

ARTICLE

In Search of Europe’s Phantom Public. “Public-ness” and the European Union

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A. Introduction

The notion of “public” is making an unexpected yet impressive comeback. After decades of neo-liberal policies where State failures and public irrationalities were systematically pointed out and the superiority of private management consistently affirmed, public authority and public intervention again appear as the inescapable solution to the most daunting issues of our times, particularly at the EU level. As the environmental emergency is making its way through our minds and the challenge raised by the accumulation of private authority in the hands of a limited number of multinational corporations becomes clearer every day, many call for stronger regulations—in areas of data privacy, tax fraud, environment, health standards, and others—and a staunch relaunch of investments, evidenced by the many versions of the “Green New Deal.” With the dystopia of a fully private vision of the future diffusing in popular culture series and novels, notions of the “common” and the “public good” are making a striking return in our democratic conversation.

Interestingly, these calls for the rearmament of Europe’s public capacity parallel our increasing sensitivity to the receding “publicness” of EU decision-making under the pressure of intense lobbying and revolving door mechanisms. Documentaries and journalist investigations have diffused a critical vision of an EU deemed incapable of evading the pressure of business stakeholders while providing a solely marginal place to the interests of citizens.¹ Whatever one thinks of the diagnosis, they are proof of a growing awareness, particularly among younger generations, that the dividing line between the public and the private is not any social or professional border, and that its robustness conditions political sovereignty, equality, citizenship, and ultimately, democracy itself.²

And yet, such a comeback finds us unprepared. The public lexicon that we continue to use routinely is still the same as thirty years ago, as if the realities that this public compass was supposed to capture—public- sphere, good or goods, interest, utilities, *service public*, and others—had not been profoundly turned around by three decades of neoliberal policies.³ Short of an overall reassessment of both the map and the territory of the public, we run the risk of using it as an empty signifier, or even a mere buzzword. Strikingly, pseudo-notions of the public interest do, in fact, blossom today, such as corporate social responsibility, *pro bono publico*, philanthropy, and more.⁴ But these public *ersatz* generate increasing skepticism among generations of citizens who are wary

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¹In a long list of books, see the groundbreaking inquiry by journalist Stéphane Horel. STEPHANE HOREL, INTOXICATION, PERTURBATEURS ENDOCRINIENS, LOBBYISTES ET EUROCRATES: UNE BATAILLE D’INFLUENCE CONTRE LA SANTE (2015).

²Michael Walzer, *Liberalism and the Art of Separation*, 12 POL. THEORY 315, 315–30 (1984).

³For a discussion of one of the most established political effects of the neoliberal turn of policies that contributed heavily to the blur of the dividing line between the public and the private, see WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM’S STEALTH REVOLUTION (2015).

⁴ANTOINE VAUCHEZ & PIERRE FRANCE, SPHERE PUBLIQUE, INTERETS PRIVES: ENQUETE SUR UN GRAND BROUILLAGE (2017). The english version is forthcoming at Cornell University Press, 2020.

about the various blends of “green–,” “pink–,” or “public–” washing by which interest groups and large companies try to hijack public interest’s powerful legitimating function.

Rather than an *a priori* or transhistorical definition of the public interest, certainly not desirable in any democratic regime, what we need is a deeper sociological and historical understanding of the types of ecologies in which the search for the public interest can prosper. It is not enough to say that public is something that somehow connects to the common and the disinterestedness, if one does not reflect upon the specific social and cognitive conditions that favor “a civilization of the public” where “acts of general interest, public service, are possible, encouraged, known, recognized and awarded.”⁵ In sociological terms, such a propitious ecology stands on at least three essential pillars that give the public its professional, axiological, and scientific underpinnings. First, specific forms of knowledge, including public law, political economy, and democratic theory, provide a grammar of justifications for the emancipation of a public sphere from the dynamics of markets—and its articulation to the realm of representative politics. Second, are policy instruments and public institutions that have accumulated an autonomous capacity and authority to regulate. Third, a specific ethos of civil servants anxious to guarantee the integrity of public decision-making processes combined with support groups, like NGOs, unions, and others, committed to the surveillance/protection of the public-private divide.

B. Public Interest’s Weak Jurisdictional Basis in the EU

Strikingly enough, while European States have all built over the past centuries idiosyncratic, yet sophisticated notions of the divide between the public and the private, the European Union developed without such a robust compass. To a certain extent, it has even been one of the key laboratories for doctrines as well as forms of governance that ignore or marginalize the role of this dividing line. Its “granit[e] mass,” the Single Market and the ever-expanding four economic freedoms, has been, for the most part, blind to the difference, considering public hospitals and universities as firms, health as a service, and citizens as either consumers or cross-border workers—as only marginally as political citizens. Competition policies have proven even more straightforward as DG Comp pushed early on—in part in fear of a European version of French *dirigisme*—for a “principle of indifference,” or equal submission, of public and private companies, making it increasingly difficult for the former to develop an alternative understanding of their role in the economy, for instance in terms of non-profit and *service public* objectives.⁶ Interestingly enough, while the Commission has accumulated unprecedented powers to regulate and fine multinationals, it uses them exclusively on the ground of their failure to comply with their *private* and market obligations rather than as a response to a public.⁷ To put it differently, while the EU has certainly pursued a variety of public goods—prosperity, peace, and others—it has consistently failed to articulate it with a robust notion of the public.⁸

One would think that EU civil service could provide a different picture, because it has been historically embedded in a robust vision of its role as guardian of Europe’s general interest, along the lines of the French *fonction publique* or the Prussian model of bureaucracy.⁹ In spite of that, the set of reforms opened with the 2000 Kinnock White Paper engaged in a profound remaking of the *Statut* towards an undisputedly managerial turn, progressively weakening the administrative culture and putting its public service ethos at risk. As revolving doors have opened

⁵See generally PIERRE BOURDIEU, ACTS OF RESISTANCE: AGAINST THE TYRANNY OF THE MARKET (1999).

⁶On the so-called “public turn” of competition policy, see DAVID GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS (2001).

⁷I am grateful to Floris de Witte for pointing this out to me.

⁸On the complex articulation between “public goods” and the “public good,” see Neil Walker, *The European Public Goods and European Public Good*, in EU CONSTITUTIONAL IMAGINARIES (Jan Komarek ed., forthcoming).

⁹DIDIER GEORGAKAKIS, EUROPEAN CIVIL SERVICE IN (TIMES OF) CRISIS: A POLITICAL SOCIOLOGY OF THE CHANGING POWER OF EUROCRATS (2017).

more widely and a steady stream of lawyers, consultants, and public affairs specialists now come in and out of EU institutions, structural affinities have consolidated between the influencers and the influenced, thereby undermining the autonomy of EU public sphere and weakening its capacity to connect to the democratic conversation.

It should also be added that the notion of public suffers from a *deficit d'intellectualité* at the EU level. The different bodies of knowledge that have developed to account for the dynamics of European Union integration do not provide a strong tradition of engagement with the notion of public interest. Legal scholarship is a case in point as the *summa divisio* of public and private law that cuts across all member states, never really made its way into EU law.¹⁰ As it emerged initially as a “transversal body of law”—one that was neither public nor private, but rather fully geared towards the mission of forging an ever closer political union through market integration—EU law never forged a robust notion of the public. Attempts were made more recently to formalize a European public and a private law. Yet, they aimed more at repatriating EU Law within the binary line of national legal cultures, without building specifically European rationales or concepts for such differentiation.¹¹

On the whole, the EU has failed so far to craft a stable ecology in which the public interest could prosper. By this, I do not mean to argue for an ontological incompatibility between the European project and the defense of the public interest. Nor do I want to ignore the many, yet marginal, efforts made by a variety of parliamentarians, NGOs, and scholars to defend the autonomy of EU decision-making as well as the legitimacy of public intervention at the European level. Rather, I want to point at the challenges ahead now that the public sector is called upon to address key challenges such as environmental crisis or the increasing concentration of private forms of authority at the global level.

C. A New Scholarly Engagement

While there are certainly many different ways to strengthen the jurisdictional basis of the public interest in Brussels' quarters, I will restrict my discussion here to how scholars can contribute and analytically equip this surge of interest into the public. For all its uncertainties, the current moment may indeed be a propitious one. A reflexive turn has seized the field of EU studies over the past decade as scholars from different disciplines have voiced the need to emancipate from the overarching notion of integration that has attracted most of the research agenda since the early years of the European Communities.¹² In the search for concepts around which to structure a renewed academic agenda, the question of public—including its history, articulation with the European society, economy, or democracy—is a good candidate, as it inevitably calls for an interdisciplinary engagement on the part of all, from legal scholars to historians, political scientists, political theorists, economists, and more.

As we aim at thickening our understanding of the public and bringing it in closer contact with Europe, we certainly need to turn to historians and reopen Europe's archive to retrieve past mobilizations and conceptualizations of Europe's public.¹³ History remains the most powerful tool to emancipate Europe from its present form, as it forces us to identify Europe's forgotten conflicts,

¹⁰Ségolène Barbo Des Places, *Summa Divisio et Droit Communautaire: dépassement, déplacement ou reconstitution d'une frontière disciplinaire?*, in *L'IDENTITÉ DU DROIT PUBLIC* 39 (Xavier Bioy ed., 2010).

¹¹In that, they differ from the instrumental role given by French public law doctrinalists to the notion of *intérêt général* in the emancipation and control of a public sphere vis-à-vis the dynamics of markets and civil society.

¹²See Armin von Bogdandy, *European Law Beyond 'Ever Closer Union' Repositioning the Concept, its Thrust and the ECJ's Comparative Methodology*, 22 *Eur. L.J.* 519 (2016); Kiran Patel, *Provincializing European Union: Cooperation and Integration in a Historical Perspective*, 22 *CONTEMP. EUR. HIST.* 649 (2013); Kalyso Nicolaidis, *European Democracy and its Crisis*, 51 *J. COMMON MKT. STUD.* 351 (2013).

¹³Francisco roa Bastos & ANTOINE VAUCHEZ, *Savoirs et pouvoirs dans le gouvernement de l'Europe: Pour une sociohistoire de l'archive européenne*, 69 *REVUE FRANÇAISE DE SCIENCE POLITIQUE* 7 (2019).

bifurcations, and the roads not taken: From early projects of a European public planning that developed at the core of the European Commission in the 1960s, to mobilizations in the mid-1990s during the negotiations over the Amsterdam treaty calling for a full recognition of the notion of *service public* at the core of the Single Market with equivalent legal value as the economic freedoms and competition. This detour is not an exercise in erudition, let alone nostalgia, but rather exists because these projects, which have been defeated or marginalized along the way, still work the European project from within and constitute a map of underlying tensions and contradictions. They can be values and principles written in treaties but also in the rich archive of treaty proposals, summit declarations, parliamentary reports, and others, that make up a yardstick from which to assess the currents of EU policies. Further, they can be institutions that voice a Europe concerned with the public-private dividing line—Ombudsman, *comité européen des droits européens*, and others—and a nebula of actors and groups that are engaged in the protection of the public interest, whether they be civil service unions, representatives of publicly-owned companies present in the *Centre Européen des Entreprises à Participation Publique* (CEEP), European Parliament’s intergroups on “Integrity and Transparency” or “Trade Unions”, or anti-corruption NGOs, such as Corporate European Observatory, Finance Watch, and the like, fighting for public integrity, as they form altogether an embryo of critical public sphere.

We would also need to become political scientists and investigate the ways in which contemporary mobilizations at the EU level reveal reserves of public-spirited-ness and identify how these forces have managed to coalesce into coalitions in defense of the autonomy of the public sphere. Two cases from recent years can illustrate this potential. One relates to the *pantouflage* of the former president of the Commission, Jose Manuel Barroso, to Goldman Sachs: This move to the global banking sector triggered an unexpected outrage from within the Commission itself. A group of EU public employees launched a petition pointing at the fact that this ran “counter to the honor and probity of a European civil service supposed to defend the general European interest.”¹⁴ Interestingly enough, the manifest was met with extensive support from the general public as more than 150,000 people supported it—pushing the European Ombudsman to, cautiously, break solidarity with the Commission and call for much stricter rules. The other case relates to EU trade negotiations and the threat created by private investment tribunals on a state’s capacity to regulate. The campaigns initiated by NGOs found unexpectedly strong support from a variety of EU institutions. From Member States like France and Germany, to the Court of Justice of the Union in its *Achmea* case,¹⁵ the Commission reaffirmed the legitimacy of States to regulate “to pursue legitimate public interests such as public security, public health, social rights, consumer protection, or the preservation of the environment.”

As this exploration of the public naturally leads to the notion of public goods, we might actually also need to turn into economists and engage in a political economy that moves beyond the thin and apolitical understanding of public goods as given by mainstream economists.¹⁶ A long-standing absentee in the field of European studies, the political economy could bring this notion back to political life, as the economist Michel Aglietta has done with the euro by embedding it into notions of political communities and sovereignty, and connecting it to notions of public investment, budget, debt.¹⁷ This would, however, need to be considerably enriched by systematic exchanges with the field of political and democratic theory.¹⁸ In a Europe where the general

¹⁴Jennifer Rankin, *EU Staff Petition Attacks Barroso Over Goldman Sachs Job*, GUARDIAN (Aug. 29, 2016), <https://www.theguardian.com/world/2016/aug/29/eu-staff-petition-attacks-former-ec-president-over-goldman-sachs-job>.

¹⁵ECJ, Case C-284/16, *Slowakische Republik v. Achmea*, ECLI:EU:C:2018:158, Judgment of 6 Mar. 2018

¹⁶As restricted to criteria of non-excludability of access and non-rivalry of consumption.

¹⁷MICHEL AGLIETTA & NICOLAS LERON, *LA DOUBLE DEMOCRATIE: UNE EUROPE POLITIQUE POUR LA CROISSANCE* (2017). Along these lines, see also the proposal for a budget of public goods of European level delineated in December 2018: see Stéphanie Hennette, Thomas Piketty, Guillaume Sacriste, Antoine Vauchez, eds., *How to Democratize Europe*, Harvard University Press, 2019.

¹⁸Walker, *supra* note 8.

interest and the long term have long been monopolized by independent institutions, we need a political theory able to avoid the risk of disconnecting once again the definition of public interest from the circuit of democracy and representative politics.¹⁹

Such interdisciplinary re-orientation of the field of European studies—from a focus on integration to an exploration of Europe’s public interest—is instrumental in providing the EU and its democratic conversation with a richer grammar and vocabulary of the public. Scholars would thereby contribute to the development of a public interest culture at the EU level that is more demanding and sophisticated in terms of “public-ness” standards—on issues of procedure, including equality of access and democratic deliberation, as well as substance, such as social and environmental justice, inclusion, and the like—for those institutions, groups, and causes who wish to work “in the name of the public” and invoke its powerful legitimizing capacity.

¹⁹Such risk can be seen the current calls for the ECB to take the *political* lead in addressing the ecological crisis through massive green-bonds purchasing.