Emilia Mišćenić · Aurélien Raccah
Editors

Legal Risks in EU Law

Interdisciplinary Studies on Legal Risk Management and Better Regulation in Europe

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Preface

The Union of today is faced with numerous legal, economic, social and many other risks that are seriously affecting its economic development as well as growth. Excessive and inadequate legal regulation act restrictively upon the activity of entrepreneurs on the market, on the one hand, and lowers the confidentiality of consumers, on the other. This in turn affects the functioning of the Union's internal market and restrains economic growth of the European Union (EU) in comparison to other important players on the global market. The consequences are reflected upon societal prosperity. The features common to all social disturbances that are taking place in the world today are, firstly, the fact that they are caused by inadequate reactions to existing risks and, secondly, the fact that they affect the world globally. The strong interdependence between the mentioned risks creates a "magical circle" that is very difficult to break and leads to serious consequences, which contribute to financial instability as well as economic crises. The Union's awareness of these risks is demonstrated in numerous communications, reports and recommendations and particularly in the European Strategy for Smart, Sustainable and Inclusive Growth (Europe 2020).[1] Europe 2020 insists upon measures necessary to achieve the so-called smart growth, meaning upon measures that are going to strengthen knowledge and innovation as key drivers for future economic growth as well as progress of the Union. It also emphasises sustainable growth and promotes a more resource-efficient, greener and more competitive economy. Finally, it promotes inclusive growth fostering a high-employment economy delivering social and territorial cohesion. These are the three key ingredients necessary for Europe's social market economy of the twenty-first century.[2] From a legal point of view,

[1] Communication from the Commission, Europe 2020, A Strategy for Smart, Sustainable and Inclusive Growth, COM (2010) 2020, Brussels, 3.3.2010.

[2] Ibid., p. 3.

these goals require a significant improvement of the existing Union's regulatory framework, the ineffectiveness of which presents one of the most important barriers to the development of technology, industry and consequently of economic growth. As rightly emphasised by the European Commission, in an era of globalisation, in which barriers to movement of goods, services and people are falling, citizens expect from legal regulations to ensure their safety and welfare, while businesses expect that legal regulations enable a level playing field and boost competitiveness.[3] However, if a regulatory framework across the Member States is scattered, inconsistent, outdated or does not take the interests of its addressees adequately into account, legal regulations may do exactly the opposite. It is precisely due to these reasons that the Union insists upon the introduction of better or so-called smart regulations in all affected areas of EU legislation. This belongs to one of the key strategic goals of Europe 2020, according to which "to face up to the challenges we face inside and outside Europe, policies, laws and regulations need to adapt to the fast pace of technological change, to foster innovation, to protect the welfare and safety of Europeans".[4]

The book *Legal Risks in EU Law* addresses these serious issues from a horizontal and interdisciplinary perspective by observing and analysing primarily legal and consequently inseparable economic, societal, environmental and other risks in different areas of EU legislation. Legal regulation is always enacted in a public interest in order to achieve a variety of goals, such as to ensure a fair and competitive market, to protect health, to provide safety, to stimulate innovations, to preserve the natural environment, to protect climate, etc.[5] Therefore, the interdisciplinary analysis of risks deriving from legal regulation in various fields is the most appropriate approach to observe the legal risk issue from different angles. On the other hand, the horizontal approach indicates that despite of the diversity of the studied subject matters and EU policies as well as the differences in applied research and writing methodology, all of the contributions tend to offer similar results. It is common knowledge that legal regulation should deliver policies and meet expectations of those to whom it is addressed, by taking into account all of the effects the regulation might have on the addressee's interests. This should include a thorough examination of economic, social, environmental and other important impacts of their legislative drafts.[6] However, in today's global society characterised by an increasing speed of changes, fast technology and economic progress, this seems to be a difficult task for lawmakers to achieve. Here is where the risk management usually includes an invitation to all relevant stakeholders to engage

[3] European Commission, Better Regulation—Simply Explained, available at: http://ec.europa.eu/smart-regulation/better_regulation/documents/brochure/brochure_en.pdf, p. 3.

[4] Ibid., p. 1.

[5] Ibid., p. 3.

[6] Wiener (2004), pp. 483–500.

in a public consultation or elaboration of independent reports, i.e. impact assessments. Unfortunately, the decision to launch regulatory initiatives is very often taken before the publication of impact assessment reports. Since a lawmaker does not dispose with the expertise necessary to respond properly to developmental challenges in specific regulatory fields, this results in regulations either offering inadequate protection or restricting market freedom. As a consequence a legal risk occurs that by its definition "commonly refers to a situation where the applicable law does not provide for a predictable and sound solution" and "might also refer to situations where the answer provided by the applicable law does not fit the market reality, or where the law does unnecessarily complicates or burdens a transaction".[7]

Bearing all that was said in mind, it is the primary mission of the authors gathered under the single roof of the book *Legal Risks in EU Law* to identify and analyse the causes as well as consequences of legal risks in regulatory frameworks of various EU policies and beyond. Over several decades now, the Union has been faced with numerous legal risks that are adversely affecting the functioning of the EU and the development of EU law. Particularly, due to the constraints of the principles of subsidiarity and proportionality, it is getting more and more difficult to justify the Union's authority to regulate in a variety of competence areas. Internal market, consumer protection, social policy, foreign policy, environmental policy, etc. are only some of the areas to which this book dedicates its chapters and horizontally examines the Union's approach to regulation and management of legal risks. In doing so, the authors generally come to very similar conclusions concerning the inability of the Union's regulatory methods to respond properly to existing legal and consequently economic and other existing risks and challenges. Especially, approximation, i.e. harmonisation of different Member States' laws as the most extensively used means of EU legal regulation, at the end of the day resulted in overregulation and further differences at national levels. New differences in legal regulation caused by the Union's attempts to remove existing regulatory differences between Member States affected the realisation of the Union's supreme goal of the establishment and proper functioning of the internal market. Furthermore, discrepancies caused by departures in application and interpretation of harmonised national regulatory frameworks across the Union seriously affect the principle of effectiveness of EU law. This is getting even more complicated by the fact that every single EU legal act has to be translated into 24 EU official languages. Despite the principle of equal authenticity, according to which all language versions of the same EU legal act are presumed to be authentic and to have the same meaning, imperfections in legal translations often result in different meanings of the same legal rules. Consequently, by managing legal risks deriving from the diversity of Member States' laws presenting barriers to trade and to the Union's economy, the Union actually produced new legal risks that need management of their own. This serious failure contributed to the legal uncertainty of

[7] UNIDROIT Explanatory Notes on Preliminary Draft Convention on Harmonised Substantive Rules Regarding Securities Held With an n Intermediary, Rome, 2004, p. 7.

stakeholders acting on the internal market and lowered their economic activity and cross-border transactions. The improper response to the management of legal risks thus resulted in the creation of further legal, economic as well as other kinds of risks, and it also adversely affected the development and economic growth of the Union.

The book *Legal Risks in EU Law* is the first in a line of publications that will try to set a new and innovative path offering effective solutions to the here presented issues. The application of an original interdisciplinary approach to legal risk management should enable a better understanding of the interests of all stakeholders included in the complex regulatory processes. Both on the level of the EU and of the Member States, lawmakers need to apply a completely new regulatory approach that will, besides focusing on general legal issues, give more attention to the specific needs of a certain regulatory field (e.g. technology, industry) and to various impacts of enacting legal regulations on the future development of the concerned and other related areas. This requires the abandoning of a traditional discipline-oriented approach in favour of new alternative regulatory methods that will accentuate the role of the interdisciplinary approach in legal regulation. The initiative for the creation of a new and innovative regulatory approach for the management of legal risks was born within the international interdisciplinary network of excellent scientists named Global Legal Network (GLN).[8] This interdisciplinary network that was formed in November 2014 in Lille (France) gathers academic scholars and practitioners coming from more than 15 European countries, as well as from the USA, Canada, Brazil and many other countries who specialise in legal, economic, political, sociological, philosophical and other sciences. Such a joint venture of science and practice mixed with valid expertise and knowledge of experts coming from a variety of disciplines guarantees the invention of new and effective regulatory approaches. Bearing in mind the significant lack of similar scientific projects at the international level, the members of GLN started a long-lasting project "Interdisciplinary Studies on Legal Risk Management and Better Regulation in Europe" that can generally be divided in three main stages. The first stage, the results of which are presented in the book *Legal Risks in EU Law*, is dedicated to the thorough analysis of causes and consequences of failures in regulatory approaches and legal risks management. Since proposing of new and effective methods of legal regulation and risk management depends heavily upon the understanding of the current situation, this stage appears to be crucial. The second stage deals with the comparative analysis of a variety of regulatory and risk management methods existing in laws of European and other world countries that can offer valid lessons and insights to the EU. The research results of the first two stages will open the door to the third and most creative stage dedicated to the development of innovative regulatory approaches for the management of legal risks in EU law. By pursuing this interdisciplinary project, the GLN members aim to achieve scientific results that will significantly contribute to the accomplishment of

[8] Visit the Global Legal Network at: http://www.global-legal-network.eu/.

key EU strategic goals on better regulation and consequently on the smart, sustainable and inclusive growth of the EU.

Rijeka, Croatia — Emilia Mišćenić
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Therefore, we would like to take this opportunity to express our gratitude to all the members of the *Global Legal Network* who contributed to this book: Assoc. Prof. Dr. Harry Post, Assoc. Prof. Dr. Ioannis Panoussis, Assoc. Prof. Dr. Réka Somssich, Assoc. Prof. Dr. Claire Marzo, Assist. Prof. Dr. Darinka Piqani, Assist. Prof. Dr. Moritz Jesse, Dr. Alessandro Chechi, Dr. Leonardo Massai and Dr. Matteo Giuseppe Vacaro Incisa. We thank the authors for their valuable contributions providing multidisciplinary perspectives on the effects of legal risks upon the recent development of EU law. The editors are especially grateful to the Law Faculty, Catholic University of Lille, for its financial support, which made the publication of this book possible, mainly to Assoc. Prof. Dr. Ioannis Panoussis as dean of the Law Faculty and Assoc. Prof. Dr. Andra Cotiga-Raccah as IELS codirector, friend as well as wife. The editors also thank Ms Noémie Bomble for her support through the creation of the GLN website: http://www.global-legal-network.eu/. We are also grateful to those who participated in the preparation of the book, in particular to

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Part I
Legal Risks in Developement of EU Law

Reframing Legal Risk in EU Law

Aurélien Raccah

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Abstract Legal risk is an oxymora. Law creates predictable duties and rights protecting human relations and justice conciliates disagreements on law's interpretation. The high production of international, European and national legislations increases legal protection and thus legitimate expectations but paradoxically (or logically) makes interpretation more complex for three reasons. Firstly, legal provisions may be imprecise, unclear or uncertain. Secondly individuals, companies or even public authorities may not have the necessary knowledge. Thirdly, the concerned bodies may not have the structural and financial capabilities to fulfil their obligations. Due to its inherent complexity, EU law faces many legal risks. The Better Regulation policy has thus introduced risk management in the EU law making process. However, the Impact Assessments focus on economic, social and environmental hypothetic consequences and the legal ones remain subsidiary as long as fall into the national competences. For that purpose, the European Commission has recently adopted a culture of evaluation monitoring the implementation of EU law. However, it doesn't prevent against any infringement relating to legal uncertainty. The Court of Justice of the European Union plays a major role to stabilise the interpretation and to allocate the liabilities. This chapter aims at presenting an exhaustive review of the doctrine relating to legal risk management

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and to connect it with the European Union in order to sketch few first elements of definition of what can be considered as legal risk in EU law.

1 Introduction

The European legal doctrine agrees that there is no common definition of legal risk.[1] From the point of view of legal science, there is no legal risk because the core of the law has to be predictable. Introducing risk in law would imply a value judgement opposing threats and security. In other words, it would introduce a subjective opinion on negative and positive consequences of the law, which is not the purpose of legal science. Thus, legal risks may be researched from economic, political, sociological or social perspectives, not from a legal one.

However, legal science may reframe legal risk as a metalanguage to describe and analyse the purpose as well as the impact of law on different components of society. In that sense, legal scientists participate in the interdisciplinary approach of social sciences, which is driven by the European Commission. It may help to explain how the EU legislative process anticipates the implementation of EU law and what the risks faced by public authorities, companies and individuals when they apply EU law are.

Risk has been taken into consideration as a scientific tool since the sociological studies of Ulrich Beck in the eighties.[2] He supports the idea that there is a plurality of risk definitions linked to our civilisation. Social modernity produces wide categories of risks, which may be identified by social science. He states that modernity is the cause of many damages to the environment (soils, forests, air, water, waste management, animals…), human health (new diseases caused by pollution, industrial foods, chemicals, pharmaceuticals…), private life (divorces, access to education, poverty…), economy (financial markets, exchange rates, liquidity, crises, unemployment…). In that sense, any social activity may create a risk of damages to certain people. According to Ulrich Beck, the new role of social sciences is to rationalise the objective constraints of each policy in order to manage their impacts on society.[3] Since these works, theories of risk management exist in natural and social sciences to identify, assess, anticipate as well as prioritise the risks before catastrophes happen. However, methods, definitions and objectives vary widely between the sciences.

The International Organization for Standardization (ISO) gives a standard definition of risk management as "risks affecting organizations can have consequences

[1] Mahler (2007), pp. 10–31; Moorhead and Vaughan (2015), p. 36; available at: http://www.ucl.ac.uk/laws/law-ethics/research/papers/erc-executive-report-legal-risk-definition-management-ethics.pdf.

[2] Beck (1986, 1988, 1991a, b, c, 1995a, b, 1999).

[3] Beck (1991a, b, c), pp. 155–182.

in terms of economic performance and professional reputation, as well as environmental, safety and societal outcomes. Therefore, managing risk effectively helps organizations to perform well in an environment full of uncertainty".[4] This international standard provides also principles and guidelines helping organisations to identify opportunities as well as threats in order to improve risk management. This approach has been already applied to companies,[5] legal firms[6] and EU institutions themselves[7] to organise their own internal structure as well as analysis. However, ISO is a non-governmental organisation setting international standards, not legal sources.

The Anglo-Saxon doctrines also adopted these theories to develop prospective studies. European doctrines are basically reluctant to those studies which are based on a hypothetical uncertain future that rarely happens. It explains why each social science opposes two schools: one presenting a new theory based on risk management,[8] and the other criticising the unrealistic purpose of prospective scientific studies.[9] Each social science tends, indeed, to define the risk(s) to justify its own scientific purpose.

Legal science has remained mostly apart from these developments. Consequently, there is neither a standard definition of legal risk, nor a clear definition of risk. Legal studies on risk management are only realised with corporate and business issues, mostly led by the Anglo-Saxon (overall American) doctrine.[10] The Basel Accords on banking supervision include many aspects of credit risk, operational risk and market risk.[11] The International Bar Association tried to define risk management for law firms as a result of a defective transaction, a claim, a legal failure or a change in law.[12] A few isolated German,[13] French[14] and Scandinavian[15] publications also relate to regulatory and liability risks. The recent works led by

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[4] ISO, No. 31000, available at: http://www.iso.org/iso/home/standards/iso31000.htm.

[5] Baranoff (2003), p. 639; Collard et al. (2011), p. 285.

[6] Hopkins (2013), p. 2; Anderson and Black (2013); Whittaker (2003), pp. 5–7.

[7] Tracol (2014), pp. 711–744. See Communication of the European Commission on Customs Risk Management and Security of the Supply Chain, COM(2012)793 final.

[8] Dowd (2002), p. 274.

[9] Elliot (2002); Meric et al. (2009), p. 277; Grimaldi (2006), p. 996.

[10] Terblanché (2012); Mccormick (2008); Howard (2007–2008), p. 505; Viscuki (2000).

[11] Since 1988, the Basel Committee on Banking Supervision has adopted 3 major accords setting capital requirements for banks: Basel III: International framework for liquidity risk measurement, standards and monitoring, 2010; Basel II: International convergence of capital measurement and capital standards; Basel I: International convergence of capital measurement and capital standards, 1988. Hull (2012), pp. 257–278.

[12] International Bar Association, *The Management of Legal Risk by Financial Institutions*, Draft Discussion Paper, Working Party on Legal Risk, 2003.

[13] Wyss (2005); Pfohl (2002).

[14] Dekeuwer-Defossez (2015), p. 5; Moury (2012), p. 1020; Lasserre (2011), p. 1632; Barbier (2011); Millet (2001).

[15] Mahler (2007).

Alberto Alemanno in the *European Journal of Risk Regulation*[16] tend to approximate these interdisciplinary movements through the concept of risk regulation.[17] In these studies, legal risk management is seen through different steps: risks identification, risks classification, impact assessment, EU law-making process, risk regulation, risk management, legal monitoring, legal liabilities and sanctions.

EU law may paradoxically create threats to national public authorities, companies or individuals that shall be managed by competent authorities. Using legal science as a tool for risk management may help to be aware of the legal consequences. For that purpose, this chapter aims to define and identify the legal risks resulting from EU law (I) and then demonstrate how the legal risks are managed by EU law (II).

2 Looking for a Definition of Legal Risks in EU Law

In 2005, the European Central Bank (ECB) expressed its will to develop a legal risk definition as part of operational risk and the Bank considers that "a general definition of legal risk would facilitate proper risk assessment and risk management, as well as ensure a consistent approach between EU credit institutions. It would also be worthwhile examining the extent to which one should take into account the fact that legal risks are inherently unpredictable and do not generally conform to a pattern. In addition, the management of legal risk would have to be consistent with the management of operational risk as a whole. For these reasons, the ECB suggest that CEBS should carry out further work to clarify the definition of legal risk".[18] However, the final Directive only mentions legal risk as part of the operational risk relating to credit institutions, but does not define it properly.[19]

[16] European Journal of Risk Regulation, since 2010, 4 issues a year, available at: http://www.lexxion.de/en/zeitschriften/fachzeitschriften-englisch/ejrr/about-ejrr.html.

[17] Alemanno (2016), p. 224; Alemanno (2014); Alemanno et al. (2014), p. 338; Alemanno and Spina (2014); Alemanno (2012); Alemanno (2011), p. 320; Alemanno (2008), Series No. 6; Alemanno (2007).

[18] European Central Bank, Opinion of 17 February 2005 on a proposal for Directives recasting Directive 2000/12/EC of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions and Directive 93/6/EEC of 15 March 1993 on the capital adequacy of investment firms and credit institutions (2005/C 52/10).

[19] Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast), OJ L 177, 30.6.2006, pp. 1–200.

Indeed, neither the EU Treaties and Legislations, nor the European institutions and the Court of Justice[20] expressively refer, use or define "legal risk". The Treaties refer 14 times to the word "risk".[21] Every reference to risk in the Treaties is tied to respective liabilities of the European institutions and Member States. However, risk is taken into consideration in many EU Regulations and Directives as well as in many soft law documents.

The first purpose of this chapter is to reframe the concept of legal risk through existing general principles of EU law (Sect. 2.1) and then to identify which threats may be seen as "legal risks" (Sect. 2.2).

2.1 Legal Risks Through EU Law Principles

If the expression of "legal risk" is not expressively used in EU law, its concept is already implemented through a few general principles of EU law. Legal risk can be considered as already partly managed by existing EU law.

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[20] The General Court mentioned it in two Judgments only to express the binding effect of EU Law in national legal orders and the consequence of an agreement between two Parties: Joined Cases T-425/04, T-444/04, T-450/04 and T-456/04, *France, France Télécom vs Bouygues e. a.* [2010] ECR II-02099, para. 187; Case T-271/04, *Citymo SA vs European Commission* [2007] ECR II-01375, para. 152.

[21] Art. 7, para 1 EU in case of "clear risk of serious breach by a MS of the [European] values"; Art. 121, para 4 TFEU provides a possibility for the European Commission to address a warning to a MS if its economic policies risk to jeopardise "the proper functioning of economic and monetary union"; Art. 126, para 3 TFEU permits the European Commission to prepare a report if "there is a risk of an excessive deficit in a Member State"; under Art. 196, para 1 a) TFEU, the Union supports the MS' action in risk prevention relating to civil protection; Art. 207, para 4 a) relating to the common commercial policy foresees (Who?), in case the agreements in the field of trade in cultural and audiovisual services risk prejudicing the Union's cultural and linguistic diversity, the Council shall also act unanimously, as well as, under b) in the field of trade in social, education and health services; Art. 256, para 2 TFEU provides Decisions given by the General Court in proceedings brought against Decisions of the specialised courts which may be subject to review by the Court of Justice "*where there is a serious risk of the unity or consistency of Union law being affected*", as well as for a preliminary ruling and in general the First Advocate General may propose it, on the basis of Art. 62 of the Protocol (No. 3) of the Statute of the Court of Justice of the European Union; Art. 7, para 3 of the Protocol (No. 5) of the Statute of the European Investment Bank specifying that "the Board of Directors shall [. . .] lay down the terms and conditions of any financing operation presenting a specific risk profile" and under para 6 "the Bank shall protect itself against exchange risks by including in contracts for loans and guarantees such clauses as it considers appropriate" and Art. 7 provides the same protection in referring to the risks. Finally Art. 19, para 2 states that "*No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment*".