

# The *Argumentum a Crise*: So Powerful, So Prone to Misuse

MARTIN BENG TZEN & LUCA ENRIQUES, DPHIL CANDIDATE, UNIVERSITY OF OXFORD, FACULTY OF LAW, AND ALLEN & OVERY PROFESSOR OF CORPORATE LAW, UNIVERSITY OF OXFORD, FACULTY OF LAW, RESPECTIVELY. AN EARLIER VERSION OF THIS EDITORIAL WAS PUBLISHED ON THE OXFORD BUSINESS LAW BLOG ([HTTPS://WWW.LAW.OX.AC.UK/BUSINESS-LAW-BLOG](https://www.law.ox.ac.uk/business-law-blog)).



The *argumentum a crise* is as simple and versatile as it is powerful and prone to misuse. It starts with ‘An important lesson from the crisis is that’ or ‘The crisis has taught us that’ followed by a statement (for example, ‘banks are fragile’), which in turn supports a policy recipe (for example, ‘the banks’ capital regime should be tightened’).

Since the financial crisis and the related euro debt crisis (together, ‘the GFC’), the use of the *argumentum a crise* has been ubiquitous. The *argumentum a crise* can in fact support any policy solution

loosely related to any of the events that took place during the GFC. Because that includes anything related to anything bad that happened in a time span of five years during which Murphy’s law happened to apply even more often than usual, there is virtually no area of financial, business, or even public finances regulation that the crisis did not teach us something about and did not prompt us to act upon with new rules.

The power of the argument lies not only in its scope but also in its very content. The GFC was such a bad sequence of events and had such dreadful consequences on Western societies that the *argumentum a crise* makes the precautionary principle incredibly hard to rebut. This makes the *argumentum a crise* an attractive rhetorical device, since its near costless insertion into an argument in support of a claim (even if conjectural) may shift the burden of proof regarding the efficiency with which a given policy may prevent some risky phenomenon, or regarding the strength of the alleged link between that phenomenon and the crisis. It doesn’t matter how small the impact of a proposed rule is on a given phenomenon, so long as it can be argued that *this* phenomenon may, however little and indirectly, contribute to trigger another crisis. Once a link is established, if only conjecturally, between a given policy and any of the events and circumstances of the GFC, any argument against that policy will be heavily discounted: its costs, its unintended consequences, its likely ineffectiveness.

Suspecting that such a powerful rhetorical device may be prone to overuse, we decided to conduct a small study. We searched the European Commission’s website<sup>1</sup> for the phrase ‘lesson(s) from the crisis’ and found fifty documents using the expression seventy-two times between 2008 and early 2015.<sup>2</sup>

As we did not conduct searches for similar phrases such as ‘The crisis has taught us’ or ‘What we learnt from the crisis is,’ our results are just a sample of a wider population of *argumenta a crise* used in European Union (EU) policy making. We should also clarify that there is nothing distinctive in the use of the argument in EU documents: the same argument was used across member states and in other jurisdictions as well. After all, its use as a political tool has been theorized by Obama’s then chief of staff Rahm Emanuel back

<sup>1</sup> [http://ec.europa.eu/index\\_en.htm](http://ec.europa.eu/index_en.htm).

<sup>2</sup> Some of our examples below do not include this exact phrase, but were found since they were in a document which included it, e.g., as a section heading.

in November 2008 when he said ‘You never want a serious crisis to go to waste’.<sup>3</sup>

The areas where lessons have been learnt are almost as widespread as the EU sphere of competence: We have come up with thirty-seven categories (but of course one could group them into a lower number of broader ones). In addition to the obvious areas, like banking regulation, credit rating agencies, short selling, and so on, there are also some less obvious ones – from auditing to industrial value chains, from US/EU relationships to corporate restructurings.

While we acknowledge that a full rebuttal of the *argumentum a crise* would often require a thorough analysis of the *real* causes and implications of the financial crisis, we still found a number of instances where its opportunistic use has been self-evident. Here are some examples:

## 1. WE HAVE LEARNT (EU) PLATITUDES

If there is a lesson from the crisis [it] is that we are all interdependent.<sup>4</sup>

[P]erhaps the main lesson from the crisis for policy makers is not to loose [sic] sight of the benefits of well-managed international economic integration and not to back out of reforms that will bolster resilience, enhance conditions for foreign investment, and help develop a strong and sustainable growth trajectory.<sup>5</sup>

A lesson from the crisis is that for measures to be consistent and effective, they have to be prepared well in advance and to be coordinated at Community level.<sup>6</sup>

Ensuring that public money is spent wisely and effectively in support of public policies is one of the major lessons of the crisis.<sup>7</sup>

[T]he crisis has made clear that the real core issue is competitiveness, not only among Member States but also compared to other parts of the world.<sup>8</sup>

[A]n important lesson from the crisis is that policies actually do make a difference.<sup>9</sup>

## 2. WE HAVE LEARNT THINGS WE ALREADY KNEW

One important lesson from the crisis is not to rely blindly on outcomes of internal models.<sup>10</sup>

One key lesson from the crisis has been that more attention needs to be paid to macroeconomic imbalances and divergences in competitiveness between EU countries.<sup>11</sup>

Another lesson from the crisis is therefore the need for harmonised rules and good cooperation between supervisors dealing with different parts of the same cross-border group.<sup>12</sup>

[T]he crisis has emphasized that growth and stability go hand in hand. A country cannot have sustainable economic growth and jobs creation nor sustainable social welfare if its public debt continues to spiral out of control.<sup>13</sup>

## 3. WE HAVE LEARNT THINGS, BECAUSE YOU CANNOT AVOID LEARNING SOMETHING IN A FIVE-YEAR PERIOD; CRISIS OR NO CRISIS

[O]ne lesson from the crisis is that many European manufacturing sectors active in global value chains depend on the timely delivery of key inputs produced by a handful of relatively small suppliers, in some instances only one or two.<sup>14</sup>

3 See, e.g., Gerald F. Seib, *In Crisis, Opportunity for Obama*, Wall St. J. A2 (21 Nov. 2008).

4 J.M. Barroso (President of the European Commission), Speech at the European Parliament Plenary in advance of the European Council (24 Mar. 2010), available at [http://europa.eu/rapid/press-release\\_SPEECH-10-123\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-10-123_en.htm).

5 European Commission, Directorate-General for Economic and Financial Affairs, *The EU's Neighbouring Economies: Emerging From the Global Crisis*, Occasional Paper 59 (Apr. 2010), available at [http://ec.europa.eu/economy\\_finance/publications/occasional\\_paper/2010/pdf/ecp59\\_en.pdf](http://ec.europa.eu/economy_finance/publications/occasional_paper/2010/pdf/ecp59_en.pdf).

6 European Commission, Proposal for a Regulation of the European Parliament and of the Council concerning measures to safeguard security of gas supply and repealing Directive 2004/67/EC (16 July 2009), COM(2009) 363, available at <http://ec.europa.eu/transparency/regdoc/rep/1/2009/EN/1-2009-363-EN-F1-1.pdf>.

7 European Commission, Directorate General for Economic and Financial Affairs, *Graph of the Week: Public Spending in the EU Before and after the Crisis* (18 Aug. 2014), available at [http://ec.europa.eu/economy\\_finance/graphs/2014-08-18\\_public\\_spending\\_eu\\_en.htm](http://ec.europa.eu/economy_finance/graphs/2014-08-18_public_spending_eu_en.htm).

8 J.M. Barroso (President of the European Commission), Speech at the European University Institute: *The European Way Forward: Leadership and Ownership* (9 May 2012), available at [http://europa.eu/rapid/press-release\\_SPEECH-12-351\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-12-351_en.htm).

9 European Commission, Directorate General for Economic and Financial Affairs, *Quarterly Report on the Euro Area*, vol. 10, no. 1 (2011), available at [http://ec.europa.eu/economy\\_finance/publications/qr\\_euro\\_area/2011/pdf/qrea1\\_en.pdf](http://ec.europa.eu/economy_finance/publications/qr_euro_area/2011/pdf/qrea1_en.pdf).

10 Expert Forum on Financial Services Users, *Solvency II Regime – Principles to Ensure End-User Protection* (Mar. 2009), available at [http://ec.europa.eu/internal\\_market/fin-use\\_forum/docs/solvency2\\_en.pdf](http://ec.europa.eu/internal_market/fin-use_forum/docs/solvency2_en.pdf).

11 European Commission, Press Release: *First Alert Mechanism Report on Macroeconomic Imbalances in Member States* (14 Feb. 2012), available at [http://europa.eu/rapid/press-release\\_MEMO-12-104\\_en.htm](http://europa.eu/rapid/press-release_MEMO-12-104_en.htm).

12 European Commission, *Regulating Financial Services for Sustainable Growth – A Progress Report* (Feb. 2011), available at [http://ec.europa.eu/internal\\_market/finances/docs/110209\\_progress\\_report\\_financial\\_issues\\_en.pdf](http://ec.europa.eu/internal_market/finances/docs/110209_progress_report_financial_issues_en.pdf).

13 J.M. Barroso (President of the European Commission), Statement following the meeting with Greek Prime Minister George Papandreou (17 Mar. 2010), available at [http://europa.eu/rapid/press-release\\_SPEECH-10-104\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-10-104_en.htm).

14 European Commission, *European Competitiveness Report 2011*, available at <http://ec.europa.eu/DocsRoom/documents/573/attachments/1/translations/en/renditions/pdf>.

#### 4. WE HAVE LEARNT WHAT WE WANT TO THINK WE HAVE LEARNT

We learned that growth fuelled by debt is artificial and unsustainable.<sup>15</sup>

The financial crisis had revealed that hedge funds could impact financial stability in ways that had not previously been expected.<sup>16</sup>

#### 5. ABOVE ALL, WE HAVE LEARNT HOW TO FRAME POLICY PROPOSALS AS LESSONS FROM THE CRISIS

As perhaps the most important lesson from the crisis, there is a distinct need to create an enhanced culture for communication between those charged with governance and the auditor.<sup>17</sup>

A clear lesson from the crisis is that Europe can succeed provided it acts collectively, as a Union.<sup>18</sup>

Lessons to be learnt from the financial crisis in respect of the disclosure obligations and the Transparency Directive: towards further transparency?<sup>19</sup>

Of course, we have cherry-picked the quotes above and used them out of context. There is no doubt that we have all learnt important lessons from the crisis<sup>20</sup> and EU policymakers are no exception. In other words, we do not doubt that some, if not many, references to the crisis and its lessons are fully persuasive. Our point is simply that a more selective use of the *argumentum a crise* would improve the quality of public policy discourse.

15 J.M. Barroso (President of the European Commission), Speech at University College Cork: *Ireland and Europe: Geared up for Growth* (5 Mar. 2014), available at [http://ec.europa.eu/ireland/press\\_office/news\\_of\\_the\\_day/president-barroso-ucc-address-march-2014\\_en.htm](http://ec.europa.eu/ireland/press_office/news_of_the_day/president-barroso-ucc-address-march-2014_en.htm).

16 Opening Remarks by Commissioner Charlie McCreevy at EU Commission Open Hearing on Hedge Funds and Private Equity (26–27 Feb. 2009), available at [http://ec.europa.eu/internal\\_market/investment/docs/conference/summary\\_en.pdf](http://ec.europa.eu/internal_market/investment/docs/conference/summary_en.pdf).

17 Klaus-Peter Naumann, Speech during the session 'Audit policy for the single market – lessons from the crisis' in the Conference organized by the European Commission *Financial Reporting and Auditing – A Time for Change?* (9–10 Feb. 2011), available at [http://ec.europa.eu/internal\\_market/accounting/docs/conference20110209/speech\\_naumann\\_en.pdf](http://ec.europa.eu/internal_market/accounting/docs/conference20110209/speech_naumann_en.pdf).

18 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Commission Work Programme 2010 – Time to Act* (31 Mar. 2010), COM(2010) 135, available at <http://ec.europa.eu/transparency/regdoc/rep/1/2010/EN/1-2010-135-EN-F1-1.pdf>.

19 Summary record of the 10th ESME meeting on 9th Dec. 2008, available at [http://ec.europa.eu/internal\\_market/securities/docs/esme/minutes\\_20081209\\_en.pdf](http://ec.europa.eu/internal_market/securities/docs/esme/minutes_20081209_en.pdf).

20 For what it is worth, the broadest lesson the crisis has taught us is, as Eugène Ionesco would put it: 'Markets have failed. Governments have failed. And I don't feel so well myself.'