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Small decisions? The European Commission and the transformation of the role of legal expert groups: the case of gender equality and non-discrimination

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Abstract: The European Equality Law Network (EELN) was founded in 2014. It resulted from the merger of two gender equality and non-discrimination expert groups. The creation of the EELN may appear as a simple decision to rationalize the landscape of expert groups. The objective of this article is to show how this merger indicates important transformations regarding the role of expert groups and legal expertise in the field of EU equality policy. This seemingly small decision participates in a larger process of change. The legal experts and the Commission are no longer partners developing together the equality policy. The members of the EELN are seen merely as service providers. The article isolates three main explanatory factors: the role of the policy sector; the role of the regulatory and enforcement politics of the Commission; the role of policy instruments in the framework of the Commission's managerial turn during the 2010s.

Keywords: European Commission, EU gender equality policy, EU non-discrimination policy, expert groups, legal expertise, policy instruments

Introduction

The European Equality Law Network (EELN) was founded in December 2014. The Directorate-General for Justice and Consumers established this expert group on a one-year basis (renewable three times), entrusting it with the contractual objective “to provide independent advice, analysis and relevant information to the Commission, on a continuous and reliable basis, regarding national legislation and policies in the fields of gender equality and non-discrimination on the grounds of ethnic origin, religion or belief, age, disability and sexual orientation” (European Commission, 2014, p. 8). The creation of this network did not really involve gathering a new group of experts to serve the European Commission. Rather, it resulted from the merger of two pre-existing groups: the European network of legal experts in gender equality¹, created in the early 1980s² to monitor the application of directives on gender equality and related issues, and the European network of legal experts in non-discrimination³, which was formally created in 2004, but also emerged from three pre-existing networks (on disability, on sexual orientation, and on race and ethnic origin, and religion and beliefs) in charge of monitoring the application of directives on the fight against discrimination.

Therefore, the creation of the new joint EELN appears as a simple decision to rationalize the landscape of EU legal expert groups on gender equality and non-discrimination. However, contrary to this strictly organizational vision, the main objective of this article is to show how this merger can be considered as an indicator of important transformations regarding the role

¹ It will be referred to as “the gender network” for convenience.

² The gender network dates its creation to 1983 (Koukoulis-Spiliotopoulos and Masse-Dessen, 2014, p. 4; see also the presentation page of the EELN on its website: <https://www.equalitylaw.eu/about-us>, accessed 03/07/19). Academic works on the subject mention the date of 1982 (Hoskyns 1996, Mazey 1995).

³ It will be referred to as “the non-discrimination network”.

of knowledge and expert groups in European governance, and especially that of legal expertise in the field of equality. Far from being “just” a small decision, this merger reveals a larger underlying process of change. This article examines this in the light of broader changes in EU equality policy and of the Commission’s “managerial turn” during the 2010s. It also shows how it has resulted in a devaluation of legal expertise on equality (reduced autonomy and ability to produce analytical and critical analyses) and in a new conception of what skills and resources are expected from the experts, transforming the way they both conduct their role and value their membership within the expert group. The legal experts and the Commission are no longer partners developing together the gender equality and non-discrimination policies. The members of the EELN are seen by their contractual authority merely as service providers.

The article analytical framework relies first on the theoretical contribution by Christina Boswell (2008). She established a typology of the functions fulfilled by scientific expertise within the European political system, in which she identifies three different functions: an “instrumental function” which enables bureaucratic structures to achieve their objective, and a “legitimizing function” which enhances the legitimacy of an organization through a manifest recourse to scientific knowledge, and which enables this organization to justify its jurisdiction over a given policy domain. In addition to these two Weberian functions, Boswell includes a third “substantive function”, which allows an administration to use expertise more strategically so as to give substance to its preferences and epistemic authority to the content of its proposals. This typology will help substantiate the diachronic evolution of the role and uses of legal expertise on equality.

Second, in order to analyse how the perceived competence of a legal expert on equality has been transformed and how this transformation has impacted their assigned role, the article will draw upon the notion of resignification. This notion has been designed by Judith Butler (1995) and taken up by Nancy Fraser (2011) to qualify the impact of certain phenomena or currents of

thoughts that gave a more ambiguous meaning – that is, a diverted or even instrumentalized signification – to the concept of feminism (post-modernism in Butler’s case, and neoliberalism for Fraser). This notion can help capture the changes in meaning that have impacted legal expertise on equality since the 2010s under the influence of managerialism.

Methodologically, this article is based first on twenty-two semi-structured interviews conducted in 2012, 2013 and 2018 with coordinators, members and former members of the EELN, as well as officials from DG Justice, DG Employment and the Legal Service of the European Commission. This series of interviews, which were specifically focused on the analysis of the EELN are complemented with interviews and documentary sources previously collected in the context of an analysis of the transformations of European gender equality policy since its emergence. This analysis shed light on the gender network’s creation and first period of existence, from the beginning of the 1980s through the 2010s (Jacquot, 2015). Second, the analysis is based on the ethnographic observation of several annual meetings and of the groups’ joint seminars in 2012 and 2013. Third, it draws on the production and analysis of a prosopographic database that collects biographical data on members of the EELN at two points in time – in 2008 and in 2018. These various data sources cover a period of time long enough to conduct a diachronic comparison that helps understand how the role of the analysed expert groups and the underlying conception of legal expertise have changed over time.

In order to unpack the changes in the role and place assigned to legal experts and expertise in the governance of the EU gender equality and non-discrimination policies, this analysis will proceed in three stages. The first part will examine the evolution of the functions of legal expertise in the field of equality since the creation of the gender and non-discrimination networks. We will see that, while Boswell’s typology needs to be enriched with one complementary function (evangelization) to capture the range of missions assigned to legal expertise on equality in a first period, the most recent period is characterized by a decrease and

a devaluation in the uses and acknowledgement of this expertise. The second part will focus on the experts themselves and on the evolution of what skills and resources are expected from them. This will allow to analyse how the signification of what should be a legal expert on equality from the Commission's perspective has evolved and how this resignification has impacted the members of the EELN. Finally, the third part will try to isolate a number of explanatory factors for these changes. Three factors will be put to the fore: the role of the policy sector and of the changes affecting the equality policy and its place in the EU political system; the role of the regulatory and enforcement politics of the Commission and the way the Commission's mission has been transformed regarding the oversight of the transposition and implementation of EU equality legislation; the role of policy instruments and the evolution of the contracting procedures of scientific external expertise in the framework of the Commission's managerial turn during the 2010s. In the conclusion we will try to point to the broader policy implications of these underlying and supposedly small changes and decisions regarding the role of legal experts and expertise on equality.

Functions and uses of legal expertise in a Community of law: the gradual devaluation of a resource

Expert groups answer to bureaucratic structures' need to mobilize knowledge, so as to inform policy-making. Administrative organizations expect these groups to perform a certain number of duties on their behalf. Focusing on the European Commission's relations with expert groups in the field of equality and its expectations regarding their legal work, the significant evolution over the past two decades has been a reduction in the types and range of functions that must be filled by the expert groups, and in the uses made of this legal expertise.

The analysis shows that while the timeline of change is different for the gender and non-discrimination networks, the mechanisms of change are similar and its results appear identical.

The creation of legal expert groups: developing policies and enforcing rights

When the Network of experts on the application of equality directives was established in the early 1980s, it was the first of a series of expert groups that were set up throughout the decade until the early 1990s⁴. The logic here was quite classical. The Commission, as a “purposeful opportunist” (Cram, 1993), sought to intensify the transfer of powers from the national to the European level, and to broaden the legitimate fields of Community intervention and its own powers (Pierson, 1996). In this quest, the Commission primarily resorted to its bureaucratic resources, including the control and coordination of expertise. This neo-functionalist model especially applied to the sector of gender equality (Mazey, 1995). From the beginning of the 1980s, the Women’s Bureau played an active role as a political entrepreneur and began to support the Commission’s action by developing groups of scholars and experts. The Network of experts on the application of equality directives had a special place among all the groups that were set up, since it covered the Commission’s core powers on the subject at a time when a large body of legislation was being established: six directives on equal treatment and equal opportunities were adopted between 1975 and 1992.

Similarly, the creation of the Network of legal experts on non-discrimination took place in the early days of the institutionalization of this issue within the Employment and Social Affairs DG

⁴ European Expert Network on the Situation of Women in the Labour Market (1983); European Network for Women’s Local Employment Initiatives (1984); Network for Positive Action in Business (1986); Steering Committee for Equal Opportunities in Broadcasting (1986); European Childcare Network (1986); Working Group on Equal Opportunities in Education (1986); IRIS-European Network of Training for Women (1988); Women in Decision-Making Network (1992).

at the time, in the wake of the inclusion of a new article in the Amsterdam Treaty introducing a generic competence in the fight against discrimination (Article 13 TEC, now Article 19 TFE). More importantly, as was the case for gender equality, the creation of the anti-discrimination network was directly linked to the adoption in 2000 of two directives (2000/43/EC and 2000/78/EC) that aimed to give concrete substance to Article 13 and that, for the first time, extended the material field of Community anti-discrimination law beyond the labour market and to new population categories.

In both cases, the creation of legal expert groups helped build a new sector of public action and responded to a need to monitor the national transposition and application of a field of law that was itself being developed.

The gender and non-discrimination networks and their original functions

If we look more closely at how the gender and non-discrimination networks operated before the 2010 decade, it is apparent that the legal expertise they produced fulfilled a wide range of functions. Drawing upon Boswell's typology of the different functions of expertise at the EU level, we see that all three functions are carried out by the gender and anti-discrimination networks. They both performed instrumental, legitimizing and substantive functions on the account of the European Commission.

Firstly, the gender and non-discrimination networks fulfilled an *instrumental function*. The legal expertise produced by the networks was used by the Commission to strengthen its capacity to act and develop its powers (see Radaelli, 1999), verify the transposition of directives by Member States, monitor their application and detect breaches that might result in infringement proceedings. This function was at the heart of the remit of the networks, which were first and foremost focused – including in their name – on “the application of the directives”. Thus, in spring 1992 the gender network started publishing a quarterly “newsletter” with a country-by-

country update on various developments in transposition and case law. The non-discrimination network did the same from its creation on.

Secondly, the networks had a *legitimizing function*. The Commission used legal expertise to assert its presence and increase its legitimacy in the concerned areas, whether in relation to other segments of the institution or in relation to the Member States (see Larsson and Murk, 2007). The aim was to show that the Commission drew on scientific knowledge, by mentioning for example the existence and work of the expert groups in the annual reports produced over the years by the relevant Units in DG Employment⁵. The establishment of legitimacy in new areas has been central, both in the case of the gender network (which was very representative of the approach adopted by the Delors Commission on social issues) and in the case of the non-discrimination network following the adoption of the 2000 Anti-Discrimination Directives.

Thirdly, the networks carried out a *substantive function* as the Commission strategically used their legal expertise to justify and inform its texts. Beyond the various thematic reports commissioned to prepare a directive proposal, the tri-annual, then biennial and then annual meetings of legal experts in which Commission members participated were generally regarded as an important forum for exchange, in particular for the Commission which could test the temperature on new subjects, and explore certain issues before taking formal action. At the same time, some of the legal experts and the Commission collaborated on an ad hoc basis to prepare cases before the Luxembourg Court, with experts providing the Commission with either expertise specifically related to the concerned national law or expertise on very specific points of law.

⁵ Name, perimeter and references have changed over the years. For instance, at the beginning of the 2000s, Unit G.1 produced an annual report on “Equality between women and men”, and Unit G.4 on “Equality and non-discrimination”.

In addition to the Commission's different uses of the expertise developed by the networks in their reports and in the various documents they produced, there was another function that we could describe as an *evangelization function*. The experts' work served, on the one hand, to develop a global reflection and analysis on what were these new areas of European law – gender equality and non-discrimination law⁶. On the other hand, beyond the information they provided to the Commission on the state of law in different countries in a bottom-up logic, legal experts also had an important role in disseminating information in a top-down logic. As experts in these new fields of law, they played the role of missionaries, tasked with carrying the gospel truth in their national contexts, and participating in the acculturation, acceptance of, and recourse to, new bodies of law by national specialists and law professionals. The Commission expected and encouraged this mission, which was a full-fledged function of the two networks of legal experts in the early stages of their existence:

There was a quarterly meeting in Brussels [...], the idea was that people were talking to each other, so they thought 'European' [...]. During the meetings, there were debates between the experts, 'exchanges of good practices' before it was called that, and it allowed to disseminate these good practices in their national cultures (Interview 1).

A reduction in the multidimensionality of the functions of legal expertise

⁶ On this point, several works in which the gender network has been involved have collectively played a significant role in establishing European law on equality between women and men as a field of study (McCrudden, 1994; Verwilghen, 1986, 1993). Similarly, many documents produced by the non-discrimination network or academics members of the network are considered landmarks in the establishment of the field (see for example: Bell, 2002; Cormack and Bell, 2005).

An analysis of the EELN's activities reveals a reduction in the functions assigned to it by its contracting authority. This is particularly visible if we go through the various functions identified above.

The *instrumental function*, which aims to support the administration in achieving its objectives, has seen its scope shrink sharply. Originally, the gender and non-discrimination networks' primary mission was to follow up on the directives in these areas. This mission was envisaged in a broad sense, encompassing the verification of both their transposition and implementation, with legal experts' work directly contributing to infringement proceedings against Member States. This function has recently been greatly reduced with a focus on the transposition phase of directives, rather than their application:

Infringement procedures against the Member States are no longer a priority. The case law comes mainly from preliminary questions (Interview 2).

This led to a major reduction in the scope of the instrumental mission assigned to legal experts. The *function of legitimizing the administration through expertise* has also shrunk in recent years. The EELN does not appear in the Commission's Register of Expert Groups. There is only a trace in this Register of the anti-discrimination network, but it appears as "closed"⁷. Similarly, the reports and publications by the EELN are not directly accessible on the Commission's website anymore. Its analyses are not referred to in documents aimed at presenting the monitoring and enforcement of EU laws in related domains⁸. Therefore, publicizing the existence of a group of legal experts specialized in equality issues to other

⁷ See: <https://tinyurl.com/y45o2j2p> (accessed on 03/07/19).

⁸ See for example the webpages devoted by the Commission to "Ending pay discrimination by monitoring and enforcing laws and rules" (<https://tinyurl.com/yxmnltqo>, accessed on 03/07/19) or "Tackling discrimination" (<https://tinyurl.com/y3sbfy6h>, accessed on 03/07/19).

segments of the institutions, or to the general public, is apparently not perceived as a necessary initiative to establish the legitimacy of the Commission's action in these areas.

The *substantive function* of expert groups has also narrowed. When it comes to preparing text proposals or shaping initiatives, the EELN's work is no longer considered an essential resource by the Commission. Rather, interviewees state that it is considered a source of information among others. Its work is indeed regularly supplemented or duplicated by other actors, usually research companies or consortia commissioned by the Commission to produce ad hoc studies. However, high legal expertise is not always easily available, especially in smaller countries, and sometimes members of the EELN provide expertise on the same question to the Commission both via an EELN's report and a research company's study.

Finally, the last expertise function we identified is the *evangelization function*, which has also become significantly less important. First of all, the idea of developing a global reflection on EU gender equality and non-discrimination law and of participating in the collective development of an emerging legal field has disappeared in favour of a more limited vision of the type of expertise experts can provide. EELN's members with a relative seniority explain the change in the nature of their work:

We answer questions. The point is [no longer] to build a point of view on discrimination that is coherent at the European level (Interview 3).

The work of the network is now more descriptive than analytical (Interview 4).

Second, the conception of experts as missionaries, supposed to raise awareness about these bodies of law at the national level, has also largely disappeared. Of course, this is partly attributable to the gradual recognition of these two new fields of law in national legal mores and habits. However, the very conception of the role of the experts as spokespersons and carriers of the gospel is no longer on the Commission's agenda and is no longer part of the missions assigned to them. Indeed, while knowledge is still disseminated through the *European*

Equality Law Review, intended for researchers, lawyers and policymakers, the Commission strongly frames the publication and must approve of every piece of text⁹. Similarly, while legal experts are allowed to participate in seminars and conferences as members of the EELN, any use of the reports produced by the experts must also follow very restrictive contractual rules and long periods of embargo, thereby automatically limiting their dissemination and uses.

Table 1: The Process of Devaluation of Legal Expertise

Category of expertise	Before 2010's	Devaluation process	After 2010's
Instrumental function of expertise	Verify the transposition of directives and monitor their application by member States		Verify the transposition of directives
Legitimizing function of expertise	Contribute to the establishment of new areas of EU law and policy sectors		Does not visibly contribute to the internal and external legitimacy of the policy sector
Substantive function of expertise	Provide information on national legislation and legal developments to the Commission (bottom-up logic)		Provide information on national legislation and legal developments to the Commission in parallel with other actors
	Develop a global thinking on new domains of EU law		Describe the legal developments

⁹ The call for tender provides the general principles for the prior approval of the content of the publication, but it also specifies the format, the number of pages, as well as the headings and their organization (European Commission, 2014).

Evangelizing function of expertise	Disseminate information on EU legislation and legal developments at the national level (top-down logic)		Disseminate some information on EU legislation and legal developments under tight scrutiny of the contracting authority
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Source: Author

The resignification of the legal experts on equality and of their role: what is a “good” legal expert on equality today?

Beyond the functions given to the expert groups, an important way of analysing the role and place of expert knowledge in EU governance is to consider the profiles of the experts themselves (Robert, 2010). A comparative prosopographic analysis of legal experts in the field of equality at two points in time, in 2008 and in 2018, shows that the legal experts have remained roughly the same over time, that they share the same characteristics and that the composition of the EELN remains stable with regard to that of the gender and non-discrimination networks (institutional affiliation, legal training, professional activity, participation in other EU groups or committees, seniority in the expert group). However, what has changed between these two moments is the contracting authority’s expectations of what types of resources and skills a legal expert on equality should possess. As will be shown below, an examination of these valued characteristics and of their evolution over time enables us to consider the changes in meaning that have impacted legal expertise on equality at the EU level since the 2010s, i.e. what it means, from the Commission’s perspective, to be useful and legitimate expert. This also enables us to consider the effect of this process of resignification

on the experts themselves, especially on how they envisage their membership and link to the EELN.

Being able to distance oneself from the member States?

The composition of the EELN is primarily marked by a national logic. Since the creation of the gender network in the early 1980s, the Commission's goal has been to bring together national experts to gather information by country while covering all national legal systems. The major development here has been the significant increase in the number of countries concerned, which now total 35 (28 Member States, 4 candidate countries and 3 EFTA/EEA countries). This increase has had a significant impact on how the expert group functions, as the number of legal experts per country has been reduced, resulting in a concentration of tasks, and presenting a challenge for some small countries to find experts on the two themes represented in the EELN. It also follows from this logic of national composition that the question of independence vis-à-vis the Member States is less central in fact than in speech (see also on this point Gornitzka and Sverdrup, 2011). The question of independence is repeatedly emphasized on the website and in interviews. However, a few legal experts are Member State officials¹⁰, and sometimes, mainly because of the scarcity of available expertise, the knowledge of national subjects and developments takes precedence over independence. More substantively, it is the legal experts' positioning with regard to the Member States and their capacity for criticism that has evolved. A cross-reading of the annual reports presenting a country-by-country analysis of the state of legislation and their comparison over time provides a measure of the evolution in the relationship to the Member States. For example, if one randomly opens the 1992 General Report of the gender network, it is possible to read the following remarks: "At first glance, Italy, Germany, Denmark and France seem to have transposed the Directive much more honestly than

¹⁰ In 2018, three country experts are members of national equality bodies.

the other Member States. [...] Although the transposition of Directive 79/7 in the last five Member States seems satisfactory at first sight, as we have already noted, certain critical remarks based mainly on national reports must be formulated”, or “This judgment has been severely criticized by the commentators (in our opinion with good reason)” (Expert Network on the Application of the Gender Equality Directives, 1992, p. 7). By contrast, the recent annual EELN reports are much more descriptive. They present the transposition choices of the various Member States rather than attribute good and bad transposition points. The positioning of the experts is therefore different. Finally, the autonomy of the experts’ production vis-à-vis the Member States has also changed. As indicated by a national expert, administrative officials from her own country review the reports she drafts and provide comments to the Commission, which in turn asks her to address these comments. This type of back-and-forth process before validation was not part of the routine operation of the gender and anti-discrimination networks in the first phases of their existence. While the ability to distance oneself from the member States and even to criticize their action used to be, if not necessarily required, at least possible and valued, this independence is not central anymore.

Being a “jurist-linguist”?

Another resource that is not only valued but required from the legal experts is proficiency in the English language. The Commission’s calls for tenders explicitly state that all productions must be written in English. This requirement has especially impacted the former gender network, which mainly worked in French throughout the 1980s and 1990s, and then in a bilingual mode. This is a point already made by Antoine Vauchez, who showed the predominance of French, in terms of both language and law, in the early days of the European integration. The figure of the “jurist-linguist” combining legal and linguistic resources allowing him/her to intervene “usefully in the various forums where this first law of Europe is being

developed” (Vauchez, 2007, p. 61-62) is still relevant for the legal experts studied, but the linguistic requirements have changed in nature: the predominance of French has been supplanted by an exclusive domination of English. This requirement for a proficiency in the English language appears useful if one wants the efficient functioning of a group gathering members from 35 different countries. What is interesting however is that this practical requirement has some direct impact on the perception of the “good” expert. Indeed, it represents a constraint for the selection of potential members – even in larger countries – who have to possess specific legal expertise and the ability to conduct it in English. According to some members, this double set of skills induces a uniformization of the experts’ background. It also represents a constraint in terms of content. The “global” and simplified English practiced within the Commission and imposed in the reports sometimes proves inadequate to reflect certain specificities and subtleties of national law so that several experts consider this change as one of the reasons for the drop in quality of the work produced.

Being able to develop a political expertise?

The last type of resource which valorisation has undergone a profound transformation is activism. Within the Commission’s gender equality and anti-discrimination Units, since the beginning of the 2000s, a logic of professionalisation has guided the administrative and managerial transformations at work, leading to a continuous marginalization of activism in favour of the EU equality policy as a cause (Jacquot, 2015). This new conception has also been applied to the legal experts and to the institutional definition of who a “good” expert should be. Thus, while the capacity to develop a political vision of the law used to be a resource the Commission sought, it tends today to be disqualified for the benefit of the production of a more politically neutral expertise.

This question of activism is of course related to the issues addressed within the EELN and is unique to many other groups of experts. The gender network was created at a time when experts were chosen for their subject matter qualifications, as well as their commitment to the cause of gender equality. This conception of the experts' role was present from the outset in the writings of the gender network, which in its reports directly appealed to the Community administration to propose strategies for the development of EU gender equality policy, and sometimes even urged the Commission to adopt a given course of action. In a text written in 2014 in the *European Gender Equality Law Review*, two 'historical' members particularly emphasize this role and describe the gender network as a "vector for raising awareness and promoting the right to gender equality" (Koukoulis-Spiliotopoulos and Masse-Dessen, 2014, p. 5). The non-discrimination network emerged from a lobbying initiative called the Starting Line Group, which, in the late 1990s, included NGOs and academics and played an active part in the adoption of the two 2000 directives on non-discrimination in a context of political crisis (Geddes and Guiraudon, 2004). The current coordinators and many of the of the non-discrimination branch of the EELN were members of this initiative and they have greatly contributed to the formation of a new policy sector at the EU level. Both branches of the EELN have activist origins. However, their conception of the political dimension of expertise differs today. Most of the gender legal experts see their role as "naturally committed" (Interview 5), whether they are young or old, from an original or recent member country, and regardless of whether they experienced the founding period of the gender network. They claim that they belong to what Allison Woodward (2004) called the "Velvet Triangle", that is, a policy community gathered around the goal of developing and defending the EU gender equality policy. They see the law as a means to achieve an end that is of the order of values. The perspective is different among the non-discrimination experts. They tend to favour an efficient vision of expertise, where values are central but where the application of anti-discrimination

law is its own end. Consequently, the former gender network has been more profoundly hit by the process of change than the former non-discrimination network. Nevertheless, the new conception of the requirements for a “good” legal expert affects both branches, even if the gap to adapt to this new conception is more or less wide.

In sum, what emerged from the 2010s on is a substantial transformation of the exchange relationship between the European administration and the legal experts, as well as a resignification of the status of legal experts and of their role. The Commission used to consider the networks members as partners, supporters and relays at the national level, working for a common objective: to develop and promote public policy, with the aim to fight inequalities. The members of the EELN are now mainly seen by the Commission and its officials as service providers within the framework of a contractual exchange. This transformation affected both the gender and the non-discrimination experts, their link to the EELN, their way of seeing the usefulness of their work and their sense of belonging, and the exchange relationship with the Commission is experienced as strongly degraded. It also impacted the value and interest that the experts have in being members of the EELN:

It becomes very bureaucratic and I know some experts are about to disengage – they would never have said that two years ago or three years ago or four years ago. It gets worse and worse, there is a threshold that is reached at a given moment... (Interview 3)

From partnership to service provision: explaining a process of change

To grasp the mechanisms of the transformation of both the functions of expertise and role of legal experts in the field of equality, it is important to first consider the changes that have occurred in European equality policy itself. The role of the policy sector as a variable deserves to be taken into account. Indeed, the evolution in the role granted to expert groups in general and to legal expertise in particular is an integral part of the evolution of this public policy and of its place in the European political system (Gornitzka and Sverdrup, 2008). Another explanatory factor is related to the regulatory and enforcement politics of the EU over the past decade. The Commission has changed its approach to its mission to oversee the transposition and implementation of EU equality law, and this in turn has direct implications on the legal expertise it relies on. Finally, the nature of the regulatory instruments of legal expertise and their specific effects (Kassim and Galès, 2010) must also be considered. Here, the transformation of the instrumentation corresponds to an evolution in contracting procedures and in the calls for tender that implement them, in particular under the influence of the European Commission's "managerial turn" during the 2010s, which transformed the status of expertise within the Community administration. From a situation where the Commission possessed its own resources of expertise, this expertise has become "an outsourced market to manage" (Georgakakis, 2017), so that this managerial vision has largely contributed to the process of change analysed here.

The paradoxes of setting up a rights policy and the consequences of a policy in crisis

Since the beginning of the 2000s, European policy to combat inequalities between women and men has gradually evolved into a rights policy, i.e. a policy that tends to focus on the promotion and enforcement of rights and the fight against differences in treatment between categories of

inequality. This rights policy has also become more inclusive, integrating the fight against discrimination in its remit. One of the characteristics of rights policies is to emphasize an individual approach to discrimination, but also to favour modes of public action based on the judicialization of the treatment of inequalities. It is therefore the whole equilibrium in European equality policy that has changed. Traditionnaly, it was equally based on legal instruments designed to implement equal treatment, budgetary instruments designed to ensure equal opportunities, and coordination instruments (such as mainstreaming, as called for in Articles 8 and 10 of the TFEU) designed for equal impact on public action. Beginning in 2008, in a context of economic and fiscal crisis, as well as a loss of political focus on equality policy, the budgetary instruments were undermined and coordination instruments were considerably weakened. Legal instruments thus became the main component of this policy with a shifting centre of gravity. However, this development occurred at a time when the legislative function of the policy itself was in crisis: little progress was made in redrafting the Lisbon treaties, and minimal requirements in the context of legislative revisions had been made since Lisbon¹¹, with blocked proposals¹², abandoned¹³ or very conflictual negotiations¹⁴, both in the fields of gender equality and non-discrimination. Therefore – and this is the paradox of this rights policy – as far as the EELN is concerned, this refocus on legislation as a new centre of gravity for the policy was not necessarily synonymous with greater centrality for legal expertise in the field of equality.

¹¹ See the revision of the 1996 directive on parental leave (Directive 2010/18 / EU), and the one of 1986 on the equal treatment of self-employed and assisting spouses (Directive 2010/41 / EU).

¹² See the gender balance on boards (COM (2012) 614 final) and the horizontal anti-discrimination directive proposals (COM (2008) 0426).

¹³ See the proposal to revise Directive 92/85 / EEC on the protection of maternity, withdrawn in 2015 (COM (2008) 637 final).

¹⁴ See the proposal for a directive on work-life balance for parents and carers (COM (2017) 253 final).

The general context of economic crisis at the EU level has also been felt at the policy level: starting with the 2007-13 and continuing with the 2014-20 multiannual financial framework, the EU equality policy entered a phase of austerity with a drop-in in funding and in resources more generally (Jacquot, 2015, p. 147-153). This general diminution of resources plays an important part in the transformation of the functions and role attributed to the expert groups. At the level of the EELN, this has been translated by a reduction in the number of experts per country, a reduction in the number of meetings per year, a widening of the areas on which the legal experts are consulted and which can thus be quite far remote from their main fields of competence, and this should also be linked to the reduction of the number of legal officers (often on temporary contracts) in the Commission's Units. All this contributes to an accumulation of elements conducive to a deterioration of relations within the EELN and between the EELN and the Commission. The result being a loosening of previously close and frequent exchanges and collaboration relationships.

Another important point is that this crisis in European equality policy took place in a context of organizational upheavals at the European Commission. On January 1st 2011, the Directorate for Equality and the Fight Against Discrimination, formerly part of DG Employment and Social Affairs, started reporting to DG Justice. Far from being merely material, this administrative transfer was consequential for equality policy and its modes of action, including the (de)consideration of expert groups, contributing to the transformation of the relationship of these services to expertise. In any case, this is how it was perceived by the public servants who experienced the DG transfer. The data analysed by Gornitzka and Sverdrup (2008) with regard to the recourse to expert groups by the different DGs also point to a lesser part played by expert groups in DG Justice policy-making.

This new environment also resulted from an increasingly managerial approach to expert groups at the level of the Commission as a whole. The organization of the other existing equality

networks was reformed: in parallel with the gender and non-discrimination legal networks, only one other group existed from 2011 to 2015: the European Network of Experts on Gender Equality (ENEGE). From 2015 on, the EELN has been the only surviving expert group, since ENEGE was not renewed¹⁵. In this new policy-making landscape and in the framework of a transformed mode of governance of European equality policy, the collaboration with expert groups is much less central, and consequently, the EELN has become a much more peripheric actor since the 2010s.

From application to transposition: the impact of a political choice

We have seen that the instrumental function of legal expertise in the fields of gender equality and non-discrimination has shrunk from a focus on both the transposition and application of directives to a reduced focus on procedural transposition. The important dimension here is that this transformation resulted from a political choice by the European Commission and a deliberate change in the way it approaches its mission of “guardian of the Treaties”, as clearly explained by officials from the Commission:

Sometimes, there is an insistence on examining national transposition: in both areas – equality and non-discrimination – we got to over 100 procedures at one point. It was the result of a general trend. In 2009, after the opening of anti-discrimination procedures, we decided that was too much, so the priority became reducing the number of proceedings [...]. There was pressure from the General Secretariat: we had to close infringement procedures, or it wouldn't look good in the statistics. In four years, we went from 100 to 20 procedures. Of course, during these four years the situation also improved in the field, but sometimes we could have been more demanding [...]. This is a demonstration of a more general dynamic that applies to many areas: do not disturb

¹⁵ There remains only a list of potential experts, but no organized group of experts as such.

the Member States – if there is any doubt, drop it. That’s why we also do procedures on transposition and not on the application: it gives us a line of technical rather than political defence [...]. In our case, gender equality and anti-discrimination are potentially sensitive issues, which explains why we focus on transposition rather than on application (Interview 6).

This transformation in the European Commission’s regulatory style, especially under the influence of the second act of the Better Regulation programme beginning in 2013, is not new to EU scholarship (Kassim *et al.*, 2013; Kelemen, 2011; Radaelli, 2018). What is important here is that this political choice has direct consequences on the use and perceived usefulness of national legal experts and of the EELN. The reduction in the level of oversight of the implementation of EU law in the fields of gender equality and non-discrimination involved a reduced need to monitor legal activity in these fields at the national level, which in turn – almost automatically – implied a reduction in the importance of the experts who performed this monitoring.

Tender is the Night: the structuring role of public policy instruments

One of the consequences of the increased managerialism within the European Commission since the 2010s has been a reinforced proceduralization of external expertise (Georgakakis, 2017). This has resulted in tighter conditions set out by the contracting authority in the calls for tenders. This evolution of the instrumentation of the contractual relationship between the EELN and the Commission has implied constraining effects.

For example, since the 2014 call for tenders, the EELN has been compelled to produce a certain number of documents per year, organize an annual seminar and respond to ad hoc requests. Of the 8 types of documents that must be produced, one of the most important is the annual report, the structure of which has been increasingly strictly defined over the contract periods, with a

growing emphasis on format rather than content. The system of “ad hoc requests”¹⁶ also gives the experts the impression of being dispossessed of their expertise capacity, as their analytical value is downplayed by the need to provide what they see as news commentary. The micro-level supervision of the work of legal experts is also regularly called into question, since the lack of autonomy granted to the experts is seen as an element of intellectual impoverishment in the EELN’s output. Previously, the gender and non-discrimination networks had greater flexibility to select the issues addressed in the thematic reports. The EELN’s ability to suggest new themes or focus on certain issues in an autonomous way has been reduced in the new tenders:

Speaking about what information the Commission asks from us, starting in 2008 to, let’s say, 2012-2013, the network was far more free to advise to the Commission about what experts saw as the topical emerging issues in the field (Interview 7).

The relationship between the Commission and its expert groups has always been governed by a form of contracting. However, the conditions of this contract changed with the managerial turn that started in the 2010s. The emphasis is placed on transparency, better management and cost reduction (Field, 2013). The new logic results in the implementation of instruments that produce ever more rationalising and disciplinary effects (standardization of procedures, increasing constraints...), at the expense of both content of expertise and relationship with the experts.

¹⁶ Specific ad hoc requests are sent by the Commission to the EELN, which is required to provide responses within seven calendar days.

Conclusion

The initial interest of this research mainly laid in the merger of the gender equality and non-discrimination networks into the joint EELN and the possible internal conflicts and tensions triggered by this merger, considering that the former networks tended to have different visions and conceptions of their role as legal experts, and different approaches to fulfilling this role. There are some tensions, lack of understanding or difficulties in working together. However, the analysis revealed that the EELN's two branches are strongly unified by the common long-term changes in legal expertise that they are facing and the transformation of their relationship with the European Commission. In many ways, they both share a form of disappointment, which underscored the paradox of an expert group whose work has become purely utilitarian from the Commission's perspective, but whose productions are ultimately underused. The delegitimization of the evangelization function of expertise has certainly been felt more harshly by the gender branch because of the larger dissonance between its ethos and the new game rules. But the changes have affected both branches, producing the same kind of results.

The long-term transformations of the place and role granted both to legal expertise on equality and the experts responsible for producing it at the European level could be summed up as follows: the time of partnership is over and that of service provision has come. From the perspective of the Commission, the goal is no longer to disseminate the dual ideal of promoting rights through acculturation to European law, but rather to respond to a tender. In this new role, the service provider's effectiveness is more important than the partner's legitimacy of position and commitment. Of course, the sector dimension is not neutral and the field of public action plays a role: equality is a fundamental right, at the heart of the EU's claimed identity. However, the willingness of legal experts to advance equality policy and the values attached to it are not considered today as a resource as such, but as an extra touch. The specialization and possible

political commitment of EELN members help anchor this notion of rights in the EU equality policy and endow it with symbolic complementary legitimacy. This is why the legal experts can be defined as service providers “with a twist”.

Analysing this case study prompts a reassessment of the role and importance of scientific knowledge in European governance. The long-term analysis of the expert groups that constitute the EELN today has illustrated what Didier Georgakakis (2017) calls “the principle of displacement and transformation” of expertise and of the role allocated to it. Expertise is mainly outsourced, but this outsourcing is not seen and used as a possibility of creating partnerships or coalitions of cause, but as mere service provision. This has also larger implications for the gender equality and non-discrimination policies at the EU level. The strong interpersonal cohesion that characterized the policy communities in these two domains is gradually weakening, thus losing an important part of its essential driving force. Seemingly small decisions, like merging two expert groups and changing the management and governance style of these groups, contribute to the larger process of dismantling the EU equality policy.

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Interview 1: ex-official from the European Commission, Brussels, 04/23/2018

Interview 2: member of the European Equality Law Network, 03/16/2018

Interview 3: member of the European Equality Law Network, 03/30/2018

Interview 4: member of the European Equality Law Network, 03/28/2018

Interview 5: member of the European Equality Law Network, 03/09/2018

Interview 6: official from the European Commission, Brussels, 10/29/2012

Interview 7: member of the European Equality Law Network, 04/09/2018