to preserve the limits on delegation, agencies operate under a reverse accountability rule: an agency proposes draft standards to the Commission but the latter can only depart from or amend them if it provides reasons.⁶ The net effect of this is to bring agency powers close to regulatory competence.⁷

Events- or Scandal-Driven Legislation

A prominent feature of many regulatory initiatives is that they are scandal or events driven. The legislature reacts after a specific scandal or crisis with a view to closing a regulatory gap and avoiding a similar event in the future. This has been a perennial feature of financial and capital markets regulation. The initiatives which followed the financial crisis and the Eurozone crisis are no exception. As various contributions in this book show, it is also a feature of other areas such as counter-terrorism and health regulation. Whilst it is appropriate for policy makers to respond to specific problems, too much preoccupation with specific events might lead to backward- rather than forward-looking law reform. Crises tend to mutate and there is a danger of policy making suffering from the ‘mazinot line syndrome’. Government and society will be ready to fight a past war but not the next one.

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³ The expression was coined by President Franklin Roosevelt’s Committee on Administrative Management; see Breyer, Stewart, Sunstein and Spitzer, *Administrative Law and Regulatory Policy*, at 146.

⁴ Case 9/56 *Meroni v High Authority* [1958] ECR 133.

⁵ C-270/12 *UK v Council (ESMA case)*, judgment of 22 January 2014.

⁶ See for example Regulation No. 1095/2010 establishing a European Securities and Markets Authority [2010] OJ L 331/84, Art. 10(1), sub-para. 6.

⁷ See, for a recent discussion, among others, M. Scholten and M. van Rijsbergen, *The Limits of Agencification in the European Union*, 2014 (15) *German Law Journal*, 1223.

Law Reform versus Crisis Management

It would appear that the European Union is better equipped to contribute to law reform than to crisis management. The latter requires clear and specific competence and wide executive discretion,⁸ elements which the Treaties did not traditionally grant to the EU institutions. Law reform, on the other hand, is a reflective exercise which the EU appears well placed to conduct. It has the advantage of pan-European expertise and can master the knowledge of several national legal systems. It acts in the EU interest as a whole and can be presumed to be less susceptible to capture by national interests. Also, being one step further away from the national electorates, it should be under less political pressure to act immediately in the aftermath of a crisis and can instead engage in thoughtful long-term law reform. Notably, the Commission's reaction in the aftermath of the 2008 financial crisis gave a different picture. The Commission felt under pressure to react immediately and initiated long-term reform leading to the adoption of a bewildering plethora of institutional and substantive measures within a short period. Such fusion of crisis management and law reform may not make for optimum policy choices. Still, the resulting picture following the global financial crisis and the ensuing Eurozone crisis shows the European Union as a winner. There is more centralisation of powers, more norm creation at EU level, extension of EU presence beyond rule making to the field of monitoring and enforcement, and recognition of a crisis management role for the EU.

The Blurring of the Line between the Public and the Private

Risk regulation in whatever form was long based on regulatory attempts to earmark bright lines; namely, to draw clear distinctions between private and public responsibilities, between the scientific-technical definition of risk and the political decision on risk assessment, between private parties who had to follow the risk assessment which was publicly decided and the public entities which accepted responsibility for value judgements. It seems that those lines of separation are disappearing. This holds true for the distinction between an objective, scientific definition on risk, and subjective, political value judgements. It holds equally true in the

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⁸ See E.A. Posner and A. Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008* (13 November 2008). U of Chicago Law & Economics, Olin Working Paper No. 442; available at SSRN: <http://ssrn.com/abstract=1301164> or <http://dx.doi.org/10.2139/ssrn.1301164>; last accessed on 1 June 2015.

interplay between science and politics and between private and public responsibilities. The interaction between the various actors is much stronger and crosses the boundaries of objective science vs. political assessment. What can be observed from the cross-subject and cross-sector analysis is the growing idea of cooperation, mutual dependence and joint rather than shared responsibilities. The implications for the legal system are just about to come to the fore. Who can hold responsibility for what? The vanishing divides make matters more difficult for the legislature, the executive and the courts which have to attribute responsibilities.

The Tension between EU and National Competence

Perhaps two areas of risk regulation stand out in contemporary EU law: counter-terrorism initiatives and measures seeking to cope with the double financial crises that hit Europe in the late 2000s. Both areas exposed the tensions and equivocations surrounding the division of powers between the EU and the Member States. On the one hand, national governments long for bright lines delineating the boundaries of EU competence. On the other hand, where expedient, they favour collective action at EU level with as few constraints as possible. The adoption of economic sanctions against non-state actors to combat terrorism is a case in point. Following the terrorist attacks of 9 September 2001, the Council adopted sanction measures giving effect to UN Security Council Resolutions despite the feeble legal basis in the Treaties for the imposition of economic sanctions against individuals. Whilst in *Kadi*⁹ the ECJ recognised competence to the EU, it also found that the Union has its own enclosed constitutional space which cannot be penetrated by international law obligations and which requires compliance with the Union's fundamental rights.

Competence issues have also played a prevalent role in financial governance. The need for urgent and effective action to cope with the Eurozone crisis, whilst respecting national red lines, gave rise to parallel international treaties sitting alongside the EU system. Those arrangements pose strong challenges not only to the integrity of EU law but also to democracy, the rule of law and the rights of the individual.

The tension between EU and national competence is also evident in other areas. The ECJ has encouraged the use of Article 114 TFEU by

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⁹ Joined Cases C-402/05 P and C-415/05 P *Kadi & Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351.

exercising a light standard of review. Still, EU and national action are closely intertwined. In the absence of common rules, Member States can regulate areas of shared competence where the EU has not yet legislated or occupied the field. Similarly, if the EU approximates the laws of the Member States through minimum harmonisation, Member States can exceed the minimum standards laid down at EU level. The fact remains that drawing the boundaries between legitimate and illegitimate EU intervention under Article 114 TFEU is far from straightforward.

Proportionality as Process and Substance Review

Proportionality permeates the EU legal order. Its appeal to the judiciary is such that in recent years it has evolved into a global standard of justice. Whilst it hides varying degrees of judicial scrutiny, one may identify some general features in the application of the principle. First, following the entry into force of the Charter, the analysis of the ECJ tends to be more structured, examining separately each of the conditions of Article 52(1) for determining whether a restriction on a right is acceptable, namely whether it is provided by law, whether it affects the essence of the right and whether it is proportionate. Secondly, although the Court continues to apply a more generous standard of review to EU measures than to national ones, the gap has perhaps become narrower. This is not only a sign that the internal market has reached a stage of maturity but also indicates that many of the national interests which are invoked to justify restrictions on free trade are now fully embraced by EU law and receive express recognition in the Treaty. The juxtaposition in the balancing exercise becomes less one between an EU and a national interest and more between two EU interests. Finally, the procedural aspects of proportionality have been enhanced. Proportionality is less a subjective merits analysis and more an exercise in consistency, cost-benefit analysis and due process.

Integration Risk and the Case Law

A final point may be made in relation to judicial construction. A risk analysis may also be applied to the case law of the ECJ. The expansive conception of EU competence, the doctrines of primacy and direct effect, the employment of effectiveness as a strong enforcement mechanism, and the preference for a uniform interpretation of EU law, may be seen as risk control mechanisms employed by the judiciary to contain threats to the integration paradigm. There are two areas where the Court's understanding of risk appears particularly wide. In the context of internal

market harmonisation, the ECJ has opted for a broad interpretation of Article 114 relying on potential obstacles to trade.¹⁰ According to the established case law, recourse to Article 114 TFEU is possible in order to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws, provided that the emergence of such obstacles is likely and the measure in question is designed to prevent them.¹¹ It suffices that there is a reasonable probability that Member States will adopt divergent measures in the foreseeable future. The ECJ is averse to integration risks, even potential ones, but the case law lacks an economic analysis and the burden of proof for the EU institutions appears relatively light.

There is another area where the Court has adopted a broad conception of risk. Perceived threats to the integrity of the EU legal order, even indirect, are examined with a heightened degree of scrutiny as are, especially, threats to the exclusivity of the ECJ's own jurisdiction. Thus in the pre-Lisbon era the ECJ adopted a broad interpretation of the first pillar going even beyond an obstacle pre-emption criterion to hold that any measure which could potentially be adopted under the Community pillar could not be adopted under the second or the third pillar.¹² Similarly, the case law reveals some distrust towards international arbitration tribunals. This is evident in the Court's approach towards international treaties which provide for the establishment of courts,¹³ and also in its Opinion on the EU's accession to the ECHR.¹⁴ In short, the case law suggests a heightened degree of vigilance towards any risk to integration.

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¹⁰ See for example Case C-359/92 *Federal Republic of Germany v Council* [1994] ECR I-3681.

¹¹ See *Swedish Match*, para. 30; *Second Tobacco Advertising case*, para. 38.

¹² See Case C-176/03 *Commission v Council* [2005] ECR I-7879; Case C-440/05 *Commission v Council* [2007] ECR I-9097; Case C-91/05 *Commission v Council (ECOWAS case)* [2008] ECR I-3651.

¹³ Opinion 1/91 *on the EEA Agreement* [1991] ECR I-6079; Case C-205/06 *Commission v Austria* [2009] ECR I-1301; Case C-249/06 *Commission v Sweden* [2009] ECR I-1335.

¹⁴ Opinion 2/13 *on the compatibility of the draft agreement on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Opinion delivered on 18 December 2014.