Proaction vs Reaction within the EU

by

Spyros A. Pappas
Member of the Athens and Brussels Bars, Former Director General at the European Commission

A. Introduction: why the public and private national sectors should systematically be considering the EU level?

1. It is uncontested that community policies are more and more present on the national scene, be it public or private. The European integration has been and is still, although at a lesser extent, a continuous process of partial transfers from the national to the community level of national competences that as from their transfer become a matter for the Union, yet subject to the principle of subsidiarity. Policy formulation, thus, is the first tangible expression of the integration process. However, this process is not exhausted with just the issuance of the various regulations, directives or other community decisions. Community law once adopted has, then, to be implemented. Consequently, policy formulation and policy implementation are the two expressions that integration can take. Nevertheless, if both are equally important, since neither is meaningful without the other, policy formulation comes first and policy implementation follows. After almost 50 years of ongoing integration, the acquis communautaire has been largely formulated and is now being implemented. Its impact on the national level is therefore more than visible: many aspects of the daily life are nowadays regulated by the community law,

while many national conflicts may find their solution by invoking community law or even by involving the EU, namely the Commission. That is the first reason why all parties concerned have an interest to rather anticipate the impact of the EU decisions than to bear their consequences, as well as to capitalize the maximum possible on it. Special features of the community reality, namely its complexities (B), the ever changing environment (C) and the increasing capitalization on community means for the cut of Gordian knots at the national level (D) add to this very reason further arguments suggesting that to be effective civil society and industry, even national governments at multiple levels, have to get involved in the decision making of Brussels at an early stage, with the right pleading at the right, each time, forum and on the right moment.

B. The complexities of the community decision making

2. Policy formulation is not the exclusivity of the European level. Speaking about the Brussels decisions would be an oversimplification. It is true that in principle the formal initiative is taken by the European Commission and that the final decision, be it regulation or directive or decision, is taken in the most of the times via the co-decision procedure (art. 251 TEC) by both the European Parliament and the Council. However, at all stages those possibly touched by the policy under elaboration have the possibility to intervene and to substantially contribute to the orientation and the content of the final legislation. In an exemplary democratic manner the European Commission, before undertaking the drafting of any of its legislative proposals, shares the problematic with all stakeholders by issuing a White Paper and by inviting them to take position and give advice. Already at this early stage of public consultation it is opportune for every interested party to be there and take part in the joint reflection since in this way it has real chances to influence the direction for the solution of the problem. At a second stage the Commission, after having elaborated the first round of reactions, issues a Green Paper in which it proposes alternative solutions. Again, at this stage another public consultation takes place that helps the

Commission in drafting its proposal which then has to follow the formal decision making process. The significance of such an early involvement speaks for itself: the later one intervene the most difficult to have an impact on the outcome.

3. Before exercising its right of initiative by sending a legislative proposal to the European Parliament and Council, the Commission goes through another check, the inter-service consultation. This is a unique way to safeguard in a systemic approach that all other policy interests have been taken into account: public policies are complex considerations since each of them entails consequences to other policy fields while being touched by some or all of them. Hence, the need to examine in advance this interrelationship. No national government ensures that effectively such an integrated approach; the inter-service consultation is not a formality but a real confrontation among all involved policies in an effort either to impose their interests on the other or block the other; in this struggle alliances between directorates general may take place, the ones against the others, yet at the end of the day in a constructive spirit and in any event in the interest of the best technocratic solution. Throughout this procedure an effective stakeholder has to remain vigilant and activate those policies they might militate in favor of its interests, the best weapon being convincing arguments. Not only the complexity of the procedure guaranties to a large degree the objectivity but also the formal requirement of an impact assessment, in which the leading directorate general anticipates an analysis on the expected or foreseen results by the implementation of the proposed measure, is a determinant factor for the reach of the best technocratic proposal.

4. If a stakeholder is still not satisfied by the proposal, another step follows that offers a new opportunity for changes: the outcome of the procedure so far -which merely is the technocratic conclusion- is subject to the political approval by the College of Commissioners; that decision is preceded by the weekly meeting of the Chefs of Cabinets who finalize the agenda of the next meeting of Commissioners; those points for which there is no further objection by one of the Chefs are put on the agenda as A points and they are then approved formally

by the Commissioners in principle without discussion. Any Chef, however, (or a Cabinet member in special meetings of Cabinet members), may question a proposal from the services; if the objection does not create unanimity, a reserve can be issued; in this case the matter becomes a B point and has to be debated by the Commissioners. The same applies if a Commissioner questions a point on the Agenda even if it is an A one.

5. The above simplified description of the Commission's procedure took a more solemn form when the Commission issued the White Paper on European Governance in 2001 (COM(2001) 428 final). Among the principles of good governance were then enumerated the openness, the participation, the accountability, the effectiveness and the coherence. Were they new? Certainly not. On the contrary, they had been consolidated through long practice and applied in particular by the Santer Commission which, nonetheless, has been victimized by an excessive populism of the European Parliament in the search of a new institutional balance. In this way the White Paper on European Governance was rather a way to calm down the excited spirits of the MEPs than to switch from an old to a new way of policy making. However, at the end of the day there was a change, although the applicable criteria remained the same. In fact, the same principles kept on being invoked and applied. The method, nevertheless, the approach and the spirit of their implementation changed. Whereas all these principles were applied in a substantial manner and responsibly by the Commission, they have now become a formality, meaning that what matters is the fulfillment of this (substantial) form irrespective of the substance, a token of a good bureaucracy. As a result, more room has been left to politics than before.

6. As a matter of fact the culture of the Commission is switching from a rather technocratic and legal to a more pragmatic but simultaneously legalistic one. For instance, the Commission recently announced its intention to screen its pending legislative proposals and withdraw 1/3 of them on the following grounds: Would they contribute to competitiveness? Would they improve regulation? Would there be a realistic chance of them

being adopted if they were left on the table? Had they become obsolete? Despite the merits of pragmatism it has to be acknowledged that in organizations such as the Commission in which there is a variety of converging and/or diverging interests the safest way to create trust is the legal one. Besides, making of competitiveness a priority over other policy objectives sounds as if the Commission would abandon its valuable systemic approach. Finally, the reference to the assumption of being adopted or not by the other two Institutions as a criterion, could also mean that the Commission is substituting its supra-national role, meaning that it is the Institution always proposing what is of Community interest, by a new one which would undermine its supra-national mission. Hopefully, this won't be the case. Still, it is obvious that the environment is getting in this way even more slippery and volatile than before. The emphasis given recently on the economic analysis over the legal criteria elaborated by the case law of the Court of Justice of the European Communities in state aid cases is another example that could also lead to an analogue lack of certainty. Despite the value of the economic dimension in particular in such cases it goes without saying that legal certainty should be preserve at any costs for the sake of avoiding the jungle of the arbitrary, an internal market which would not be subject to previsions and planning: nobody would feel safe to invest.

7. The same wind of politicization airs in the European Parliament and in the Council. First of all, it has to be noted that the right of initiative is not exercised as before fully by the Commission. On many occasions it is either or of the other two Institutions that is indicating to the Commission what and on what principles to propose. Second, even if the Commission has tabled a proposal it happens that although radically modified by the other Institutions, the Commission does not decide to withdraw it from the process. Third and more important: the compromise of Luxembourg according to which no position is formed in Council until unanimity is reached belongs now to history. The 25 are not as eager as the 15 to accept compromises for the common interest. National interests -the confrontation of which forms an additional complexity of community policies next to the confrontation among

themselves- are today confronted in Council without there being the political will to promptly cede before the interest of the Union as a whole. All in all, these are signs of moving from a rather technocratic and supra-national minded Union towards a more political one in which national concerns shadow, at this very moment after the last large enlargement, the common way to further integration. Changing alliances among Member States form each time the required majority. It is for stakeholders another consideration to address to Member States and contribute to the formation of these alliances.

8. The picture is getting even more complex if one considers that 80% of the European secondary legislation is decided through the Comitology procedure. In simple words Comitology is the way of managing and updating existing regulations or directives without having to follow again the cumbersome co-decision procedure; a Regulatory Committee consisting of representatives of the Member States under the chairmanship of the Commission is entitled to make the necessary adjustments (that for the continental theory is an executive task by delegation whereas the Anglo-Saxons would see in it a legislative act). That shows the important role of the Member States in the decision making which is not always understood. Moreover, it is another expression of the "political minded" Union, since the majorities are formed according to the prevailing national interests in conformity with the voting system in the Council which possibly intervenes in case that the relevant committee does not reach the required majority. As if all of that were not sufficient there is ongoing discussion of giving the same rights to the European Parliament on grounds of its upgrade since the Treaty of Nice to the status of co-legislator next to the Council. If the latter has a say in Comitology why not the former? In this way the system will become even more political: next to the national interests, the interests of the parties represented on the European Parliament.

9. It is quite clear from the foregoing that Brussels is not only the Commission or even all the Institutions together. Brussels is a reference which should be understood as the above complex system of decision making in which capitals retain an important role. In particular when it comes to implementation, according

to article 10 TEC, this is a task for the national administrations while the Commission remains the guardian of the primary and secondary community law.

C. The ever changing environment

10. At the European level everything flows; the degree of the European integration is getting increased; the trends are for a period on the upwards and for a subsequent period on the downwards; the number of the Member States is getting increased; euro-euphoria is substitute by euro-pessimism and vise-versa; policies are evolving; people are replaced; the latter has worsened since the last reform conducted by the Commission: all staff, directors general included, have to rotate; while this is in a number of cases a precautionary measure and anyway challenging, for those holding revocable positions entails a threat; a community minded and objective director general or director may be penalized for his/her commitment to the common cause; this is another component of the politicization of the system. In contrast to all of these changes community law as it is interpreted by the Court of Justice of t he European Communities remains a solid value, the backbone of the European integration.

11. In such a changing environment it would be impossible to find out what to do when a problem arises unless one feels familiar with the more general context and with the procedures. The role of the Institutions, their internal culture, staff at the various levels, administration and politicians, procedures, majorities or blocking minorities by Member States, the political trends of political coalitions and above all community law and the relevant case law are key for the defence of one's rights. Therefore, things may become easier if one is also known by those they are responsible, namely if they have a good picture of the party in question. An anticipatory, therefore, policy undoubtedly pays back and generously. Nevertheless, the cultivation of a picture and relationship takes time. Besides, it should be borne in mind that community policies are not easily amendable and take long time before they are concluded. Accordingly, the investment is not for next day but a long term one.

D. The cut of the national Gordian knots

12. Legal conflicts at the national level take time before a solution is given. In particular when it comes to cases before national Courts which are throughout the EU overcharged with pending cases. Furthermore, national Courts are not always familiar with the implementation and interpretation of community law. Next to that, the achievement of the Internal Market has led to numerous consortia consisting of companies from more Member States that are searching business in another Member State. National public administrations are getting accustomed to deal with foreign companies but they have not yet achieved an optimum level of familiarization. Despite the advanced degree of the deepening of European integration national defensive attitudes still prevail over the acceptance of foreigners at the national level. Finally, when major interests are conflicting it is not always an easy affair to find a solution. All of that are some of the reasons why those they contest a national measure they have the tendency to involve the European level, specifically the European Commission. In many case, in parallel to national proceedings it is getting more and more common to address the matter to the Commission. What is searched is either the solution or the political pressure that is exerted on the national government by the simple involvement of the “big brother”. No government likes being caught “guilty” by the Guardian of the Community’s order.

13. The mechanism to involve the Commission is article 226 TEC. The submission of a complaint gives the Commission the possibility to intervene and check the conformity of the national measures with community law that prevails over national legislation. However this possibility should not be taken for granted. It is up to the Commission to assess whether it will open a case or classify it and at what stage of the procedure or in case that it identifies an infringement whether to go to Court or not. Even if a case has been opened and there is infringement of community law without the Member State accepting to comply with its obligations it belongs to the discretionary power of the Commission to challenge an unlawful national measure before the Court in Luxembourg. No

application against a decision of the Commission to classify a case or against the failure of the Commission to lodge an application against the unlawful attitude of a Member State is admissible by the Court. The latter does not intervene in the "political" relationship between the Commission and the Member States.

14. A number of examples: a classical case is the conflicts in public procurement; to bid important public works or services, some times co-funded by the Community, large consortia consisting of multinational companies are formed; tenderers, the offers of whom are rejected, lodge an application with the national authorities and with the European Commission; quite often the simple intervention of the Commission works as a catalyst, reminder for the respect of equal treatment and of transparency letting the national authorities correct an unlawful act of theirs. Another example is the field of environment; should there be anywhere within the EU a violation of the green directives the immediate intervention of the Commission might be expected in case of national failure to act. The same applies on the consumer protection and health fields, as well as on all other community fields. However, in all these cases, unless it is exceptionally a binding competence for the Commission, it is not possible to contest the Commission's decisions before the Court. Either because of the low significance of a case or because of its heavy agenda or the particular relationship at the very moment with the Member State in question the Commission may decide not to follow up a complaint. Hence, it is invaluable if one has the margin to convince the Commission to get into the file and examine (or not) a complaint.

15. An exceptional policy field of particular significance is, naturally, competition. Here, the Commission holds a quasi-judicial competence and its decisions or failure to decide are subject to the check of the Tribunal of First Instance of the European Communities. Mergers, state aids, cartels and abuse of dominant position are thoroughly reviewed by the Tribunal which has started going deep into the assessment of the cases when judging the reasoning of the Commission. After a first period during which the Commission benefited from a large discretion in evaluating competition cases as from 2002 the

> case law changed into a new judicial policy investigating more than before the justifications given by the Commission. Consequently, in the field of competition politics are rather limited, although the distinction between law and economics on the one hand and politics on the other is not always an easy one.

By way of conclusion it could be said that under the applied participatory European Governance system, the defence of (public or private) interests forms part of the decision making as well as of their implementation and is a conditio sine qua non for all stakeholders.